

1967

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Tamale v Kigezi District Administration
[1967] 1 EA 1 (HCU)

Division: High Court of Uganda at Kampala

Date of judgment: 18 November 1966
Case Number: 277/1965
Before: Sir Udo Udoma CJ
Sourced by: LawAfrica

[1] Fishing law – Meaning of “land” and “landing” in Uganda Fish and Crocodiles Act and Fishing Rules (U.) 1951 discussed – Whether Muluka Chief is an “authorised officer” within the Fish and Crocodiles Act (U.)

Editor’s Summary

The plaintiff was a dealer in fish on Lake Edward and owned a fishing boat with an outboard motor. His fishing licence authorised fishing with only ten nets and required him to land his catches only at Katwe in Toro. The defendant was sued as the employer of a Muluka Chief, who had seized the boat and its outboard motor and (as the judge found) the boat’s catch at Rwenshama in Kigezi. The Muluka Chief claimed that he had authority to do this under the Fish and Crocodiles Act because the plaintiff’s employees had committed breaches of the Act and the Rules made thereunder by “landing” at Rwenshama; by refusing to give him their names and the name of the owner of the boat and to produce the fishing licence on request; and by using more than ten nets. These breaches were denied by the plaintiff, who contended that his men had not “landed” at Rwenshama but had merely gone there in search of three lost fishing nets and had not disposed of any fish there.

Held –

- (i) (a) “land” in r. 9 of the Fishing Rules 1951 means “to discharge from a boat or canoe”; and “landing” in that rule refers only to the landing of fish; therefore, no breach of that rule had been committed;
 - (b) the Muluka Chief was not an “authorised officer” within the meaning of the Fish and Crocodiles Act; therefore, no offence could have been committed by the fishermen in failing to produce the licence to him or in failing to give him their names and the name of the owner of the boat;
 - (ii) therefore, no breach of the Act or of the Rules had been committed and the seizure was unlawful.
- Judgment for the plaintiff.

No cases referred to in judgment.

Judgment

Sir Udo Udoma CJ: This suit has been instituted against the Kigezi District Administration which, by virtue of the provisions of s. 3 (2) of the Local Administration Act (Cap. 25), is a body corporate having perpetual succession, and may sue or be sued in its corporate name. The Kigezi District Administration (hereinafter to be referred to as the defendant) is sued as the employer of the Muluka Chief, William Bahinguza, and therefore vicariously liable for the wrongful act of the said Chief as its servant.

The claim is by Haji Yusufu Tamale; and is against the defendant for an alleged wrongful seizure and detention of the plaintiff's outboard engine and a quantity of fish.

The defendant, by its statement of defence, has admitted the seizure and detention of the outboard engine by its servant in the course of his employment but alleged that the seizure was lawful. It has however denied the seizure of the fish.

The plaintiff is a dealer in fish. He does not himself fish as he is not a fisherman. He employs a number of fishermen and supplies them with an outboard engine boat and fishing nets to fish for him. He pays the fishermen wages as well as gives them money on every occasion they return to him with their catches.

In 1964, the plaintiff held a fishing vessel licence No. 2990 of February 17, 1964, Ex. B, issued to him by the Administrator of the Baamba-Bakonja area of the Toro Kingdom District Administration for his fishing boat No. T. 774 authorising him to fish only in Lake Edward with only ten fishing nets and to land his catches only at Katwe in the Katwe Gombolola within the District of Toro. The plaintiff's fishing boat was fitted with an outboard engine – a petrol consumer – bought by the plaintiff in February, 1964 for the sum of Shs. 2, 100/-.

For the purpose of carrying on his fishing business, the plaintiff employed in 1964 four fishermen among whom was John Karakwenda whom he appointed head fisherman to take charge of his fishing outboard engine boat and generally to supervise with the assistance of another fisherman the work of the fishermen. John Karakwenda was paid Shs. 120/- per mensem as wages while his assistant received Shs. 100/- per mensem. The other two fishermen were paid Shs. 90/- per mensem each. In addition, on every occasion that the four fishermen returned with their catches and landed them at Katwe landing beach they were given an allowance of Shs. 3/- for their food.

According to the terms of their appointment and the arrangement made between the fishermen and the plaintiff, the system was for the fishermen to board, man and operate the outboard engine boat, go out into Lake Edward daily and there carry on their fishing operations with the ten nets supplied to them by the plaintiff; and thereafter return with the whole of their catches and land the same at Katwe for the plaintiff, who would there take delivery of the fish and arrange for the sale and disposal thereof personally to his customers. The fishermen employed by him had no authority either to sell or otherwise dispose of their catches to anyone anywhere without the prior authority and instruction of the plaintiff. The outboard engine, as a petrol burner, used to consume about five gallons of petrol daily usually supplied by the plaintiff.

The plaintiff's case is that according to their practice, in the night of September 30, 1964, his fishermen under the leadership of John Karakwenda set off with his outboard engine boat and his ten nets for Lake Edward to carry on their fishing operations.

In the lake they dropped all the ten nets into the water according to their system of fishing and thereafter sat in their outboard engine boat, already anchored in the lake, waiting for their nets to sink sufficiently to the bottom of

the waters of the lake until such time they considered appropriate to pull their nets out of the water with their catches.

Shortly thereafter some other fishermen from Rwenshama employed by one Haji Musa also came to the lake in their own boat. On arrival they also, according to the usual system of fishing, dropped their nets into the waters of the lake across the plaintiff's nets, which by then were already below and towards the bottom of the waters of the lake. John Karakwenda, as the head fisherman of the plaintiff, spoke to them; for by that time their outboard engine boat was afloat and stationary at anchor. He warned the other fishermen, employees of Haji Musa, that since they had chosen to have dropped their nets across those of the plaintiff, they should be careful when pulling up their nets out of the water not to disturb or pull up the plaintiff's nets already in the water.

At about 4 a.m. on October 1, 1964, when John Karakwenda and his men pulled up their nets out of the water and collected their catches, which then consisted of three hundred fish, and loaded them into their boat, they noticed that three of their nets were missing. They then saw Haji Musa's fishermen who, by then, had already pulled up their nets out of the water and collected their catches, going in their boat towards Rwenshama. John Karakwenda and his men went after them to ascertain whether by some mistake they had gone away with their missing nets. John Karakwenda and his men finally caught up with Haji Musa's men at about 6.30 a.m. at Rwenshama.

The plaintiff's outboard engine boat anchored midstream about seventy-five feet away from the shore of Lake Edward at Rwenshama. John Karakwenda left one of his men in charge of the boat, while he and two of his other men disembarked from the boat, and, as the water was shallow where they had anchored, they walked across to where the boat of Haji Musa's men was already at anchor. John Karakwenda spoke to the men about their three missing nets. Haji Musa's fishermen admitted having taken the three missing nets in error and immediately surrendered them to the plaintiff's fishermen.

While in conversation with Haji Musa's men, information concerning their own boat was received by John Karakwenda and his men. As a result they immediately returned to where their outboard engine boat had been moored, and observed that their boat had been dragged through the shallow waters nearer the shores of Lake Edward at Rwenshama and that the outboard engine therein had been pulled out of and removed from the boat.

A Muluka Chief, William Bahinguza (hereinafter to be referred to as the Muluka Chief) took possession of the outboard engine pulled out of the plaintiff's boat as well as all the fish in the boat. He sold the fish there and then to one Kafero of Masaka for the sum of Shs. 120/- and carried away the outboard engine to his house at Rwenshama. The reason advanced in support of the Muluka Chief's conduct in this respect is alleged to be because the plaintiff's fishing boat and fishermen ought not have come to Rwenshama as they belonged to Katwe area. Rwenshama, incidentally, is within the area and jurisdiction of the Kigezi District, whereas Katwe is within the area and jurisdiction of the Toro Kingdom Administration. John Karakwenda's explanation that they had come there in search of their missing nets but not to land their catches made no impression on the Muluka Chief, who there and then arrested all the plaintiff's fishermen and took them to his house.

John Karakwenda reported the matter to the police at Rwenshama, and returned with the police to the house of the Muluka Chief. During a search conducted by the police, the plaintiff's outboard engine was found under the Muluka Chief's bed. The police removed it and took it to the police station at Rwenshama. The matter was later reported to the plaintiff, who immediately visited the police post at

Rwenshama; and, on finding the outboard engine of

his boat there, demanded its return to him. The demand was rejected. The outboard engine was subsequently delivered to the police headquarters at Kabale. On a subsequent enquiry there, the plaintiff was directed to the Fisheries Officer at Katungula Kichwamba, who according to the plaintiff had assured him that the outboard engine would be returned to him by the Muluka Chief.

When all efforts to get back his outboard engine proved abortive, the plaintiff retained the services of an advocate who, on his instructions, addressed the letter, Ex. A, to the defendant; and when no reply was forthcoming the plaintiff instituted this action claiming the damages already set out above.

Substantially there is not much in dispute between the plaintiff and the defendant as to the facts of this matter, except on points of detail and as to certain steps alleged to have been taken by the Muluka Chief, William Bahinguza, in the execution of his duty and in connection with the fish and the outboard engine, the main subject matter of this action.

In brief the defendant's case is that on information received the Muluka Chief visited the waterside (or port) of Rwenshama on October 1, 1964, at about 3 a.m. He there found the plaintiff's outboard engine boat moored in the water. The boat was occupied by three men. There were thirty-seven nets fishing instead of the ten fishing nets provided by law to be carried by a fishing boat. The boat bore the registration number T. 774 and from that he knew at once that the boat was of Toro origin and therefore had no right to land at Rwenshama.

The Muluka Chief then spoke to the three occupants of the boat. He demanded their names and addresses and the name and address of the owner of the outboard engine boat. The three men refused both to answer his questions and to produce to him for inspection their licence which entitled them to land at Rwenshama. Consequently he ordered the men to pull off or take out the outboard engine from their boat, which they did. He then took the three men together with the engine to his house at Rwenshama and there detained them.

The Muluka Chief says that he did all this because it was his duty; and that he had authority to seize fishing boats which committed any breaches of the fishing rules at Rwenshama.

Later, however, it is the case of the defendant that one of the three men, who were under detention in the Muluka Chief's house, managed to escape; and he only saw him again that day when at about 7 a.m. he returned to the house with a police officer. The police officer later carried away the outboard engine from his house to the Rwenshama Police Station and the two other men, who were detained by him went away with the police. All the fishermen and their boat and thirty-seven nets with the exception of the engine were released that day by the Police.

The Muluka Chief immediately thereafter reported the matter and the conduct of the police to the Fisheries Officer, Blasio Emeru (hereinafter to be referred to as the Fisheries Officer) then in charge of the whole of the Western Region fisheries area including the fishing villages of Rwenshama and Katwe. The Fisheries Officer was then stationed at Kichwamba. The result of that complaint was the letter dated October 6, 1964, Ex. C in these proceedings, from the Fisheries Officer, giving the Muluka Chief certain advice and instructions. It is the defendant's case, that immediately on the receipt of that letter, a copy of which was also forwarded to the police by the Fisheries Officer, the outboard engine was returned by the police to the Muluka Chief, who, on receiving the same, and acting on the advice of the Fisheries Officer, took the engine and deposited it with the Gombolola Court, Bungangari. The defendant says that the engine is still deposited there and that since then it had not been possible to institute proceedings in any court against the plaintiff and his fishermen because their addresses were unknown.

In his address to the court counsel for the defendant submitted that the Muluka Chief had authority by law to seize boats and prosecute all who committed breaches of the Fishing Rules in Rwenshama; that by their conduct the plaintiff and his fishermen contravened r. 9, and the first Schedule thereto, of the Fishing Rules, 1951 (Legal Notice No. 59 of 1951) made by the authority of s. 43 of the Fish and Crocodiles Act (Cap. 228), since the plaintiff and his fishermen had no right to have landed at Rwenshama, having regard to the plaintiff's licence. By landing there the plaintiff and his men had committed offences under ss. 40 and 41 (1), (2) and (3) of the Fish and Crocodiles Act.

Counsel further contended that the Muluka Chief was justified in seizing the plaintiff's engine as the said engine was required as an exhibit in an action contemplated against them; and that in seizing the engine the Muluka Chief acted within the provisions of s. 38 (d) of the Fish and Crocodiles Act.

The refusal of the plaintiff's fishermen to disclose their names and the name of the owner of the outboard engine boat and also to produce the licence, when requested to do so, it was further contended, constituted offences within the provisions of s. 31 of the Fish and Crocodiles Act. Therefore, it was argued, the Muluka Chief was entitled by law to arrest and detain the plaintiff's fishermen. Instead of ten nets fixed by law the plaintiff's fishermen carried in their boat thirty-seven fishing nets contrary to the Rule contained in Legal Notice No. 319 of 1958. On these grounds it was submitted finally that the claim of the plaintiff be dismissed.

Counsel for the plaintiff submitted that the Muluka Chief had no authority in law to have seized the engine and to have arrested and detained the plaintiff's fishermen as no offence had been committed by the plaintiff's fishermen. There was no breach of the Fishing Rules, i.e. r. 9 and the first Schedule thereto relied upon by the defendant. It was further contended by counsel that under s. 23 of the Fish and Crocodiles Act a demand for the production of a licence can only be made to the licensee himself and not to his servants or employees. There was no evidence of any such demand having been made to the plaintiff at any time; and that the seizure and detention envisaged in s. 38 (d) do not apply to the Gombolola court or to any African court, having regard to the schedule conferring jurisdiction on African courts under the African Courts Ordinance, Legal Notices Nos. 203 and 204 of 1961.

Before examining these important legal submissions, it is necessary, I think, that I deal first with the evidence as a whole before the court.

I think it is clear from the evidence and it is common ground that the plaintiff's fishermen were at Rwenshama on October 1, 1964, with the plaintiff's outboard engine boat. The boat was then moored in the waters of Lake Edward. But the defendant says that they were there at about 3 a.m. whereas the plaintiff's case is that the fishermen arrived there at about 6.30 a.m. after they had pulled up their fishing nets out of the waters of the lake, where they had fished by dropping their nets into the waters of the lake. It is also the plaintiff's case that his fishermen began pulling their nets out of the waters of the lake at 4 a.m. on October 1, 1964. If that evidence is accepted, and I see no reason for rejecting it, it would have been impossible for the plaintiff's fishermen to have been at Rwenshama at 3 a.m. Furthermore, there is no evidence which this court can accept that at about 3 a.m. when the Muluka Chief arrived at Rwenshama, if indeed he did arrive there at all at that time, which is highly improbable, he had met fish dealers waiting there at that time to buy fish.

I have no difficulty and there is no doubt whatsoever in my mind at all in accepting the evidence of the plaintiff that, on arrival at Rwenshama, the plaintiff's outboard engine boat had on board or contained three hundred fish that

morning. I therefore reject the evidence of the defendant that there was no fish in the outboard engine boat when he visited Rwenshama.

The evidence of the defendant that there was no fish at all in the plaintiff's outboard engine boat makes nonsense of the defendant's case that the plaintiff's fishermen were arrested and the outboard engine seized because the plaintiff and his fishermen had committed a breach of r. 9 and the first Schedule thereto of the Fishing Rules, 1951, the provisions of which I propose to examine in more detail later in this judgment.

I find as a fact that the three hundred fish in the plaintiff's outboard engine boat were confiscated and sold by the Muluka Chief for Shs. 120/- to a person by the name of Kafero. The finding that the plaintiff's outboard engine boat contained fish at the time the Muluka Chief saw it at Rwenshama is reinforced by the letter dated October 6, 1964, Ex. C, addressed to the Muluka Chief by the Fisheries Officer, part of the contents of which suggests the reasonable and justifiable inference that in reporting the action of the Police to the Fisheries Officer, the Muluka Chief had most probably represented to him that the plaintiff's fishermen had landed and disposed of their catch at Rwenshama. The relevant portion of the letter is para. 3, which reads:

"This canoe by landing and disposing of his catching at Rwenshama (Kigezi District) contravened the First Schedule (Rule 9) of the Fish and Crocodile Ordinance."

The defendant has admitted that the Muluka Chief had seized and detained the engine of the plaintiff's outboard engine boat. It is significant that, in his evidence, the Muluka Chief did not in any way suggest that one of the reasons for his seizing the engine of the plaintiff's boat was because the plaintiff's fishermen had landed or disposed of their catch at Rwenshama. It is plain therefore, and I find it as a fact, that the fishermen who manned the plaintiff's outboard engine boat did not land or dispose of their catch at all at Rwenshama. I am also satisfied that there were only seven fishing nets in the fishermen's outboard engine boat and that the reason for the fishermen going to Rwenshama at all was to ascertain from Haji Musa's men whether they had by mistake carried away their three missing nets; and that as a result of that visit they were able to recover their missing nets from Haji Musa's men.

The main submission of counsel for the defendant was that the Muluka Chief had acted within the authority of the law in seizing the plaintiff's engine, because the plaintiff's fishermen had contravened r. 9 and the first Schedule thereto of the Fishing Rules. Rule 9 of the Fishing Rules is headed: "Landing and Disposal of Fish", and provides:

- "9. No person shall, in respect of the waters listed in the First Schedule to these Rules:
- (a) Land or dispose of any fish except at the places authorised in the Schedule;
 - (b) Land any fish between sunset and sunrise."

And, in the First Schedule, the authorised place for the landing and disposal of fish caught in Lake Edward within the Toro Kingdom Administration is Katwe, while Rwenshama is the place for landing or disposal of fish caught in Lake Edward within the area and jurisdiction of the Kigezi District Administration.

On the evidence by the authority of the licence, the plaintiff's fishermen were only entitled to land their catches or dispose of them at Katwe between sunset and sunrise.

There appears to be some confusion with reference to the use of the word “land” in r. 9. In my opinion the true meaning of the word “land” within the context of the rule is to “discharge” from a boat or canoe; and “landing” in r. 9 is and can only be referable to the landing of fish but not of persons, passengers or fishermen themselves. So that, if even the plaintiff’s fishermen that morning had disembarked from their boat and gone ashore or walked on the beaches, so long as their catch was still in their boat moored and anchored midstream and not discharged therefrom and exposed for sale, they would have committed no offence under r. 9 of the Fishing Rules.

A breach of r. 9 could only have occurred if the plaintiff’s fishermen had deliberately landed or disposed of their catch at Rwenshama. On the evidence of the defendant, there was not even an attempt made by the plaintiff’s fishermen to land their catch at Rwenshama; because, according to him, when he arrived and examined the boat there was no fish at all in the boat. I hold, therefore, that on the evidence of the defendant the plaintiff and his fishermen did not commit any breach of r. 9 of the Fishing Rules.

It seems to me, however, that on the evidence of the plaintiff, which I accept, if any offence was committed at all, that offence was committed by the Muluka Chief when he had the plaintiff’s boat discharge its fish and thereafter sold it to Kafero.

The next point of importance for consideration on the submissions of counsel for the defendant concerns the provisions of ss. 23 and 31 of the Fish and Crocodiles Act (Cap. 228). It was contended by counsel that the plaintiff and his fishermen had committed offences under s. 23 by their refusal to produce their fishing licence to the Muluka Chief and to give their names and addresses, when demanded, on the authority of the provisions of s. 31.

In s. 23 of the Fish and Crocodiles Act it is provided that:

“Every licensee shall, on being required to do so by an authorised officer, produce his licence for examination so as to enable the authorised officer to ascertain the name and address of the holder of the licence, the date of issue, and the authority by which it was issued, and if he fails to do so he shall be guilty of an offence and liable on conviction to a fine not exceeding five hundred shillings.”

And the provisions of s. 31 are in the following terms:

“When any person is seen or found committing an offence or is reasonably suspected of having committed an offence against this Act, any authorised officer may demand his name and address and if he refuses to give such information or fails to give such information to the satisfaction of the authorised officer, or if the latter has reasonable grounds for believing that unless arrested the offender may escape or cause an unreasonable amount of delay, trouble or expense in being made answerable to justice, he may arrest him forthwith.”

It should be observed that the key expressions in both ss. 23 and 31 of the Act are “authorised officer”; for it is only authorised officers who could exercise the powers prescribed in both sections. The complaint of the defendant and one of the reasons advanced as the ground for the arrest of the plaintiff’s fishermen was that they committed offences within these two sections for failing to produce their fishing licence, when required to do so, and also refused or failed to disclose their names and addresses and the name of the plaintiff to the Muluka Chief; and that the Muluka Chief was justified by the provisions of the two sections of the Act to have them arrested.

The important question on this issue, assuming that the defendant’s contention is right, is: was the Muluka Chief an “authorised officer” within the meaning

and intendment of the Act? For an answer to that question one must turn to s. 3 of the Act. An “authorised officer” is there defined as meaning –

“any Administrative Officer, any Fisheries Officer, any Game Warden or honorary Game Warden or any employee of the Game and Fisheries Department so authorised in writing by the Chief Game Warden, any Magistrate, any Police Officer of or above the rank of Corporal, and any Chief authorised in writing by name or rank by a District Commissioner.”

To succeed in bringing the Muluka Chief within the two sections of the Act, it must be proved to the satisfaction of this court that the Muluka Chief at the time of the incident at Rwenshama was a Chief authorised in writing by the District Commissioner to exercise the powers enshrined in these sections.

There was not a tittle of evidence produced before this court to establish that the Muluka Chief involved in this case has ever been or is a Chief authorised in writing either by name or rank by a District Commissioner which would have entitled him to exercise the powers provided for in ss. 23 and 31 of the Act. The onus of proof was upon the defendant; and that onus has not been discharged.

It was further submitted, apparently on the strength of the Fisheries Officer’s letter, Ex. C, and his evidence that the Muluka Chief was an Administrative Officer within the definition of s. 3; and that under the Local Administration Act (Cap. 25) he is an administrative officer within his area.

I must confess that not only was this submission unconvincing, but that I was startled to learn that a Muluka Chief could in any sense be classified as an administrative officer within the contemplation of the provisions of ss. 23 and 31 of the Fish and Crocodiles Act.

I have always considered administrative officers to be a class of high officers of state. For the purpose of satisfying myself I had to refer to the Interpretation Act (Cap. 16 of the 1964 Edn.), and there found that “administrative officer” is defined as meaning:

“a District Commissioner, a Government Agent, an Assistant District Commissioner, and any public officer or class of public officer declared by the Minister by a statutory order to be an administrative officer or administrative officers.”

It follows from the above definition that the term “authorised officer” in ss. 23 and 31 of the Fish and Crocodiles Act does not, and was never intended to include a Muluka Chief.

Under the Local Administrations Act (Cap. 25), the relevant provisions about chiefs are to be found in ss. 2 and 40. In s. 2 “chief” is defined as meaning “a person employed by an Administration to be in charge”, and “Administration” in the context of the Local Administrations Act means “a local administration for which provision is made in s. 3 of this Act”. Turning then to s. 40 of the Local Administrations Act, the side note of which reads “General Responsibility of Chiefs”, only two classes of chiefs appear to be recognised; namely:

- (1) A chief in administrative charge of every county and subcounty; and
- (2) A chief in administrative charge –
 - (a) of every parish; or
 - (b) of every parish and village; or
 - (c) of every village.”

There is no reference whatsoever to a Muluka Chief, and there is no evidence before this court to indicate the class of chief to which a Muluka Chief belongs in terms of the provisions of s. 40 of the Local

Administration Act.

There can therefore be no doubt whatsoever that the Muluka Chief concerned in this case had no authority in law to have demanded the production of the plaintiff's fishing licence for his inspection, nor had he any authority in law to have demanded the names and addresses of the plaintiff and of his fishermen at Rwenshama. In assuming the powers vested in authorised officers in ss. 23 and 31 of the Fish and Crocodile Act, the Muluka Chief exceeded whatever right, if any, he had; and the plaintiff's fishermen were not bound to give him the answers required by him. They acted within their right in refusing to disclose their names and addresses to the Muluka Chief, if even that was the case, which, in my finding, it was not.

After a careful consideration of the evidence as a whole and the legal authorities to which I was referred by both counsel. I have reached the conclusion that this action must succeed on the main issue of the wrongful seizure and detention of the plaintiff's outboard engine and his three hundred fish, which were sold for Shs. 120/- to one Kafero. I am satisfied and hold that the Muluka Chief had no authority in law to have seized the engine and confiscated the fish, which latter he converted to his own use.

[The learned Chief Justice then went on to deal with the issues as to damages and concluded:] There will therefore be judgment for the plaintiff against the defendant in the total sum of Shs. 2,170/- with interest on the decretal amount at six per cent. I also award the plaintiff costs of this action against the defendant. The interest to be chargeable and payable to the plaintiff by the defendant from October 1, 1964.

Judgment for the plaintiff.

For the plaintiff:

Mayanja & Co., Kampala

Abu Mayanja

For the defendant:

J. W. R. Kazzora, Kampala

Aslanidis v Aslanidis and Schumacher
[1967] 1 EA 10 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	12 December 1966
Case Number:	7/1966
Before:	Russell J
Sourced by:	LawAfrica

[1] *Divorce – Domicile – Domicile of choice in Uganda – When acquired.*

[2] *Domicil – Divorce – Domicil of choice in Uganda – When acquired.*

Editor's Summary

On a petition by a wife based on the respondent husband's domicil in Uganda it was proved (partly by the evidence of the respondent himself) that he came to East Africa in 1946 with a Greek domicil of origin, that he moved from Kenya to Uganda in 1957 and had resided there continuously since (apart from occasional visits abroad) and that he was the sole proprietor of a business in Uganda. The respondent also testified that he intended to stay indefinitely in Uganda and to make his permanent home there.

Held –the respondent (and therefore the petitioner) had acquired a domicil of choice in Uganda.

Decree nisi granted.

Cases referred to in judgment:

- (1) *Frederick King v. Elsie May Rigby King and Thomas Smith* (1940), 7 E.A.C.A. 1.
- (2) *Thornhill v. Islay Thornhill and Another*, [1965] E.A. 268.

Judgment

Russell J: The petitioner has petitioned this court for a decree of divorce on the grounds of the adultery of her husband, coupled with cruelty, pursuant to s. 5 (2) (b) (v) of the Divorce Act (Cap. 21) of the Laws of Uganda, but to establish jurisdiction it was essential that the petitioner should prove that she was domiciled in Uganda at the time the petition was presented as prescribed by s. 2 of the Act. As this was the only issue upon which I had any serious doubt, I will deal with it first.

In her evidence the petitioner testified that she married the respondent on November 23, 1957, and thereafter lived and cohabited with him at various places in Uganda until he left for a visit to Germany in February, 1965, and returned in November, 1965. Prior to his marriage the respondent was employed in Kenya but subsequent to his marriage he was doing business in Uganda under the name of M. J. Aslanidis & Co. After his return he resumed cohabitation with his wife for a short period but in June, 1966, the lady named, Marianne Schumacher, arrived in Uganda and the respondent then left the petitioner and has since that date been residing with the lady named and a child prematurely born in Germany in August, 1965, of which the respondent is admittedly the putative father.

As the evidence of the petitioner was quite clearly inadequate to establish the domicile of the respondent and thereby her own, the respondent himself was called as a witness and testified that he first came to East Africa in 1946 and moved from Kenya to Uganda at the beginning of 1957, since which time he has stayed continuously in Uganda apart from occasional visits abroad, including the visit to Germany in February, 1965. He testified that when he left Uganda he intended to return and that he intends to stay indefinitely in Uganda and make

his permanent home here. He is the sole proprietor of a trading firm known as M. J. Aslanidis & Co. which was registered in Uganda. pursuant to the Business Names Registration Act, about five years ago. He was born in Port Said, Egypt, of Greek parents who were resident in Egypt but domiciled in Greece. He therefore acquired a Greek nationality of origin. I am satisfied that the respondent gave his evidence truthfully and not merely for the purpose of taking advantage of the laws of this country to enable him to facilitate a divorce by alleging a Uganda domicile. I am also satisfied that he abandoned his domicile of origin and acquired a domicile of choice in Uganda and that the petitioner was entitled to file this petition as she had acquired the new domicile of choice of her husband prior to the presentation of the petition.

The only case cited by counsel for the petitioner was *Frederick King v. Elsie May Rigby King and Thomas Smith* (1), which was adverse to the petitioner and caused me some concern. One of the main points raised by the petitioner in that case regarding the acquisition of a domicil of choice in Kenya was the fact that he could either petition the court for a divorce under the laws of Kenya as being domiciled in Kenya or, alternatively, he could file a petition under the provisions of the Indian and Colonial Divorce Jurisdiction Acts which then applied to Kenya. There was therefore no valid reason why he should falsely allege he had abandoned his domicile of origin and acquired a domicile of choice in Kenya. In this case the petitioner had no such alternative as, prior to abandoning his domicile of origin, the respondent was domiciled in Greece and the petitioner could not have petitioned this court under the Divorce Act, neither could she have availed herself of the non-domiciled parties provisions of the Indian and Colonial Divorce Jurisdiction Acts as applied to Uganda. I have, however, been influenced by the case of *Thornhill v. Islay Thornhill and Another* (2), in which the following passages from 7 Halsbury's Laws (3rd Edn.), were quoted with approval:

"Page 15, para. 28:

'domicil of choice is acquired later by the actual removal of an individual to another country accompanied by his animus manendi'.

At p. 16. para. 31, the following passage also appears:

'Any person not under disability may at any time change his existing domicil and acquire for himself a domicil of choice by the fact of residing in a country other than that of his domicile of origin with the intention of continuing to reside there indefinitely.

For this purpose residence is a mere physical fact, and means no more than personal presence in a locality, regarded apart from any of the circumstances attending it. If this physical fact is accompanied by the required state of mind, neither its character nor its duration is in any way material'."

In *Thornhill's* case (2) the petitioner came to Uganda in 1961 and was employed by a company in which he and his brother owned shares. In May, 1961, he went to the United Kingdom and Ceylon on business and returned to Uganda in January, 1963. He formed the intention of making his permanent home in Uganda and in 1964 petitioned the high Court for a divorce. He had not taken any steps to acquire Ugandan nationality nor had he acquired any real estate in Uganda. On appeal, reversing the decision of the High Court, it was held that, although the onus of proof was on the petitioner, there was sufficient evidence on record to establish the change of domicil as he was in fact residing and had an intention of continuing to reside in Uganda. The facts in this case regarding domicile appear to me to be stronger than in the *Thornhill* case (2).

[The learned judge then went on to deal with the issues of adultery and cruelty and granted a decree nisi.]

Decree nisi granted.

For the petitioner:

Messrs. Patel and Patel, Kampala

C. J. Patel

Ssettimbe v Sekizinvu and others
[1967] 1 EA 12 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	25 November 1966
Case Number:	B. 40/1966
Before:	Sir Udo Udoma CJ
Sourced by:	LawAfrica
Appeal from:	The Court of the Judicial Adviser.

[1] Jurisdiction – Buganda Principal Court – Civil claim arising out of felony – Whether criminal prosecution must be brought before civil claim can proceed.

[2] Practice – Felony giving rise to civil claim – Buganda Principal Court – Whether criminal prosecution must be brought before civil claim can proceed.

Editor’s Summary

The appellant sued the respondents in the Principal Court of Buganda claiming damages. His plaint alleged assault, battery and robbery. He had previously reported the matter to the police, who had refused to prosecute the respondents. The Principal Court ordered the case closed on the ground that it should have been lodged as a criminal case. That order having been confirmed on appeal by the Judicial Adviser the appellant appealed to the High Court.

Held –even assuming that the Principal Court acted on the principles of Common Law, the appellant, having reported the matter to the police, was entitled to bring a civil claim without a criminal prosecution being brought first.

Appeal allowed.

Cases referred to in judgment:

- (1) *Smith v. Selwyn*, [1914] 3 K.B. 98.
- (2) *Jack Clark (Rainham) v. Clark* (1947), 176 L.T. 180.
- (3) *Nanshiedu v. Henry Nuno* (1944), 10 W.A.C.A. 97.
- (4) *Carlisle v. Orr*, [1917] 2 I.R. 534.

Judgment

Sir Udo Udoma CJ: The appellant is seeking the order of this court setting aside the decision and order of the Judicial Adviser of Buganda which had affirmed the decision and order of the Principal Court, Buganda, of June 9, 1964, closing the appellant's civil claim and insisting that the appellant should lodge his case in the lower court as a criminal charge.

The order of the Principal Court complained of reads as follows:

“Plaintiff in this case sued eight defendants for having attacked and tied him with ropes and that they also tore his clothes and consequently robbed him of Shs. 400/-. After reading through the whole plaint we have seen that this case was by mistake lodged as a civil case. We therefore order

for the closure of this case that the plaintiff may lodge this matter in a lower court under the class of criminal case.”

That order was made on June 9, 1964.

The appellant was dissatisfied and thereupon appealed against it to the Judicial Adviser who, on December 17, 1964, dismissed the appellant’s appeal with costs in these words:

“The Principal Court made an order closing this case and ordering the appellant to lodge his complaint as a criminal case. The appellant was not satisfied with the order and appealed to this court. After reading the appellant’s plaint, I am satisfied with the order of the Principal Court and confirm it. I award costs against the appellant in favour of the respondents as per attached list.”

The appellant has now again appealed to this court against the decisions and orders of both the Judicial Adviser and the Principal Court, Buganda. The main ground of appeal is that the Judicial Adviser as well as the Principal Court was wrong in law in holding that his claim was by mistake lodged in the Principal Court as a civil claim; that the civil claim be closed; and that the case should be lodged in the lower court under the class of criminal cases.

At the hearing of the appeal, and on the application of the appellant, the names of James and Rugambwa, that is, the sixth and seventh respondents, were by leave of the court struck off the appeal. The ground advanced in support of the application was that, since the filing of his plaint in the Principal Court, it had not been possible to trace and serve the two respondents, and that no useful purpose would be served by leaving their names on the list of respondents. The appellant then indicated that he was content to proceed against the remaining respondents only. The appeal therefore proceeded against Daudi Sekizinvu, Aleni Kasule, Gutaggwa, Yosefu Kafero, Mulagi and Kajubi, that is, the first, second, third, fourth, fifth and eighth respondents respectively, jointly.

In his submissions, the appellant, who argued his appeal personally, contended that he was not bound to prosecute the respondents before he could proceed civilly against them, because, in his plaint he had pleaded that immediately after the assault committed on him as a result of which he lost his Shs. 400/- he had reported the matter to the Police at the Kakiri Police Station for the purpose of having the respondents prosecuted. The Police had rejected the case, and refused to prosecute the respondents; and instead advised him to file a civil action against the respondents in the Principal Court. He maintained that he had brought the action against the respondents in the Principal Court on the advice of the police, who had refused to prosecute the respondents.

The respondents, who also argued their appeal personally through their spokesman, Aleni Kasule, the second respondent, admitted that it was true that the appellant had reported the matter to the police at Kakiri; and that the police had refused the case because the appellant was unable to produce a medical report as to any injury sustained by him during the so-called assault. They, however, denied having assaulted and robbed the appellant. They claimed that all of them were Chiefs and could not have assaulted or robbed the appellant of his Shs. 400/-, having regard to their status.

In its order, the Principal Court did not advance any authoritative reason for refusing to try the case of the appellant, having regard to the allegation contained in parts of para. 3 and paras. 5 and 6 of the appellant’s plaint.

In so far as the averments are material and relevant to the issue under consideration, the allegations in the paragraphs aforesaid are as follows:

“They tied me on a tree and carried me swinging between two men on whose shoulders lay the tree onto which I was tied . . . When it was dark I prayed the strangers under whose guard I was to release me, and they did so. On the following day, in the early morning, I went to Kakiri Police Station (and reported the incident) and the police sent me to a doctor for examination . . . The doctor saw me and gave me treatment. Afterwards I went back to the police whereby I was told that if I had anything to claim for this matter, that I had better take this matter to the Court of His Highness the King. Therefore that is why, following the advice, I have come here to sue all the eight defendants for having co-operatively (sic) assaulted me and put me to shame before all the people of my area . . . on account of that I demand from them damages of Shs. 2,000/- and that they refund to me my Shs. 400/- which they robbed from me . . .”

Looking at the plaint as a whole, although it is true that on the face of it, the allegation concerning the sum of Shs. 400/- does give the impression that the case is a felony, that is to say, robbery with violence, but the real complaint by the appellant would appear to be about the assault and battery suffered by him. The impression one could gather from the tenor of the plaint itself seems to be that the appellant was merely saying that he had Shs. 400/- in his possession and that it was in the process of the assault and battery on him that he lost the money. Apart from the allegation concerning the Shs. 400/- having been missing or taken from him, the plaint would appear to disclose an ordinary action of assault and battery. It is correct to say that in the very first paragraph of his plaint, the appellant did allege that he was beaten, his clothes torn, and that he was robbed of the sum of Shs. 400/-.

The Principal Court is a court established in Buganda as a native court. It administers only native law and custom of Buganda and some statutory offences for the enforcement of which jurisdiction is specifically conferred upon it. It does not administer the common law of England nor does it administer the Penal Code of Uganda. If indeed, the view was taken that the plaint discloses a criminal offence, it is not quite clear why the Principal Court should refuse to try a civil case merely because it alleges the commission of a crime. The Principal Court did not refer to any authority or precedent which precludes it from adjudicating in a civil claim in which a criminal offence is alleged.

It is even more difficult to appreciate the grounds upon which the Judicial Adviser had dismissed the appellant's appeal and upheld the decision and order of the Principal Court. He appeared to have taken the view that, because the Principal Court had held that it was by mistake that the action was brought to the court as a civil claim since it alleges a criminal offence, the appellant ought to be referred to the lower court where prosecution for the offence alleged might be initiated. The question is, by whom – the police? – surely not.

It is true of course that as a matter of public policy, under the English Common Law, as was long ago laid down in the well-known case of *Smith v. Selwyn* (1), an action for damages based upon a felonious act on the part of a defendant committed against a plaintiff is not maintainable so long as the defendant has not been prosecuted. But it should also be appreciated that the practice in such circumstances is for the court only to stay further proceedings in the action, and not to close the case or dismiss it on the ground that the writ or statement of claim is based on a felony for which the defendant has not been prosecuted. Unless the felony alleged appears plainly on the face of the writ or statement of claim, the burden is upon the defendant to show conclusively that the case, which the plaintiff makes, is one of felony and cannot be anything else. Where there is some doubt whether the action is based upon a felony or misdemeanour the court will not order a stay of proceedings. See *Jack Clark (Rainham) v. Clark* (2).

To the rule that a felony cannot be made the foundation for a civil claim, there are several exceptions. As was held by the West African Court of Appeal in *Nanshiedu v. Henry Nuno* (3), the rule that civil proceedings must wait upon a criminal trial where an offence is alleged applies to felonies only and not to misdemeanours.

Furthermore, the rule has no application where the plaintiff is able to give a reasonable excuse for the defendant not having been prosecuted. When deciding the question whether an action is based upon a felony or not, the court must look at the reality of the matter and all the circumstances of the case and is not bound by the statement of claim alone. See *Carlisle v. Orr* (4).

I think it is right to state that on the face of the order made by the Principal Court, it was not merely staying further proceedings in the case but had virtually closed, that is to say, dismissed or struck off the case as, in its view, it was purely a criminal case. It is difficult to find a precedent for the decision and order of the Principal Court in this case under the Customary Law of Buganda.

In native customary law the distinction between a criminal and a civil claim is a very thin one indeed. For, even in criminal cases, according to customary law, compensation may be awarded against the person convicted and in favour of the complainant in the case. However that may be, there is no doubt whatsoever that there is hardly any distinction between a felony and a misdemeanour in customary offences or crimes. It is not therefore clear under what particular customary law the decision of the Principal Court was based as it is not entitled to apply the Common Law of England in its proceedings.

Assuming that the Principal Court, though not entitled to administer the Common Law of England, had acted on the principles of the Common Law stated above, its decision and order were wrong in law, because in his statement of claim, the appellant had explained that his complaint against the respondents was first made to the police for the purpose of prosecution and that the police had refused to prosecute; and had advised him to resort to a civil claim in the Principal Court.

It seems clear therefore that in the circumstances of the instant case, the appellant had done what would normally be expected of him as a citizen by reporting the matter to the police for action. He had therefore given a reasonable excuse for not having prosecuted the respondents. The duty of prosecuting criminals is vested in the police, and, in my view, where the police had refused to proceed criminally against the respondents, the appellant was not bound to institute a private prosecution. He was therefore entitled to proceed to enforce his civil claim against the respondents.

It is somewhat unsatisfactory that the Judicial Adviser, who himself had confessed to having read the whole of the plaint filed by the appellant, should have merely confirmed the decision and order of the Principal Court, without indicating his reason for so doing; and without any reference to any precedent for this practice in support of the order of the Principal Court throughout its long history of existence.

In all the circumstances, this appeal is allowed. The decisions and orders of both the Principal Court and the Judicial Adviser are set aside. It is ordered that the case be sent back to the magistrate's court, Mengo, of competent jurisdiction, having regard to the recent integration in Buganda and the quantum of damages claimed by the appellant, to be there heard and disposed of on its merits. Costs of this appeal to the appellant in this court. The appellant is also awarded costs against the respondents in the proceedings in the Court of the Judicial Adviser. Order accordingly.

Appeal allowed.

The appellant and the respondents appeared in person.

Kashibai v Sempagama
[1967] 1 EA 16 (HCU)

Division: High Court of Uganda at Kampala
Date of judgment: 7 December 1966
Case Number: 232/1966
Before: Bennett J
Sourced by: LawAfrica

[1] Practice – Particulars – Allegation that plaint bad in law and discloses no cause of action – Whether particulars should be ordered.

[2] Practice – Pleadings – Defence alleging plaint bad in law and discloses no cause of action – Whether particulars should be ordered.

[3] Practice – Points of law pleaded in defence – Whether particulars should be ordered.

Editor’s Summary

In an action by a widow on behalf of her husband’s estate for damages the defence contained a plea: “The plaint is bad in law and does not disclose any cause of action . . .”. The plaintiff applied for further and better particulars.

Held –particulars must be given.

Application allowed.

No cases referred to in judgment.

Judgment

Bennett J: This is an application for further and better particulars of para. 1 of the written statement of defence, which reads:

“1. The plaint is bad in law and does not disclose any cause of action and the action brought is out of time.”

The suit is a claim for damages for negligence, and is brought by the widow of a man who was killed in a motor accident on behalf of his estate.

On behalf of the plaintiff it is contended that para. 1 of the written statement of defence raises three defences, namely: (i) the plaint is bad in law; (ii) it does not disclose the cause of action; and (iii) the suit is brought out of time. The plaintiff’s advocate asks for particulars of the first two defences on the

ground that if he does not get them he will be taken by surprise at the trial.

The defendant's advocate contends that para. 1 of the written statement of defence must be read as a whole, and that the plaintiff is asking for particulars of legal propositions and not of facts. He contends that pleadings must be confined to facts and that matters of law need not be pleaded. He says that the plaintiff is, in fact, asking for particulars of the legal arguments upon which he will rely at the trial, which he cannot be compelled to disclose at this stage.

Order 6, r. 27 enables a party to raise a point of law in his pleadings. The rule was made in 1960 and is a departure from the older rule that pleadings should be confined to material facts. The application for particulars is made under O. 6, r. 3, which corresponds to O. 6, r. 5 of the Indian Civil Procedure Rules.

In the A.I.R. Commentaries (7th Edn.), Vol. II, at pp. 2182 and 2183, the requirements as to what should be pleaded in a written statement of defence which raises a point of law are set out. To quote from p. 2183:

“Where the defendant contends that the suit or application is misconceived he must specify or particularise why he contends that the suit or application is misconceived. If he relies on any facts for those purposes he must state those facts in his pleading, if it is merely the position in law

which he relies on, he must set out with sufficient particulars the position in law upon which he ultimately bases his submission.”

In my view the words in para. 1 of the written statement of defence “The plaint is bad in law and does not disclose any cause of action” must be read disjunctively. That is to say, it would appear that the defendant intends to raise an objection in point of law in addition to the objection that the plaint discloses no cause of action.

In my judgment, the plaintiff is entitled to know what this other objection is, otherwise he will be taken by surprise at the trial. I therefore allow this application, and order the defendant to furnish the plaintiff with further and better particulars of para. 1, of the written statement of defence, within fifteen days.

The plaintiff’s advocate had previously asked for particulars by letter, and his request was not complied with. In these circumstances I order the defendant to pay the plaintiff’s costs of this application.

Application allowed.

For the plaintiff:

Wilkinson & Hunt, Kampala

R. E. Hunt

Muwonge v Attorney-General of Uganda [1967] 1 EA 17 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	17 March 1966
Case Number:	10/1966
Before:	Newbold P, Sir Udo Udoma CJ and Duffus JA
Sourced by:	LawAfrica
Appeal from:	The High Court of Uganda – Bennett, Ag. C.J.

[1] *Master and servant – Vicarious liability of master for acts of servant in course of employment – What is course of employment – Test of liability where act unauthorised.*

[2] *Police – Government liable as master for act of policeman done “in exercise of duty” although contrary to orders.*

Editor’s Summary

The appellant’s father was killed during a riot. The shot which killed him was fired by a policeman who had seen the appellant run towards a house, had concluded that the appellant was a rioter and, having

followed him, fired wantonly into the house not caring whom he killed or injured. At the time, stones were being thrown and shots were being fired nearby.

Held – the firing of the shot was an act done within the exercise of the policeman's duty for which the Government of Uganda was liable as master, even though it was wanton, unlawful and unjustified.

Per Newbold P: An act may be done in the course of a servant's employment so as to make his master liable even though it is done contrary to the orders of the master; and even if the servant is acting deliberately, wantonly, negligently or criminally, or for his own benefit, nevertheless if what he did is merely a manner of carrying out what he was employed to carry out then his master is liable.

Appeal allowed.

No cases referred to in judgment.

The following judgments were delivered:

Judgment

Newbold P: This is an appeal against the decision of the Acting Chief Justice of Uganda dismissing a suit brought by a minor through his next friend under the Law Reform (Miscellaneous Provisions) Ordinance claiming on behalf of himself damages for the unlawful killing of his father, upon whom the plaintiff was dependant, by a policeman in the exercise of his duties. The plaint was brought under the provisions of the Uganda law against the Attorney-General of Uganda.

It is not in dispute that the principles of law governing the liability of the Attorney-General in respect of the acts of a member of the police force are precisely the same as those relating to the position of a master's liability for the act of his servant. This being so the legal position is quite clear and has been quite clear for some considerable time. A master is liable for the acts of his servant committed within the course of his employment or, to be more precise in relation to a policeman, within the exercise of his duty. The master remains so liable whether the acts of the servant are negligent or deliberate or wanton or criminal. The test is: were the acts done in the course of his employment or, in this case within the exercise of the policeman's duty. The acts may be so done even though they are done contrary to the orders of the master.

There is not, I think, any great dispute between the submissions made by counsel on behalf of the appellant, and those made by counsel on behalf of the Attorney-General, in relation to the broad outline of the legal principles to be applied here. When their arguments are examined I think it will be found that there is little, if any, area of dispute between them in relation to the law to be applied; the area of dispute is really in the application of the facts to the law.

The trial judge, having examined the facts, set out, in my view correctly subject to one matter, the general principles of law to be applied. This one matter I shall deal with briefly here, because it has not really been the subject of much argument although it is a ground of appeal. At one stage in his judgment, having considered the general legal position, the judge posed the question: "Did the policeman who shot Matovu honestly believe that in firing into his house he was executing his master's orders? I think the answer to that question must be in the negative". Very shortly thereafter the trial judge, having answered that question in that form, came to the conclusion that the act of the policeman, whoever he may have been, in shooting Matovu had not taken place in the course of his duties. It seems to me that the trial judge was there applying the test of honest belief by the servant in order to determine whether an act was in the course of employment. If that was the test that the trial judge applied then, with respect, I think he was wrong. The test of a master's liability for the acts of his servant does not depend upon whether or not the servant honestly believes that he is executing his master's orders. If that were so the master would never be liable for the criminal act of the servant, at any rate when the criminal act is towards benefiting the servant himself. I think it dangerous to lay down any general test as to the circumstances in which it can be said that a person is acting within the course of his employment. Each case must depend on its own facts. All that one can say, as I understand the law, is that even if the servant is acting deliberately, wantonly, negligently or criminally, even if he is acting for his own benefit, nevertheless if what he did

was merely a manner of carrying out what he was employed to carry out then his acts are acts for which his master is

liable. Dealing with the facts of this case, it seems to me that the sole principle of law which should be applied in determining whether the Attorney-General is responsible for the acts of this policeman is: Were those acts committed in the course of the duty of the policeman, no matter whether they were committed contrary to general instructions.

What are the facts here? A considerable amount of evidence has been called but it boils down to this: that on the evening of November 10, 1964, a disturbance took place at a place called Nakulabye. When the disturbance started there were already some policemen there seeking to arrest a man described in the evidence as a Congolese. The behaviour of the crowd got out of the control of the policeman then present and undoubtedly a riot developed. Reinforcements were sent for and successively more reinforcements were sent for and arrived. The first major lot of reinforcements arrived under the command of Assistant Superintendent of Police Ezama and for all practical purposes he was the senior officer present thereafter, at any rate for the times relevant to this suit. A.S.P. Ezama arrived with a number of men, precisely how many I cannot at present recall but I think four car crews, and each car commander was armed with a .410 pistol. The behaviour of the crowd became progressively worse, stones were thrown and policemen, one or more, were injured. A.S.P. Ezama withdrew to the cars and called for reinforcements. These subsequently arrived, the first lot of reinforcements being two sections, one under the control of Sergeant Lutta up to the moment of arrival and the other under the control of Corporal Eryngo. Each of these sections comprised about eight men and both of these sections were armed with .303 rifles, and, as far as the evidence goes, nothing else. When they arrived at the scene stones were still being thrown according to the evidence of A.S.P. Ezama, though counsel for the Attorney-General in the course of his arguments has submitted that at that time things were quiet. I do not think that such was the position, nor do I think that the judge thought that such was the position because of a passage to which I shall refer later. Subsequently further reinforcements arrived armed also, I believe, with rifles but I need not deal with them because the relevant events had been completed by the time they arrived. There were also two other lots of officials, the Fire Brigade and some prison warders, who had arrived on the scene but for all practical purposes I do not think it necessary to refer to them.

At some time, obviously after the two sections armed with rifles arrived at the scene, the deceased, Matovu, was shot and it seems to be accepted by all concerned, though the record does not show it, that he was shot by a bullet from a .303 rifle. This being so it would appear an irresistible inference that he was shot by one of the policemen in one of the two sections commanded respectively by Sergeant Lutta and Corporal Erynyo. As I have said the evidence of A.S.P. Ezama is that at the time of arrival stones were still flying and, indeed, this is borne out by, I think, Corporal Erynyo who stated that two members of his section returned and reported that they had gone off to join other policemen and they had been stoned and had fired a shot each. Another policeman who was called by the plaintiff also made it clear that the crowd was hostile and that he fired in self-defence. This policeman was, I think, a member of Sergeant Lutta's section. From that evidence it seems fairly clear that at certain parts of this general area a riot was taking place and that stones were still being thrown at or after the time of the arrival of the two sections armed with .303 rifles. Apparently, as I have said, some constable shot Matovu. No evidence has been given on the part of the police witnesses to show precisely the circumstances in which Matovu was killed, but there is evidence from the plaintiff in this action, that is Motive's son, corroborated in essential parts by a friend of the plaintiff, to the effect that the plaintiff was returning to his house after drawing water at a well when he heard firing and was slightly injured by a bullet. He then ran into

his house, which was near by the area of the riot, told his father about it, his father at that time being in the house. His father then went to another room to get medicine to dress the wound and en route there, while inside the house, a policeman was seen while outside the house to fire into the house and the shot killed Matovu. The inference drawn from those facts by the trial judge is set out in the following words:

“The inference to be drawn from the evidence as a whole is that some member of the police force seeing the plaintiff running towards the house concluded that he was a rioter, followed him to the house, and fired wantonly into the house not caring whom he killed or injured.”

Counsel for the appellant naturally relies upon that finding of fact. Counsel for the respondent challenges it. Although he did not in his submissions use these words, I think the basis of his submission was that this was an inference from primary facts and that an appeal court could as easily draw an inference from primary facts found by the trial judge as could the judge. He asked this court to draw an inference to the contrary, that is, an inference that the policeman, whoever he was, who shot Matovu did not believe that he was pursuing a rioter or that a rioter had run into the house. There was evidence each way upon which the trial judge could draw the inference he did draw and I see no reason whatsoever to draw any contrary inference. I think, indeed, that it is an inference of fact very properly drawn by the trial judge. Where policemen are in an area where a riot is taking place, people are throwing stones and shots are being fired and a person runs from quite close to the area of disturbance into a house it is at least a reasonable possibility that that person may have been connected with the disturbance. Be that as it may, it is an inference that the trial judge drew and I can see no reason whatsoever to come to a conclusion that it was an inference he should not have drawn or that it was an erroneous one.

Turning now to the application of the law to those facts, what is the position? As I have said and as counsel for the appellant urged, so far as relates to the two sections with which we are primarily concerned, that is Sergeant Lutta's section and Corporal Eryenyo's section, they were armed with rifles and with nothing else and the instructions given to at least one of these section commanders were, if I may use the exact words, “to disperse the crowds at Nakulabye by the use of rifles”. Now counsel for the appellant has stressed that, whether or not the action was justified, what these policemen were sent to do was to quell a riot, to disperse a crowd and for that purpose they were armed with rifles, even if one disregards the words “by the use of rifles”. These policemen arrived on the scene and at the time there is clear evidence that stones were still being thrown. There is also clear evidence that at the time the senior officer in command of the position, that is A.S.P. Ezama had not only used a firearm but indeed had exhausted the ammunition for his firearm and had, I believe, borrowed a Greener gun and fired two shots from it. Now it is true that the use of firearms up to that time does not, so far as appears from the evidence, appear to have resulted in any injury to any member of the crowd. Nevertheless the position is that two sections of policemen sent to quell a riot and armed only with rifles arrived at the area, find the senior officer present has exhausted his ammunition, find firing with lethal weapons taking place, and find stones being thrown by a hostile crowd. Some or all of those two sections then spread out. There is evidence, I think, that Sergeant Lutta took his section along the road. Corporal Eryenyo also took his. A.S.P. Ezama in the course of his evidence said that in order to drive the crowd back the police fanned out, which is just what one would expect to take place when police are seeking to quell a riot and disperse a crowd. There is also evidence that at least five members of the two sections armed with .303 rifles fired their rifles. Now that is five out of about sixteen policemen. Some fired as many as

nine rounds, others fired only one round; but it is from that group that the policeman who killed Matovu came. In those circumstances was the policeman, no matter who he may be, acting in the course of his duty? For my part I have no hesitation whatsoever in saying that he was. What was the nature of the duty which he was sent there to do? It was to quell a riot. What means was he given to perform his duty? A rifle. What happened when he got there? He found that firing had already taken place and he found, at any rate in some areas, stone throwing still taking place. One must remember that where a riot is taking place, particularly at night, there may be areas which are perfectly quiet and other areas which are very violent; and policemen, and the rioters themselves, in different parts of the area have no idea what is happening in the other parts. As I have said the nature of the duty was to quell a riot, the means given to these two sections to perform their duty were rifles. That does not mean to say that they had full authority to use their rifles in any circumstances. By no means. But it is an indication that the use of their rifles must have been something which was contemplated by their seniors. As I have said also, on arrival firing had already taken place and stones were still being thrown. In these circumstances, speaking for myself, I fail to see how it can be suggested that the act of a policeman in using his rifle would not be within the exercise of his duties unless there was clear evidence that the use by an individual policeman of his rifle was a use for his own purpose and unconnected in any way whatsoever with his duties. There is no such evidence. I accept, as did the trial judge, that the act of the particular policeman who shot Matovu was a wanton act, an unlawful act, an act in the particular circumstances which was not justified. But that does not mean to say that it was not an act done in the course of his duties. A policeman may still be acting in the course of his duties if the manner in which he carries out his duty is a wrong one; but nevertheless he is still carrying it out.

Counsel for the respondent has referred to the “frolic of his own” class of case. He has, for example, referred to a possible case of somebody taking advantage of a situation to vent his own spite and kill an enemy. But in those circumstances the act of the person in venting his own spite is an act outside of the course of his employment and there is no suggestion that such was the position here. The inference of fact drawn by the trial judge and, in my view correctly drawn, was that the policeman, whoever he may have been, who caused this death did so by following what he thought was a rioter entering into the house and firing wantonly into the house, not caring whom he killed or injured. This to my mind is merely a wrong manner, a wrong mode, of carrying out the policeman’s duty. I accept that in all these cases in which the question arises as to whether a particular act is or is not done in the course of employment, it is a question of fact, a question of degree. In almost every case there is room for a difference of opinion. The trial judge in this case thought that the act done by the policeman was not an improper manner of carrying out his duty but an act outside the course of his duty. For my part, in the circumstances which I have detailed and on the inference of fact that the trial judge has himself accepted, it seems to me that it was an improper manner of carrying out his duty and nothing else. This being so it was an act for which the Attorney-General, as representing the State, is liable. Accordingly, with respect, I think the decision of the trial judge is wrong and I would have given judgment for the plaintiff.

The trial judge found that the damages to which the plaintiff would have been entitled if the decision had been given in his favour was a sum amounting to Shs. 4,200/-. I would accordingly set aside the judgment and decree of the trial judge and substitute therefore a judgment in favour of the plaintiff for the sum of Shs. 4,200/- and order that the defendant in the suit pay the costs of the suit. I would also order that this sum be paid to the next friend of the plaintiff to be held in trust by the next friend until the plaintiff comes of age, with power to

the next friend to apply any sum therefrom for the maintenance or education of the plaintiff. Accordingly, I would allow the appeal on the terms I have set out.

Sir Udo Udoma CJ: I agree with the judgment just delivered by the learned President.

Duffus JA: I agree with the judgment of the President. I shall just add a few words on the facts. The learned trial judge has found that there was a state of riot when A.S.P. Ezama and his men opened fire. He also found that this state of civil disturbance stopped when members of the Special Force arrived but before this other members of the ordinary police had come armed with .303 rifles and it is clear that the disturbance was then still continuing. Sergeant Lutta in his evidence said he saw two crowds, one in the vicinity of the roundabout and one on the Hoima Road; both were hostile crowds and were throwing stones, and when Inspector Lalobo arrived at 8.15 p.m. the crowds were still throwing stones at the police. At this stage the parties were apparently subdivided, thus Sergeant Lutta sent three of his men off, he said these men were under the instructions of A.S.P. Ezama but Ezama does not mention these three men, who apparently went off as a body, and were three of the men who fired a considerable amount of ammunition. I think the learned judge was justified in finding that “the inference to be drawn from the evidence as a whole is that some member of the police force seeing the plaintiff running towards the house concluded that he was a rioter, followed him to the house, and fired wantonly into the house not caring whom he killed or injured”. The whole point at issue was therefore whether this policeman was at this stage acting within the course of his employment as a police officer. The learned judge found that he was not but I entirely agree with the President that on the facts of this case that the policeman was then still acting within the course of his employment. It follows that judgment should have been given to the plaintiff and I agree with the order proposed by the learned President.

Appeal allowed.

For the appellant:

Kiwanuka & Co., Kampala

B. K. M. Kiwanuka

For the respondent:

Attorney-General, Uganda

J. Mitchell and A. K. Korde

Kityo v Uganda
[1967] 1 EA 23 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	11 November 1966
Case Number:	619/1966
Before:	Sir Udo Udoma CJ
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[1] *Criminal law – Counts – Charges – Whether there is misjoinder of counts in same charge.*

[2] *Search – Powers of police to search and seize under s. 20 Criminal Procedure Code (U.) – Uttering of false documents – Whether production of false evidence of police to support defence to suspicion that goods have been stolen is “uttering”.*

[3] *Indictment – Two offences forming subject matter of one indictment.*

[4] *Police – Powers of police to search and seize under s. 20 Criminal Procedure Code (U.).*

Editor’s Summary

The appellant was tried on a charge containing two counts: (i) under s. 299 of the Uganda Penal Code for being in possession of goods (certain car parts including a carburettor, air cleaner, steering column, trafficator, engine and box) found in a Morris Minor USD 429 reasonably suspected of having been stolen; (ii) under s. 330 of that Code for uttering two false documents namely (1) a purported agreement to sell USD 429; (2) a purported transfer form of USD 429 from the seller to the appellant, which he had produced to the police in support of his contention that he had lawfully acquired USD 429 in the condition and state as seen by them. The appellant, having been found guilty on both counts and sentenced to two terms of imprisonment, the sentences to run concurrently, appealed on the grounds (a) there was a misjoinder of counts; (b) that he was wrongly convicted under s. 299 of the said Code as the police acted outside the powers conferred under s. 20 of the Uganda Criminal Procedure Code concerning the right to search the car USD 429 and the appellant and to seize anything reasonably suspected of being stolen; and (c) the false documents were not voluntarily uttered to the police.

Held –

- (i) there was no misjoinder as the two offences with which the appellant was charged were based on the same facts;
- (ii) the police, acting upon reasonable suspicion, correctly exercised their powers under s. 20 of the Code of Criminal Procedure, and the conviction under s. 299 of the Penal Code was correct. A precise suspicion is not necessary;
- (iii) the documents were voluntarily uttered to the police and, having been proved to be false, the conviction under s. 330 of the Penal Code was correct.

Appeal dismissed.

Cases referred to in judgment:

(1) *R. v. Dalip Singh* (1943), 10 E.A.C.A. 121.

(2) *R. v. Smith and Others*, [1958] 1 All E.R. 475.

(3) *R. v. Derek Clayton Wright* (1948), 33 Cr. App. R. 22.

(4) *R. v. Francis Smith* (1926), 19 Cr. App. R. 151.

(5) *Justini Ngozebwa v. R.* (1954), High Court of Uganda, Criminal Appeal No. 215 of 1954 (unreported).

(6) *R. v. Athman bin Salim* (1947), 14 E.A.C.A. 59.

(7) *R. v. Fitchie* (1857), 7 Cox C.C. 257.

(8) *R. v. Joseph Radford* (1844), 1 Cox C.C. 168.

(9) *R. v. Ion* (1852), 6 Cox C.C. 1.

Judgment

Sir Udo Udoma CJ: The appellant was convicted on July 30, 1966, on a charge containing two counts by the magistrate in the magistrates' court, Mengo. In the first count he was charged with being in possession of goods reasonably suspected of having been stolen contrary to s. 299 of the Penal Code. In the second count he was charged with uttering false documents contrary to s. 330 of the Penal Code. He was sentenced to eighteen month's imprisonment on the first count, and on the second count to one year's imprisonment. Both sentences were ordered to be concurrent. He now appeals against both conviction and sentence on a number of grounds.

The facts on the evidence were that as a result of information received and the instructions given to all police officers in all Police Stations in Kampala by Mohanar Singh Sandhu, Assistant Superintendent of Police, C.I.D. Headquarters, Kampala, the police, including Mohanar Singh Sandhu himself, kept a careful and regular watch for some time between the months of May and August, 1965, on the movements of the appellant's car – a Morris Minor No. USD 429. As a result it was noted that at whatever area of the city of Kampala that the appellant's car frequented there was always a theft of and from motorcars and, in particular, from Morris Minor cars. The appellant's car number USD 429 was then known to frequent a particular area of the city in which there are cinema houses, the National Theatre, the Speke Hotel and public bars.

On August 7, 1965, at about 8 p.m., Mohanar Singh Sandhu saw the appellant's car drive past the Speke Hotel. It went near the Neeta Cinema car park and thereafter turned and went towards Kampala Road. Then while on his rounds of duty that same night at about 11 p.m., Mohanar Singh Sandhu saw the appellant's car again being driven along the Buganda Road. It was coming from the Wandegeya side of the road and proceeding towards the Norman Cinema. Mohanar Singh Sandhu observed the behaviour of the driver of the appellant's car. He appeared to be looking at the left and then right sides of the road while driving his car slowly.

The appellant's car then entered into the Norman Cinema car park still moving very slowly. It stopped there for a short while and then drove off again into Kampala Road. It turned left and drove slowly past the cars which were parked near the Odeon Cinema. Mohanar Singh Sandhu, who was still following its movement, noticed that there were two people in the car but was unable to recognise their faces from a distance.

The appellant's car then drove towards Cooper Motors' and entered into the B.P. Petrol Filling Station near the Uganda Company opposite Cooper Motors, but did not buy any petrol. From the manner in which the car appeared to be prowling about Mohanar Singh Sandhu became suspicious. In the result, when the car turned and was about to drive out of the petrol station, Mohanar Singh Sandhu drove his own car forward and blocked the exit from the petrol station. He stopped his car and alighted therefrom, and, on looking at the Morris Minor, found that it was being driven by the appellant. He was at the steering wheel when the car stopped. That was at about 11.30 p.m.

Mohanar Singh Sandhu introduced himself to the appellant and informed him that he was suspicious about his movements and would like to check the contents of his car. At the request of Mohanar Singh

Sandhu the appellant opened the boot of his car. On searching the boot of the car, Mohanar Singh Sandhu found a briefcase containing tools and spanners of all sizes and shapes capable

of opening any car size nuts and bolts. There were altogether twenty-one flat spanners, seven ring spanners, one ratchet spanner, one pipe spanner, two star screwdrivers, one hole punch, two pliers, two levers, and three pipe spanner handles.

Mohanar Singh Sandhu spoke to the appellant. In reply to a question as to why he should carry with him such a large number of tools at that time of the night, the appellant said that all were his own tools and that he was always in the habit of carrying them about in case he should have a breakdown. In view of his previous information about the car and his observation of the conduct of the appellant, Mohanar Singh Sandhu noted the registered number of the car to be No. USD 429. A close search and examination also revealed several inconsistencies in respect to the inside finish of the car compared with the description of the car No. USD 429 in the register in the Central Motors Registry.

According to the Register, the car Morris Minor USD 429 is described as of black colour and of 1959 model, whereas the car being driven now by the appellant was fitted with a new model steering column with a blinker and a trafficator switch which was only available for the 1962 model of Morris Minors. The colour of the body of the car was yellow or fawn instead of black. The carburettor and air cleaner were not of the 1959 model but of 1960 and 1962 models respectively. The seats and door covers were almost new and did not correspond with the colour scheme of the car, which should have been red.

The roof upholstery appeared new. The upholstery on the door and inside the car was of grey and blue colours and the seats were also of blue colour and new. The piping was changed to red. The appellant was there and then told that his car was suspected of having been fitted with parts stolen or unlawfully obtained. Consequently the appellant was invited to the Central Police Station for further enquiries. He refused and said that he was not a thief. He entered his car and was about to get it started when Mohanar Singh Sandhu pulled out the ignition keys from the keyhole of the car. Still the appellant refused to accompany Mohanar Singh Sandhu to the police station.

The appellant alighted from his car, opened the bonnet thereof and with the help of a piece of silver paper made a direct connection on the cut-out and started the car within a matter of minutes. The appellant then boarded the car and was about to drive off when he was again stopped by Mohanar Singh Sandhu who pulled off the silver paper and thereby caused the engine to stop.

Moreover, when the bonnet of the car was opened by the appellant, Mohanar Singh Sandhu had noticed that the engine of the car was new. His suspicions were again aroused because the engine of a car which had been in use for about six years could not still be new. There was no doubt that the engine was new because on or about August 30, 1965, Joseph Ngyou, after having tested it confirmed that the engine was new and in very good condition. Joseph Ngyou incidentally is a foreman at Gailey and Roberts Motors and had had nine years in the motor industry and was familiar with Morris, Austins and Wolseleys.

Thereupon Mohanar Singh Sandhu repeated what he had told the appellant before conducting the first search, that he suspected that some of the parts of his Morris Minor had been stolen or unlawfully obtained and that he would like to know how he came by the car. In answer the appellant said that he had bought the car from Christopher Lubega some three years ago in the same condition as Mohanar Singh Sandhu had found it that night, and that since he bought it he had changed none of its parts.

Soon thereafter a police patrol car arrived. On the invitation of Mohanar Singh Sandhu, the appellant drove his car in front of the police patrol car and finally arrived at the Central Police Station. There, to confirm his suspicions,

Mohanar Singh Sandhu again searched the Morris Minor USD 429 and concluded that the engine, gearbox, battery, upholstery of seats and ceiling, the floor mat and the steering wheel had been stolen or unlawfully obtained and fitted into the appellant's car.

On further enquiry the appellant repeated what he had said before that he had bought the car from Christopher Lubega for Shs. 4,000/- in the same condition in which it was that night. The appellant then made a statement in Luganda (Ex. 9) (English translation Ex. 10), which was read over to him and he agreed that it was correct and signed it. This was in the course of the enquiries as to the ownership and the condition of the car. The car was there and then detained for further enquiries but the appellant was allowed to go and fetch his registration card.

On August 9, 1965, the appellant produced and tendered to Mohanar Singh Sandhu a registration card together with the insurance cover note for the car. Both were put in and marked Ex. 3 in the proceedings at the trial. According to the card, the car is ex-Kenya 1959 model originally black and was first registered in Uganda in 1962. The car was still registered in the name of Christopher Lubega. The appellant explained that, even though he had bought the car three years ago, he had had no money to apply for the change or transfer of ownership into his own name although at that time the fee for change of ownership was only Shs. 10/-.

Mohanar Singh Sandhu requested the appellant to bring Christopher Lubega for the purpose of further enquiry. Between August 9 and September 16, 1965, the appellant reported at the Police Office that he could not trace Christopher Lubega. On September 16, 1965, at the request of Mohanar Singh Sandhu the appellant went with Detective Constable Kibeti for the purpose of showing Detective Constable Kibeti the house of Christopher Lubega at Bombo.

On arriving in Bombo, the appellant could not point out Christopher Lubega's house. Five miles after Bombo, the appellant pointed out to Detective Constable Kibeti an old dilapidated and unoccupied house in the bush as the house of Christopher Lubega. It turned out that Christopher Lugeba was not even known in the area.

Later, however, the police were able themselves to trace Christopher Lubega through a friend of the latter by the name of Paulo Kiddza. At the Police Station there was a conversation between Christopher Lubega and Mohanar Singh Sandhu concerning the sale of the car to the appellant. As a result, when the appellant reported to the Police Station, he was informed that on enquiry Christopher Lubega had denied selling the car to the appellant for Shs. 4,000/- but only for Shs. 1,500/- of which the appellant had only paid Shs. 880/- and that when the car was sold to the appellant it was not in good running order; that the various parts then found in the car at the Police Station were not in the car when it was sold. On being told that, the appellant explained that he had a transfer form and an agreement to prove that Christopher Lubega was not speaking the truth. He therefore went away to fetch the agreement and the transfer form.

The following day, the appellant, in support of his story that he had bought the car from Christopher Lubega at the price of Shs. 4,000/- and had also paid the price in full, as a result of which Christopher Lubega had signed in his favour the transfer form, produced and handed over to the police both the agreement Ex. 4 and the transfer form Ex. 5 purported to have been signed by Christopher Lubega.

After examination of both documents Exs. 4 and 5 respectively, Mohanar Singh Sandhu returned them back to the appellant. He told him that in the circumstances it was not easy for him to decide which of them spoke the truth

and that it was better that both the appellant and Christopher Lubega should report at his office at a later date.

On October 11, 1965, Christopher Lubega, Paulo Kiddza and the appellant reported at the Police Office. In the presence of and to the hearing of the appellant, Mohanar Singh Sandhu repeated what the appellant had told him to Christopher Lubega concerning the sale of the car. He told Christopher Lubega that the appellant had claimed to have bought the car, Morris Minor USD 429, from him and had paid him Shs. 4,000/- for it, in consequence of which he, Christopher Lubega, had signed in his favour the transfer form Ex. 5 and the agreement Ex. 4. There and then Christopher Lubega denied having signed the agreement Ex. 4 and the transfer form Ex. 5. He maintained that the signatures thereon were not his and then explained that he had only signed an agreement selling the car to the appellant for Shs. 1,500/-. Christopher Lubega was supported by Paulo Kiddza, who said he had witnessed the sale and that even out of the agreed price of Shs. 1,500/- only part of it was paid by the appellant.

It should be noted, that in his evidence at the trial Christopher Lubega confirmed the explanation given to Mohanar Singh Sandhu on that occasion, and swore that he sold the Morris Minor car USD 429 to the appellant in July 1963; and that at that time the car was black in colour; that the bearings and gearbox were spoilt and the inner cover of the roof was torn; that most of the parts were damaged; that at the time of the sale the appellant only paid him Shs. 880/- and they had entered into an agreement for the balance to be paid by instalments; that after the sale the car could not even move and had to be towed away by the defendant; and that the engine then had trouble and was certainly not the engine shown to him in the course of the trial of the case.

When Mohanar Singh Sandhu asked the appellant to produce the agreement, the appellant said that he did not bring the agreement Ex. 4 with him; and that he would only produce the agreement Ex. 4 in court as the same was then in the possession of his advocate.

On October 18, 1965, the appellant reported at the Police Office and produced and handed over to Mohanar Singh Sandhu the agreement, Ex. 4, and the transfer form, Ex. 5. Mohanar Singh Sandhu retained both the agreement and the form and advised the appellant to report back to him the next day. The appellant took exception to the documents being retained. He insisted on getting the documents back. Mohanar Singh Sandhu thereupon obtained photostatic copies of the documents and handed those copies to the appellant while retaining the originals surrendered to him.

On October 19, 1965, in the presence of the appellant, Mohanar Singh Sandhu produced both the documents and showed them to Christopher Lubega, who immediately denied having signed the documents and the signatures on the said documents, and maintained that his signature thereon was forged. The appellant insisted that the signatures on both documents were those of Christopher Lubega.

On October 28, 1965, the appellant was charged and specimen signatures were taken and forwarded with the documents to Mr. Sydney Cecil Grimley, a specialist handwriting expert, for scientific examination in the Scientific Aid Laboratory of Government. At the trial of the appellant. Senior Superintendent Grimley testified that the signatures on the agreement Ex. 4 and the form Ex. 5 were not those of Christopher Lubega.

In his evidence, the appellant swore that the agreement he made with Christopher Lubega for the sale of the car to him was for Shs. 3,800/-, and that Ex. 4 was that agreement; that the agreement mentioned Shs. 4,000/- because he, the appellant, was at the time of the sale of the car to him indebted to Christopher Lubega in the sum of Shs. 200/-. Later the appellant changed and said that the price of the

car agreed between him and Christopher Lubega was Shs. 4,000/-.

He swore again that the agreement and the transfer form Exs. 4 and 5 respectively were delivered to him by Christopher Lubega already signed, but that he did not know who had signed them; that since he bought the car he had only changed the battery, which he had bought from a shop the name of which he did not know.

Under cross-examination, the appellant said that he bought the Morris Minor car in April, 1963, for Shs. 3,800/-. Later he changed and said he had bought it for Shs. 4,000/-, but that he only paid Shs. 3,800/- at the time of the purchase to Christopher Lubega and subsequently paid to him the balance of Shs. 200/-. He admitted that he had changed the seat covers but that his receipt for the money he paid for the seat covers was lost; that he did not change either the engine or the gearbox; that the car was in good condition when he bought it because as soon as it was pushed it started; that Christopher Lubega did not sign the agreement Ex. 4 and that he himself changed the colour of the car from black to brown.

The appellant called Assistant Superintendent John Walter Awiny as his witness. John Walter Awiny in his evidence swore that as a result of a traffic offence he had had occasion to examine the Morris Minor car in February, 1964, in order to find out if any of the parts fitted in it had been stolen. On examining the car, he had entertained suspicions that some of the parts fitted into the car were stolen and, in particular, that the engine and the seats and upholstery were the same at that time as those found in the car in court at the trial.

The witness continues that the number of the engine then found by him was different from the engine number registered in the Central Registry; and that, although he suspected some parts of the car to have been stolen, he could not prosecute the appellant then because the provisions of s. 20 of the Criminal Procedure Code had not been complied with. Under re-examination the witness maintained that he had then suspected that the engine in the car was stolen.

In his judgment the learned trial magistrate, after a careful review of the evidence as a whole, held that in all the circumstances of the case the suspicion of Mohanar Singh Sandhu was a reasonable one. He found as a fact that certain of the parts of the car, and, in particular, the carburettor, air cleaner, steering column, trafficator, the engine and gearbox were comparatively new and were not in the car when the appellant bought the same from Christopher Lubega, and therefore were reasonably suspected of having been stolen or unlawfully obtained. On that finding he held that it was the duty of the appellant to give to him a satisfactory account as to how he had come by those parts; and that on the evidence the appellant had failed to satisfy him as to how those parts came to be fitted into his car; and therefore concluded that in the circumstances the appellant was guilty on the first count under s. 299 of the Penal Code.

On the second count, the learned trial magistrate held that, on the evidence of the prosecution, the documents Exs. 4 and 5 respectively were forged and therefore false, the signatures thereon not being the signature of Christopher Lubega. He then held that the appellant had uttered them to the police well knowing that they were forged. Accordingly he found the appellant guilty and convicted him as already stated.

The decision of the learned trial magistrate has been challenged and attacked on a number of grounds by counsel for the appellant. The grounds argued crystallised into three main heads, namely:

1. that there was a misjoinder of counts and that the joinder of two offences in the charge on which the appellant was convicted was wrong in law

- and had occasioned a miscarriage of justice; and, that the trial magistrate ought to have so ruled when objection was taken by him at the trial;
2. that the circumstances of the case do not fall within the ambit of the offence created by s. 299 of the Penal Code as the appellant was not stopped or searched on any suspicion as required by s. 20 of the Criminal Procedure Code; that the suspicion, if any, was not a reasonable one, nor was it proved that any parts fitted into the vehicle were reasonably subject to suspicion; and
 3. that there was no uttering in law in as much as Mohanar Singh Sandhu compelled the appellant to produce the agreement of sale Ex. 4 and when produced he seized it; the gravamen of that ground being that the document was obtained by the police under duress.

On the first ground of appeal counsel for the appellant submitted that there was a misjoinder of two different offences although in two separate counts in the same charge. That it was wrong in law for the magistrate to have tried the appellant on a charge consisting of two different offences and of different characters and that by so doing the magistrate was acting in breach of s. 134 (1) of the Criminal Procedure Code, particularly as the offences occurred at two different times. Counsel also contended that in the course of the trial his objection on this point was wrongly over-ruled by the trial magistrate, his contention then having been that the two offences were not of similar character. Finally counsel submitted that the misjoinder of the offences is of such a fundamental nature that the whole of the trial has been vitiated.

The State Attorney for the respondent, submitted that there was no misjoinder because the two offences arose out of the same transaction and involved the same witnesses at the trial. Counsel then cited and relied on *R. v. Dalip Singh* (1) and *R. v. Smith and Others* (2).

As already stated, the charge against the appellant consisted of two counts, the first of which was: "being in possession of certain car parts reasonably suspected of having been stolen or unlawfully obtained". The second count concerned the offence of uttering a false document. On the evidence, the documents purported to have been uttered to Assistant Superintendent of Police Mohanar Singh Sandhu, are the agreement Ex. 4 and the transfer form Ex. 5 alleged by the appellant to have been executed and given to him by Christopher Lubega, the agreement and the form having been tendered by him as evidence of his having purchased and fully paid for the Morris Minor Car No. USD 429.

It is unnecessary to repeat the evidence again as the same has been fully set out above in this judgment. Suffice it to state that the two documents Exs. 4 and 5 were produced by the appellant in support of his explanation to the Police that there was nothing suspicious about his Morris Minor car and that he was truly the owner of it.

In my opinion there is a nexus between the first offence with which the appellant was charged and the second one of uttering false documents. On the evidence, the documents were produced in the first instance voluntarily by the appellant for the purpose of establishing his ownership of the car and allaying any suspicion entertained by the police, which had necessitated the enquiry into the various parts of the car and the detention of the same. Surely, it is common sense that, if the documents had been genuine and Christopher Lubega had admitted to the police that he had executed them properly when he sold the car to the appellant and that the car was in the condition then found by the police, that obviously would have been the end both of the enquiry and of the case.

I agree with the ruling given by the learned trial magistrate that there was no misjoinder of the charges because the two offences charged were based on the

same facts. The investigation by the police in respect to the first charge dealing with the suspicion that parts of the car had been stolen from other cars and fitted into the car in question was still in progress and had not been completed. It was as a result of the enquiry conducted by the police that the false documents Exs. 4 and 5 were produced and tendered to the police by the appellant. It so happened that the documents in question were not genuine. They were forged. The obvious intention on the part of the appellant was to mislead the police and put them off the track of the enquiry.

The provisions of s. 134 (1) of the Criminal Procedure Code of this country are similar and appear to have been based on the provisions of r. 3 of the English Indictment Rules, the relevant portion of which reads as follows:

“Charges for both felonies and misdemeanours may be joined in the same indictment, provided that those charges are founded on the same facts, or form part of a series of offences of the same or a similar character.”

The above quoted provisions of the English rule were considered in *R. v. Derek Clayton Wright* (3). There the appellant was convicted on an indictment containing four counts. The first charged him with arson contrary to s. 42 of the Malicious Damage Act, 1861, in that he unlawfully set fire to a vessel. The second count charged him with arson of the vessel with intent to prejudice the insurers, contrary to s. 43 of the same Act. The third count charged him with attempting to obtain money by false pretences from the insurers in respect of the policy of insurance on the vessel, and the fourth charged him with obtaining money by false pretences from other insurers by pretending that a mink coat had been stolen from his motorcar and that he was entitled to payment under the policy in respect of the alleged loss.

It was held that as the charges contained in the first three counts were in substance charges of firing a vessel with the intention of defrauding underwriters and the charge contained in the fourth count was a similar charge of defrauding underwriters, the nexus of fraudulent acts to the prejudice of underwriters was present throughout so as to constitute the charges “parts of a series of offences of the same or a similar character within the meaning of r. 3 of the Rules in Sched. 1 to the Indictment Act, 1915, and that the counts were properly joined in one indictment”.

In *R. v. Dalip Singh* (1), relied upon by the State Attorney, the appellant and one Sikanda Hitwasi were charged together with stealing articles, the property of the Kenya and Uganda Railways; in the second charge the appellant alone was charged with giving a bribe to a Police Officer contrary to s. 93 (2) of the Kenya Penal Code, in order to procure his release from arrest and prosecution for the theft.

The bribe was offered a very short time after the arrest of the appellant and Sikanda Hitwasi, while they were being taken to the Police Station under arrest. The two charges were tried together. On the first charge the appellant and Sikanda Hitwasi were convicted (by virtue of s. 187 (c) of the Criminal Procedure Code) under s. 316 of the Penal Code and on the second charge the appellant alone was convicted.

On a second appeal to the Court of Appeal for Eastern Africa, the main ground and contention by counsel for the appellant was that there was a misjoinder of charges because the stealing and bribery were not “offences of the same or similar character”, nor were they “founded on the same facts” and therefore the joinder contravened s. 135 (1) of the Kenya Criminal Procedure Code.

It was held:

1. that in the circumstances the two charges were “founded on the same facts” since the evidence showed that the bribe had been offered within

- a very short time of the arrest of the appellant and Sikanda and while they were on their way to the Police Station; and
2. that the theft by the appellant and Sikanda and the offering of the bribe by the appellant were different offences committed in the course of the same transaction.

Although there appears a slight difference between *R. v. Dalip Singh* (1) and the instant case in that, while the bribe involved in *Dalip Singh's* case was offered while the appellant and Sikanda were being taken to the Police Station, in the instant case the agreement Ex. 4 and the form Ex. 5 were produced on or about October 18, 1965, and the incident as a result of which the appellant in the present case was taken to the Police Station for enquiry had occurred in August, it should be realised that the production of the agreement Ex. 4 and the form Ex. 5 was done in the course of police enquiry when no decision had as yet been taken to charge and prosecute the appellant. The two offences with which the appellant was charged are therefore based on the same facts.

Furthermore in *Dalip Singh* (1) there were two persons involved and the view might have been taken, that since Sikanda was not a party to the offer of the bribe, the case against him might be prejudiced as regards the stealing charge by the joinder of the bribery charge and by both he and Dalip Singh being tried together, and that in order to avoid such prejudice there ought to have been separate trials. No such view was taken.

In the instant appeal, I think it is reasonable to state quite clearly that in the circumstances of this case the facts concerning the suspicions of the various parts of the car are inseparable from the facts concerning the production of the agreement Ex. 4 and the form Ex. 5. Were there separate trials for the two offences, it is quite obvious that during both trials the evidence as to the production of the false documents and as to the circumstances under which the documents were produced would not have been avoided, as the two incidents are closely connected. Furthermore it is quite obvious that in both trials the same witnesses would have been required.

It may be worthy of note that Appeal Courts in England are usually very critical of the practice of bringing a number of different indictments against persons where, in their view, a single indictment would have been appropriate. For instance, in *R. v. Francis Smith* (4), where the appellant had pleaded guilty to four charges contained in four different indictments of burglary and was sentenced to six months' imprisonment with hard labour on each indictment, such sentences to run concurrently; on appeal against sentence only by leave, Hewart, L.C.J., was critical of the fact that the appellant was charged on four separate indictments. He said (19 Cr. App. R. at p. 152):

"A fact appears in this case which appears far too often, and which has very often been the subject of remarks in this court. There was not the slightest reason in this case why all the charges should not have been included in one indictment. The cases clearly come within s. 4 of the Indictment Act, 1915, and the third rule under that section, which provides that the charges for any offences, whether felonies or misdemeanours, may be joined in the same indictment if those charges are founded on the same facts or are part of a series of offences of the same or a similar character. It would be difficult to imagine cases which more clearly came within that rule than these four offences of burglary committed on two consecutive nights."

See also *R. v. Smith and Others* (2).

As already indicated, in my view, the charges were properly joined in one charge. This ground of appeal therefore fails.

I turn now to consider the second ground of appeal. Counsel for the appellant's contention on this ground was that on the authority of the Criminal Appeal No. 215 of 1954 – *Justini Ngozebwa v. R.* (5), the circumstances disclosed in the instant case do not fall within the ambit of the offences created by s. 299 of the Penal Code as the appellant was not stopped or searched on any particular suspicion as required by s. 20 of the Criminal Procedure Code. It was further submitted that the suspicion, if any, was unreasonable; that at the trial it was not proved that any of the parts fitted into the appellant's Morris Minor car No. USD 429 were reasonably the subject of suspicion; and that before a vehicle could be stopped, the prosecution must be able to show to the satisfaction of the Court that there had been a reasonable ground for suspicion.

It is true, of course that in *Justini Ngozebwa v. R.* (5), which was heard by Lewis, J., in this court, it was held that "a Police Officer must always give reasons for the suspicion which prompted the arrest and if they are valid then and only then can an accused person be called upon to give an account".

In his judgment, Lewis, J., had held that the magistrate, in convicting the accused in that case, had overlooked the fact that before a person could be put to account for his possession of an article under s. 299 of the Penal Code, the circumstances set out in s. 20 of the Criminal Procedure Code must be present.

The relevant provisions of s. 20 (1) of the Criminal Procedure Code are in the following terms:

"20(1) Any Police Officer may stop, search or detain any vessel, boat, aircraft or vehicle in or upon which there shall be reason to suspect that anything stolen or unlawfully obtained may be found, and also any person who may be reasonably suspected of having in his possession or conveying in any manner anything stolen or unlawfully obtained, and may seize any such thing."

The question then in the instant appeal must be: on the evidence had Assistant Superintendent Mohanar Singh Sandhu reason to suspect that anything stolen or unlawfully obtained might be found in the Morris Minor car No. USD 429, when in the night of August 7, 1965, he stopped and searched it?

It is not necessary to recapitulate the evidence of the prosecution on this aspect of the case. It may be observed, however, that in his judgment, the learned trial magistrate had accepted the evidence of Mohanar Singh Sandhu which was to the effect that between May and August, 1965, a careful watch was kept by the police on the movement of the appellant's car as a result of information received; and that it was noted that at any area visited by the car there was always theft of cars particularly Morris Minors; that a search of the Vehicle Registry had revealed that the car No. USD 429 was a 1959 model ex-Kenya but registered in Uganda only in 1962; that he first met the car at about 8 p.m. that night; that from 10 p.m. he had followed the car and watched the conduct of the driver; that he finally stopped the car at 11.30 p.m., when he found that the car was still prowling around the area his suspicion was aroused. On stopping the car, Mohanar Singh Sandhu said he told the appellant that he was suspicious about the way he had been moving around and that he wanted to check the car. On searching the car, apart from a large number of tools found in the boot, he also observed several changes in the structure and upholstery of the car, and immediately told the appellant that he suspected his car to have been fitted with parts stolen or unlawfully obtained. Thereupon he requested him to go to the Police Station with him; that at first the appellant was reluctant to follow him but eventually did so when a Police Patrol car arrived.

In my view, on that compressed evidence, there can be no doubt that Mohanar Singh Sandhu acted within the powers vested in a Police Officer under s. 20 (1)

of the Criminal Procedure Code and that the appellant was properly charged and tried under s. 299 (1) of the Penal Code. The requirements postulated by Lewis, J., in *Justini Ngozebwa v. R.* ((5) had been clearly accomplished. The appellant was told in no uncertain terms that his car was fitted with stolen parts apparently from other cars. It is not necessary that at the time of the stopping and searching of the car a Police Officer must have in his mind a precise suspicion about anything stolen or unlawfully obtained so long as there is in all the circumstances of the case reason for such a suspicion.

In the course of his submission on this point, counsel referred the court to *R. v. Athman Bin Salim* (6), a Kenya case, and contended that that case has no application to the circumstances of the instant case. It was not clear to me the grounds upon which that case was distinguishable from the circumstances of the instant case.

In that case, the Court of Appeal for Eastern Africa had held that, in deciding whether proceedings lie under s. 316 of the Penal Code of Kenya, the test is not whether the Police Officer, who stopped the lorry in the exercise of the powers conferred on him by s. 25 of the Criminal Procedure Code of Kenya, actually had in his mind at the time he stopped it, the precise suspicion indicated in that section, but whether there was in all the circumstances reason for such suspicion. This ground of appeal must therefore fail.

The submission of counsel for the appellant in respect of the third ground of appeal was that, since the agreement Ex. 4 was not voluntarily tendered to Mohanar Singh Sandhu by the appellant, there was no uttering of the document in law. The main point of contention was that the document Ex. 4 and the transfer form Ex. 5 were seized from the appellant by force, and therefore that they were obtained under duress.

I do not think that there is any substance or merit whatsoever on this ground of appeal. The evidence was that the agreement Ex. 4 and the transfer form Ex. 5 were, in the first instance, voluntarily tendered to Mohanar Singh Sandhu for the purpose of establishing his ownership of the Morris Minor car No. USD 429, which was then suspected by the police to have been fitted with parts stolen from other cars. In tendering these documents to the Police Officer, the appellant had claimed that they were issued to him; that the signature thereon was that of Christopher Lubega from whom he had bought the car; and that he had paid the full price for it. The documents were subsequently kept by the police when on investigation Christopher Lubega denied having signed and issued the documents to the appellant. Christopher Lubega denied also the signatures on the documents and that denial was supported by the evidence of a handwriting expert to whom the documents were referred.

In my judgment, in those circumstances, the police were justified in refusing to return the documents to the appellant. Instances are not wanting where documents known or suspected to have been forged had been seized from the forger or whoever produced them for the purpose of instituting a prosecution against such people.

It may be of interest to refer to only two English cases on the point, which I feel have very strong persuasive effect. In *R. v. Fitchie* (7), it was held that, a pawnbroker was, upon the hearing of an application in court against him, which was to compel him to deliver up goods, which had been pledged with him (the money advanced, with interest, having been repaid to him), produced and delivered to a magistrate through the hand of his attorney a forged duplicate as the genuine one, which he had given when the goods were pledged, and which had been received back by him when the money was refunded, was properly convicted of uttering an accountable receipt for goods.

The matter was later referred to the judges for their opinion on the law. Before the judges, the contention of counsel for the pawnbroker was that the uttering, if at all, was not done by the prisoner but by his attorney. In the judgment of the court affirming the conviction, Cockburn, C.J., said ((1857), 7 Cox C.C. at pp. 216-262):

“The facts are plain. Elizabeth Hopwood pledges with the prisoner certain goods, receiving the usual pawn ticket. In a few days her husband goes to redeem the articles; he pays the amount advanced, with interest, restores the pawn ticket to the prisoner, and receives what he supposes to be the articles pledged. But it turns out that part only have been returned; and upon that proceedings are taken before the Magistrate to recover the remainder. In order to meet that demand the prisoner produces a false instrument, which is delivered by his attorney to the magistrate as being the genuine pawn ticket which had been given to Elizabeth Hopwood. That is done in his presence and with his sanction; and is clearly as much as uttering as though it had been done with his hand.”

In *R. v. Joseph Radford* (8), it was also held that the mere exhibition of a forged receipt to the party with whom the prisoner in claiming credit on account of that receipt, is an uttering to that party, although the prisoner never voluntarily parts with the possession of it.

There the prisoner was a stonemason and purchased stone at a quarry, the property of Mr. Lee. At the time of the dealing, the quarry was managed by George Turner. The prisoner incurred the debt of £5 14s. 6d. on July 6, 1840; an invoice was sent without any receipt. The prisoner was repeatedly applied to for payment, and made repeated promises of payment. At last in July, 1844, he for the first time alleged that he had paid for the stone at the time (1840), and that he had a receipt signed by Turner. On this, Forster, who had succeeded Turner as Manager, went over to him; the prisoner produced a receipt, and exhibited it to him to look at, but would not part with it out of his hand.

On August 21, 1844, Forster returned to him, taking Turner with him, and again called on him to produce the receipt; he did produce it, and held it up for him and Turner to look at, but refused to part with it out of his hand. Mr. Forster, however, got it from him, and he was apprehended.

At the trial, it was contended that it was not uttering at all; and further that the act of uttering a forged instrument with intent to defraud was precisely analogous to the publishing of libel with intent to defame; and that there must be either a delivery of the false paper, or a communication of the context to the party to whom the uttering takes place; because there could not be uttering of a forged receipt unless it be used directly to get credit upon it by its operating as a receipt for the purpose proved – to induce a belief that he had paid the money, and, therefore, was a man of substance – did not amount to an uttering within the Act. These submissions were rejected as untenable and the conviction of the prisoner was affirmed. See also *R. v. Ion* (9). In my view this ground of appeal must also fail as without substance.

Before concluding this judgment, there is a point in the charge on the second count which I consider of some importance, although it was not raised by counsel. In the second count, it is not mentioned to whom the documents were uttered. That, in my view, was a serious omission, which would have enabled the counsel for the appellant to have applied at the hearing to have the count struck off on the ground that it was bad for uncertainty; as it was not disclosed therein the man to whom the appellant was alleged to have uttered the documents. Such an omission must be presumed to have embarrassed the appellant. The magistrate might have struck off the count or have permitted an amendment to

be made thereto; because it is necessary that a charge should give to an accused person information necessary and sufficient to enable him to know what case to meet. However, counsel did not object to the charge, and the hearing of the case continued. It was only in the course of the trial that evidence disclosed that the uttering was made to Mohanar Singh Sandhu.

In any event the irregularity has been cured by the verdict as it appears that the appellant was in no way misled. Furthermore, the learned trial magistrate, in his judgment, found that he was satisfied on the evidence that the appellant “voluntarily uttered those documents to the Police hoping to get out of the predicament in which he was, and I therefore convict him of uttering false documents contrary to s. 330 of the Penal Code.”

It should also be noted that throughout the hearing of this appeal there was no complaint against the evidence given and accepted by the learned trial magistrate against the appellant. In my view the evidence against the appellant was overwhelming.

The concurrent sentences of eighteen months’ imprisonment on the first count and on the second count of one year’s imprisonment, in my view, err on the side of leniency. The sentences are in no sense excessive or harsh, having regard to the nature of the offences and the whole circumstances of the case.

This appeal is therefore dismissed both as to conviction and sentences.

Appeal dismissed.

For the appellant:

Haque and Gopal, Kampala

Z. Haque

For the respondent:

The Attorney-General, Uganda

A. F. W. Kakembo (State Attorney, Uganda)

Ndagizimana and another v Uganda **[1967] 1 EA 35 (CAK)**

Division:	Court of Appeal at Kampala
Date of judgment:	16 March 1966
Case Number:	216/1965
Before:	Newbold P, Duffus and Law JJA
Sourced by:	LawAfrica
Appeal from:	The High Court of Uganda at Masaka – Jones, J.

[1] *Criminal law – Practice – Evidence – Statement made by accused to police admitted after judge*

hears evidence as to admissibility in absence of assessors – Procedure incorrect.

[2] Criminal law – Practice – Evidence – Statements – Observations on procedure to be followed before admitting extra-judicial statements in trials with assessors.

[3] Evidence – Statements by accused to police admitted after judge hears evidence as to admissibility in absence of assessors – Procedure incorrect.

[4] Evidence – Statements by accused – Observations on procedure to be followed before admitting extra-judicial statements in trial with assessors.

Editor's Summary

In a murder trial the judge heard, in a “trial within a trial” held in the absence of the assessors, evidence as to the admissibility of statements made by the appellants to the police. This evidence was not repeated after the recall of the assessors, but the statements were admitted in evidence.

Held – the evidence should have been given again before the assessors to show that the statements were admissible.

Per Curiam: observations on the procedure to be followed as to the admission of a disputed extra-judicial statement by an accused person in a court sitting with assessors.

Appeal of first appellant dismissed.

Appeal of second appellant allowed.

No cases referred to in judgment.

Judgment

Duffus JA: read the following judgment of the court:

The two appellants were jointly charged and convicted in the High Court of Uganda for the murder of one Munyakazi. The prosecution alleged that Munyakazi had recently withdrawn Shs. 800/- from his employer, who had been saving this money for him over a period of years, and that these two appellants on discovering this murdered him and stole his money. The prosecution mainly relied on the written confessions made by each appellant to the police. In the case of the first appellant, Leopoldi Ndagizimana, the prosecution, however, also called considerable other evidence which would of itself prove his guilt, and was accepted by the court, but in the case against the second appellant the prosecution's case depends solely upon the written confession to the police.

The only point of substance in this appeal is whether the learned trial judge properly admitted these statements in evidence in that it appears from the record that the judge, having held two "trials within a trial" to decide on the admissibility of each statement, then proceeded to admit these statements in evidence, relying on the evidence that he heard in the "trials within a trial" held in the absence of the assessors, and without again hearing evidence in the presence of the assessors to prove that the statements had been properly and voluntarily taken and taken in accordance with the Evidence (Statements to Police) Rules, 1961.

We would here shortly refer to that part of the record showing the procedure adopted by the court. This matter started with a statement by the prosecution counsel and we quote:

"Khan: I shall now call evidence of the Charge and Caution statements.

Kothari and Patel: We are making objections to these statements going in.

Court: Assessors are asked to leave.

Trial within a trial begins."

The court then proceeded to hear evidence in the absence of the assessors and the prosecution called the sergeant of police who recorded the statement and also the detective constable who interpreted, and evidence was given to show how both appellants were arrested and the first appellant charged and cautioned and came to make his statement and the fact that it was voluntary. The first appellant then also gave evidence, and the learned trial judge then made his ruling and the record, including the last part of the ruling, proceeds:

"The only question I have to decide is whether the statement was made voluntarily or not. I have no hesitation

in saying that it was and I admit it. (Exs. 9 and 10.)

Assessors are recalled.

P. 15 Paulo Kyabogora S/S

This is the Luganda statement (Ex. 9). This is the English translation (Ex. 10) which accused 1 made.

XD By Kothari: None

By C. R. Patel: None.

P. 16 John Bikanga Kasaija S/S:

This is the Luganda statement signed by accused 1 (Ex. 9). I signed it. This is the English version (Ex. 10). (Luganda version read to the court).

XD By Kothari for accused 1 – none.

By C. R. Patel for accused 2 – none.

Part heard.

Case adjourned to 24/11/65.”

On the resumption on November 24, similar procedure was adopted with regard to the statement given by the second accused and we would again shortly quote from the record as follows:

“24/11/65: Appearances as on 23/11/65.

Khan: I wish to call Patrick Wanyonyi to put in a charge and caution statement made by A. 2.

Mr. C. R. Patel: I am going to challenge its admissibility.

Court: Assessors are told to leave the court for a while.

Trial within a trial proceeds.”

The judge then heard evidence, in the absence of the assessors, of the second appellant having been charged and cautioned and of the method by which he made a voluntary statement in Swahili. The second appellant gave evidence and after this the judge made his ruling admitting the statement in evidence and we again quote from the record including the last part of the ruling:

“I therefore hold that the statement was voluntarily made and properly recorded.

I admit it.

Assessors recalled.

P. 17 Patrick Wanyonyi, S/S:

This was the Swahili statement taken voluntarily from acc. 2 on the 23/10/64. (Admitted and marked Ex. 11) (read to court). This is the English translation made on the same day (Ex. 12).

XD By Kotheri:

I do not know where A. 1 was when I took a statement from A. 2. I don't know whether A. 1 made a statement. I think he made a statement. I did not take one.

By C. R. Patel:

I knew nothing about this case.

I am a Muluya. I know Luganda. I did not insist on accused speaking Swahili. He did not speak Luganda to me.

Khan: That is the close of the case for the prosecution.”

The procedure to be followed as to the admission of a disputed extra-judicial statement by an accused person in a court sitting with assessors has been the

subject of many decisions of this court. We will, however, repeat the basic principles to be followed.

Under the Criminal Procedure Code of Uganda all criminal trials in the High Court shall be with assessors. Assessors are therefore part of the court and it is essential that all the evidence and proceedings at the trial should be in their presence except when a dispute arises as to the admissibility of evidence. In this case in order to avoid the assessors being possibly prejudiced by the hearing of evidence which is afterwards held to be inadmissible the practice is that a trial judge hears arguments and, if necessary, evidence as to the admissibility of the disputed evidence in the absence of the assessors but if he decides that the evidence is legally admissible then the assessors have to be recalled and the disputed evidence is led as if there had never been a “trial within a trial”. It is necessary that all the evidence on which the prosecution rely is given before the assessors and the prosecution cannot rely on the evidence given in the “trial within a trial” in the absence of the assessors to establish any of the essential facts of their case. Under our law the judge is the ultimate judge of the facts but before he delivers his judgment he must first require each assessor to state his opinion of the case. He is not bound to accept their opinion but he has to hear this opinion and record it and his judgment may, quite properly, be considerably influenced by these opinions. It is therefore absolutely essential for the assessors to hear all the evidence which the judge has ruled as being legally admissible.

In this case from those passages of the record which we have set out, it is clear that the prosecution have not led sufficient evidence, before the court as fully constituted with its assessors to establish that these statements were properly taken and voluntarily made. Thus the evidence does not show that the appellants were in police custody at the time, nor that the statements were taken by the police after the appellants had been charged and cautioned and, further, whether the statements were read over and signed by the appellants. Indeed, no proper evidence was led to show that the safeguards required by the Evidence (Statements to Police) Rules, 1961, were carried out. All this necessary and vital evidence was fully gone into in the “trial within a trial” but it would appear that the judge and the counsel in the case overlooked the fact that this evidence should again be given before the assessors.

The result is that, in our view, sufficient evidence had not been led before the court, as fully constituted, to warrant the admission of these statements in evidence.

The prosecution’s case against the first appellant, Leopoldi, does not depend only on this statement and there was in our view ample other evidence to prove his guilt. There was the evidence of the first prosecution witness, James Bahuze, to the effect that the first appellant admitted in his presence and that of other prisoners in the lock-up that he had killed the deceased. There is the further fact that the first appellant then called the police and took them to the spot where the deceased’s body had been hidden. There is also the fact that the first appellant was shown to have been in possession of a considerable quantity of money after the deceased had been murdered and there is also the fact that in his defence he admits having knowledge that the second appellant and another man hid the body of the deceased and that he was promised a certain amount of money by the second appellant.

We are of the view, therefore, that the court must have in any event convicted the first appellant of this offence and that there has been no miscarriage of justice in his case.

The position is different with regard to the second appellant, Saidi. The prosecution put forward no evidence other than his incriminating statement,

and the only other evidence was that given by the first appellant when he gave evidence at the trial. In our view the conviction against the second appellant cannot stand. We therefore dismiss the appeal insofar as the first appellant, Leopolidi, is concerned and allow the appeal of the second appellant, Saidi. His conviction and sentence are quashed.

Appeal of first appellant dismissed.

Appeal of second appellant allowed.

For the appellants:

B. L. Barot, Kampala

For the respondent:

Attorney-General, Uganda

S. K. Treon

Shire v Republic [1967] 1 EA 39 (HCK)

Division:	High Court of Kenya at Nakuru
Date of judgment:	2 February 1967
Case Number:	240/1966
Before:	Harris J
Sourced by:	LawAfrica

[1] *By-law – Possession for sale of uninspected meat – Whether evidence of possession of meat in course of preparation for cooking in eating-house sufficient evidence of possession for sale – Eldoret Municipal By-laws 56 and 61 (K.).*

[2] *By-law – Possession for sale of uninspected meat – Meaning of “meat” – Whether uncooked meat included – Eldoret Municipal By-laws 32, 56 and 61 (K.).*

Editor’s Summary

The appellant was convicted of having had in his possession for the purpose of sale within the municipal area meat which had not been inspected and passed as fit for human consumption contrary to the Eldoret Municipal By-laws. The evidence was that the meat when found was in the kitchen in the process of being cut up, and that the premises were an hotel or eating-house.

Held –

- (i) the only reasonable conclusion was that the meat was being prepared for cooking with a view to

being served as food to patrons of the eating-house as part of the fare provided for which a monetary charge would be made, which would constitute a “sale”, so that the appellant had it in his possession “for the purpose of sale”;

- (ii) “meat” in the by-law includes (subject to the exceptions set out in it) all meat and offal of any animal intended for human consumption irrespective of whether it has first to be cooked or not; therefore the meat found in the possession of the appellant fell within the by-law.

Appeal dismissed.

No cases referred to in judgment.

Judgment

Harris J: This is an appeal by the accused against his conviction in the court of the resident magistrate at Eldoret on a charge brought by the Republic through the Eldoret Municipal Council of having had in his possession for the purpose of sale within the municipal area meat which had not been inspected and passed as fit for human consumption by the meat inspector. The charge was laid under the provisions of by-law 56 as read with by-law 61

of the Eldoret Municipal By-laws made under the Municipalities Act (Cap. 136 of the 1948 edition of the Laws of Kenya).

By-law 56, as amended, is in the following terms:

“No person shall offer or expose or deposit for sale or have in his possession for the purpose of sale or delivery within the municipal area or being the licensee of any premises under the Eldoret Municipality (Food Shops and Stores) By-laws, 1961, shall have in his premises any meat unless the same has been inspected and passed as fit for human consumption by the meat inspector.”

By-law 61 provides that any person convicted of an offence against or contravention of or default in complying with any provisions of inter alia by-law 56 shall be guilty of an offence and be punishable as therein provided.

The particulars of the offence charged are set out in the charge sheet as follows, namely, that the accused “being the occupier of an Eating House, on Plot No. 7, Section IX, Uganda Road, Eldoret, in Rift Valley Province, did on September 15, 1966, have in his possession 50 lbs. of beef, for the purpose of sale within the premises, which had not been inspected and passed as fit for human consumption by the Meat Inspector”. It will be observed that he was not charged as having been the licensee of the premises but merely as a person having had the meat in his possession for the purpose of sale.

The accused was convicted and fined Shs. 500/- or six months’ imprisonment in default.

The grounds of appeal are, first, that the learned magistrate “failed to appreciate that the meat in question was not for sale”, and, secondly, that he had erred in referring in his judgment, in support of his decision, to the provisions of by-law 22 (2) of the Eldoret Municipality (Restaurant, Eating House and Snack Bar) By-laws, 1962, made under the provisions of the same Act. In addition, an argument was submitted by the appellant’s counsel turning upon the meaning of the word “meat”.

The appellant, in this court, accepted the findings of the learned magistrate that on the day in question he had fifty pounds of meat in the kitchen of his eating house, that the meat had not been inspected or passed as fit for human consumption, and that it was “in his possession”, but he did not accept the finding that it was in his possession “for the purpose of sale” within the meaning of by-law 56. The onus of proving the existence of each of the constituents of an offence under by-law 56 rests upon the prosecution and it is necessary, therefore, to determine whether that onus was discharged in regard to the purpose for which the meat was in possession of the appellant.

In his evidence in the court below Peter Njuguna, a health assistant employed by the council, said that on the day in question, accompanied by another assistant named Reuben Kenyanga, he visited the appellant’s eating house in Eldoret to look for uninspected meat, acting on the instructions of the Chief Health Inspector. He said that when he entered the premises the appellant was present, somebody else was engaged in cutting the meat into pieces, and the meat was decomposed. The assistant Reuben Kenyanga in evidence said that, accompanied by Peter Njuguna, he went to the appellant’s premises (which he described as an hotel) where he found two big pieces of meat in the kitchen on a table being cut by a man into pieces. He said that on seeing that the meat had not been inspected he stopped it from being further chopped and that it was unfit for human consumption. The appellant adduced no evidence in the court below, with the result that the only evidence before the learned magistrate as to the

purpose for which the appellant had the meat in his possession was that tendered by the prosecution.

Bearing in mind that the appellant was the owner of the premises, that the meat when found was in the kitchen in the process of being cut up, and that the premises are an hotel or eating house, I am satisfied that, in the absence of any evidence or suggestion to the contrary, the only reasonable conclusion to be drawn from these facts, none of which is denied, is that the meat when found was in the course of being prepared for cooking with a view to being served as food to the guests or patrons of the eating house on the premises as part of the fare provided in the ordinary course of business and for which a monetary charge would be made. I have no doubt that the serving of food in this manner would constitute a “sale” of the food, and that the appellant’s purpose in having the meat in his possession was to enable him to effect such a sale.

Counsel for the appellant, however, contended that the prohibition in by-law 56 relates only to the sale of meat and offal in its natural state and does not extend to the sale of prepared or cooked meat, and in support of this argument he relied upon the definition of “meat” for the purposes of Part V of the by-laws (which includes by-laws 56 and 61) to be found in by-law 32 which is as follows:

“ ‘meat’ means the flesh of offal of any animal intended for human consumption. Meat for the purposes of this Part shall not be deemed to include canned meat, potted meats, prepared hams and bacon, prepared sausages of all kinds, and biltong, and these shall not be subject to this Part.”

The definition, as will be seen, may be said to fall into two parts, the second constituting an exception from the first. It is clear that the meat with which this case is concerned is beef and, not being canned meat, potted meat or biltong, does not come within the second part of the definition. Does it, then, fall within the first part? The apparent necessity for the second part of the definition itself suggests that, without it, the first part would extend to include prepared hams, bacon and sausages. If this be correct why should it not include prepared beef, which is not saved by the exception? A simple test as to the correctness of the appellant’s contention that prepared or cooked meat does not come within the definition may be applied by considering the result of such a construction. If that construction were correct it would mean that only meat and offal in an uncooked state would constitute “meat” for the purpose of Part V. But neither the word “uncooked” nor any cognate word or expression appears in the definition. Furthermore, can it be said that uncooked offal is ever used in that state for human consumption? In my opinion the interpretation suggested by the appellant is unsustainable, the word “meat” comprehends, subject to the exceptions already mentioned, all meat and offal of any animal intended for human consumption irrespective of whether it has first to be cooked or not, and the meat found in the appellant’s kitchen therefore falls within the ambit of by-law 56.

For these reasons I consider that the appellant was rightly convicted of the offence charged. It is true that the learned magistrate appears in the course of his judgment to have relied to some extent upon the provisions of by-law 22 (2) of the Eldoret Municipality (Restaurant, Eating House and Snack Bar) By-laws, 1962, as well as upon the Food, Drugs and Chemical Substances Act, 1965, and he held that there arose a presumption of sale the onus of rebutting which rested upon the appellant. This is incorrect, for under by-law 56, upon which alone the charge was based, the onus of proof rests always upon the prosecution. Since, however, that onus has, in my view, been sufficiently discharged so as to leave no reasonable doubt in the matter it follows that the conviction must be upheld. The appeal is accordingly dismissed.

In view of this decision it will not be necessary to deal with the other ground advanced by the prosecution in support of the conviction.

Appeal dismissed.

For the appellant:

C. V. Patel, Eldoret

For the respondent:

Attorney-General, Kenya

V. S. Dhir (State Counsel, Kenya)

Mwatsahu v Maro
[1967] 1 EA 42 (HCK)

Division:	High Court of Kenya at Mombasa
Date of judgment:	14 September 1966
Case Number:	74/1966
Before:	Harris J
Sourced by:	LawAfrica

[1] *Practice – Judgment in default of defence – Meaning of “liquidated amount” – O. 48, r. 2 (1) Civil Procedure (Revised) Rules, 1948 (K.).*

[2] *Practice – Registrar entering judgment in default – Extent of power to do so – O. 48, r. 2 (1) Civil Procedure (Revised) Rules 1948 (K.).*

Editor’s Summary

The plaintiff obtained judgment in default of defence against the defendant for an amount which included the cost of repairing a car sold to him by the defendant which, as the defendant had no title, he had had to return to its rightful owner. The defendant refused to approve the decree, claiming that this was not a “liquidated amount” and the registrar had no power to enter judgment in default. On reference to the judge,

Held – (distinguishing *Eksteen v. Kutosi* (1951), 24 (2) K.L.R. 90) the true nature of the claim was one for pecuniary damages for breach of warranty of title which was not within O. 48, r. 1 (2), and therefore the registrar had no power to enter judgment for it.

Objection upheld.

Case referred to in judgment:

(1) *Eksteen v. Kutosi Bukua* (1951), 24 (2) K.L.R. 90.

Judgment

Harris J: This is a claim for a sum of Shs. 4,796/75, together with interest and costs, in respect of loss and damage alleged to have been suffered by the plaintiff by reason of the defendant having purported to sell to the plaintiff for the sum of Shs. 2,450/- a motor car, registered number KAX 870, to which the defendant had no title and upon which the plaintiff, in the erroneous belief that he had legally and effectively purchased the vehicle, subsequently expended a further sum of Shs. 2,346/75 in purchasing spare parts for the car and putting it into a roadworthy state of repair, after which he found himself obliged to deliver it up to the rightful owner.

The defendant, through his advocate, entered a late appearance but filed no defence, and the plaintiff, after the time for defence had expired, applied ex parte under the provisions of O. 48, r. 2 (1) of the Civil Procedure (Revised) Rules, 1948, for, and obtained the entry by the registrar of, judgment in default

of defence. Upon the plaintiff's advocate preparing and submitting to the advocate for the defendant a draft of the formal decree the latter raised an objection to the procedure insofar as relates to the said sum of Shs. 2,346/75 on the ground that this portion of the claim did not constitute a "liquidated amount" within the meaning of O. 48, r. 2 (1), and that the registrar, in entering judgment under that rule, had acted in excess of his powers. The question before me is as to the correctness of this objection.

The plaintiff, in support of the draft decree, relied upon the judgment of Windham, J., in *Eksteen v. Kutosi Bukua* (1), where, in refusing to set aside an ex parte decree granted in default of appearance and defence, the learned judge expressed the view that, for a claim to constitute a liquidated demand, it is enough that it should state the amount demanded and give sufficient particulars of the contract to disclose its nature. The defendant, on the other hand, contended that in the present case the sum in issue was, in reality, being claimed as damages for breach of warranty and that a claim for damages as such cannot constitute a liquidated demand.

On the authorities the matter would seem not to be free from some element of doubt. In the Annual Practice for 1953, to which the defendant also referred, it is stated (at p. 19), in dealing with the former procedure under O. 3, r. 6 of the Rules of the Supreme Court in England relating to specially endorsed writs for the recovery of liquidated demands (corresponding to that under O. 35 in this country), that, although liquidated damages are within the term "liquidated demand", such damages, in order to be liquidated, must be recoverable either (a) as a specified sum (or money at a specified rate) agreed to be paid as damages in a certain eventuality or (b) as money recoverable under statute as damages (as in the case of interest on a bill of exchange). In the 1966 edition of the Annual Practice, however, as the plaintiff pointed out, this statement appears not to have been repeated but to have been replaced (at pp. 55 and 56) by the statement, in relation to proceedings under the new O. 13, r. 1 of those Rules, that a liquidated demand is "in the nature of a debt, i.e. a specific sum of money due and payable under or by virtue of a contract" which is either already ascertained or capable of being ascertained as a mere matter of arithmetic.

Rules 1 and 2 of O. 48 should, I think, be read in conjunction with certain of the provisions of O. 9. Rule 1 declares that wherever in the Civil Procedure (Revised) Rules, 1948, it is provided that any ministerial act or thing may be done by the court that act or thing may be done by the registrar, and r. 2 provides that in the cases therein specified (which include uncontested cases where the claim is for a liquidated amount and the defendant, having appeared, has failed to file a defence) the registrar may, on application in writing, enter judgment. The only circumstance in which, under O. 9, the court may enter summary judgment after appearance and in default of defence is that covered by the proviso to r. 9 (2) of that order, which enables this to be done if the plaint is drawn claiming a liquidated demand, in which event the court may pass judgment "as provided for by r. 4 hereof". Rule 4 provides that where a plaintiff claims a liquidated demand the court may, in default of appearance, give summary judgment but this rule in turn must be construed in the light of r. 6 of the same order which, in the case of a plaintiff claiming pecuniary damages only, enables the plaintiff in default of appearance to set down the case for assessment of damages. It seems to me that these two rules should be read disjunctively so that a case which falls properly within either of these rules cannot fall within the other, and it would appear, therefore, that the effect of r. 6 is to restrict the application of r. 4 to claims other than claims for pecuniary damages and that accordingly the proviso to r. 9 (2) should be similarly restricted, with the result that the court could not properly pass summary judgment under r. 9 (2) where the claim is for pecuniary damages. It may be assumed that the powers conferred upon the

registrar by O. 48, r. 2 (1) were not intended to exceed the corresponding powers conferred upon the court by O. 9, and I must hold therefore that, whatever may be the precise meaning of the expression “liquidated amount” in r. 2 (1), the powers of the registrar arising under that rule do not include that of passing summary judgment after appearance and in default of defence where the claim is for pecuniary damages.

Notwithstanding that the plaintiff’s claim as stated in the plaint is for an ascertained amount the entire of which he says can be vouched and that it has its origin in a breach of warranty on the part of the defendant implicit in the contract for sale between him and the plaintiff, I am of the opinion that, in its true nature, the claim (except possibly as to so much thereof as is based upon a failure of consideration) is one for pecuniary damages for breach of warranty of title and therefore that it does not fall within the provisions of O. 48, r. 2 (1) and that the decision of Windham, J., in *Eksteen’s* case (1) is distinguishable. From this it follows that the entry of judgment by the registrar in the present case was in excess of jurisdiction and therefore that the defendant’s objection to the draft decree must be upheld. The defendant will have the costs of the proceedings relative to that objection and of the hearing before me.

Objection upheld.

For the plaintiff:

Atkinson, Cleasby & Satchv, Mombasa

Mansur Satchu

For the defendant:

S. Ghalia, Mombasa

Abdulhusein

Leslie and Anderson (Coffee) Ltd v Hoima Ginnars Ltd
[1967] 1 EA 44 (HCK)

Division:	High Court of Kenya at Mombasa
Date of judgment:	17 September 1966
Case Number:	84/1966
Before:	Harris J
Sourced by:	LawAfrica

[1] *Practice – Appearance – Whether entry of unconditional appearance waives irregular service.*

[2] *Practice – Service outside jurisdiction – Whether summons or notice of summons from Kenya should be served in Uganda – Civil Procedure (Revised) Rules, 1948, O. 5, r. 25, r. 26 and r. 27 (K.).*

[3] *Practice – Waiver of irregularity – Whether irregular service of summons waived by entry of unconditional appearance.*

Editor's Summary

The plaintiff, who is the respondent in this case, in March, 1966, sued the defendant, a company incorporated in Uganda with no place of business in Kenya, in the Kenya Court on an arbitration award obtained in Kenya. The summons was served upon the defendant outside the jurisdiction at Kampala, pursuant to leave granted by the Kenya Court. The defendant accepted service and entered an unconditional appearance, but subsequently took proceedings to avoid the service and the order granting leave to serve out of the jurisdiction, on the ground that notice of the summons and not the summons itself should have been served, Uganda being an independent state.

Held –

- (i) the procedure providing for service of summons out of the jurisdiction laid down in O. 5, r. 25, of the Civil Procedure (Revised) Rules continues to apply to service in Uganda;
- (ii) even if there had been any irregularity in the service, it would have been capable of being waived, and had been waived, by the conduct of the defendant in entering an unconditional appearance.

Order refused.

Cases referred to in judgment:

- (1) *Hewitson v. Fabré* (1888), 21 Q.B.D. 6.
- (2) *Gohoho v. Guinea Press Ltd.*, [1963] 1 Q.B. 948.
- (3) *Bhagwan Kaur v. Kesar Singh* (1954), 27 K.L.R. 62.
- (4) *Re Pritchard (deceased)*, [1963] 1 Ch. 502.
- (5) *Marsh v. Marsh*, [1945] A.C. 271.
- (6) *Fry v. Moore* (1889), 23 Q.B.D. 395.

Judgment

Harris J: This is a chamber summons taken out by the defendant and, at the instance of the parties, adjourned into court, whereby the defendant seeks an order to the effect, as stated in the summons, that “the court has no jurisdiction to order service of the summons in this suit out of its jurisdiction in as much as the defendant is a company incorporated in Uganda and has no resident or place of business in Kenya and consequently is not within the terms of O. 5, r. 25 of the Civil Procedure Rules”.

In the suit the plaintiff claims the sum of Shs. 481,888/40 plus interest and costs pursuant to an award dated at Mombasa, January 4, 1966, of the appeal committee provided for by the arbitration rules of the Hard Coffee Trade Association of Eastern Africa. The plaint was filed on March 15, 1966, and by an order dated April 22, made on the application of the plaintiff, the court gave leave for service of the summons upon the defendant at its registered office in Kampala, Uganda, outside the jurisdiction of this court, requiring the defendant to enter an appearance within twenty-one days from the date of service.

The summons was sent for service by the registry of this court at Mombasa to the District Registrar at the District Court of Mengo at Kampala, and on June 13 was served by a process server of that court upon a director of the defendant company at Kampala, the director accepting service in the presence of the process server. On July 2, being within the period of twenty-one days allowed by the order, the defendant by its advocates in Mombasa entered an appearance in the suit. The appearance was not expressed to be conditional or to have been entered without prejudice to the defendant’s right to object to the manner of service.

On July 13, that is, prior to the expiration of the period of fifteen days after appearance allowed by O. 8, r. 1, for the filing of defence, the plaintiff filed a notice of motion for judgment under O. 35, r. 2, supported by an affidavit of his advocate averring that in his belief there is no defence to the suit. On the following day, July 14, the defendant filed the present chamber summons supported by an affidavit of

one of its directors stating that the company is incorporated in Uganda and has no place of business in Kenya and is not resident in Kenya.

At a very early stage in the hearing it became apparent that the chamber summons was not aptly framed and that the relief which the defendant was seeking was in substance an order declaring that the service of the summons to enter appearance on the defendant at Kampala was bad in law and void and, if necessary, declaring that the order of this court of April 22 for service of the summons

outside the jurisdiction was also bad in law and void. As the case developed it became clear that the pith of the defendant's contention was that, by reason of certain recent changes and developments in the constitutional position of Uganda, the defendant did not now fall within the provisions of O. 5, r. 25 and that therefore, instead of being served with the summons issued by the Registry, the defendant should have been served with a notice of the summons as provided by rr. 26 and 27. Despite the fact that he might have been taken by surprise by this turn of events counsel for the plaintiff was content to proceed with the hearing on this basis without any formal amendment of the chamber summons and the court has had the advantage of a full and careful argument on each side.

Order 5, r. 21 empowers the court to allow service out of Kenya of a summons or of notice of a summons in any of the several cases specified in that rule and it is not disputed that the present suit falls within the ambit of the rule.

Rule 25 of O. 5 provides that:

"Where leave to serve a summons out of the Colony has been granted under r. 21 and the defendant is a British subject or British protected person or resides in the United Kingdom or in any British Dominion, Colony, Dependency or Protectorate or mandated territory out of the Colony, the summons shall be served in such manner as the Court may order."

Rule 26 of the order provides that:

"Where the defendant is neither a British subject nor British protected person and is not in British dominions or in any British Protectorate or mandated territory, notice of the summons and not the summons itself is to be served upon him."

Rule 27 of the Order declares that where leave is given to serve notice of a summons "in any foreign country to which this rule may by order of the Chief Justice from time to time be applied" the procedure laid down in that rule for the transmission of the notice through diplomatic channels shall be followed.

The defendant, relying upon the three last-mentioned rules, contends that since Uganda, where its registered office is situate, is, like Kenya, a sovereign, independent country it does not fall within either the expression "British Dominion, Colony, Dependency or Protectorate or mandated territory" as used in r. 25 or the expression "British dominions . . . British Protectorate or mandated territory" as used in r. 26, but constitutes a "foreign country" within r. 27, and since the defendant is neither a British subject nor a British protected person within these rules, the result, it is said, is that, as required by r. 26, notice of the summons and not the summons itself should have been served and the procedure prescribed by r. 27 should have been followed.

The distinction between a summons and notice of a summons would appear to have its origin in the concept that for the judicial power in one sovereign state to issue, in the name of the government of that state a summons to a person who is resident in another sovereign state and is not a subject of the first state, requiring him to enter an appearance in legal proceedings in the first state, would constitute an invasion of the sovereignty of the second state. The importance that once attached to this principle is illustrated by the decision of the Queen's Bench Division in England in the case of *Hewitson v. Fabré*(1), where it was stated to be a most fundamental matter and in which it was held that when a defendant, a French subject resident in France, was served with a writ issued in England when he should have been served with notice of the writ the defect in procedure was fatal. It would seem that the essence of the distinction, so far as based upon this conception, has now largely disappeared, for we find in r. 28 of O. 5 a provision expressly empowering the court to direct that any summons, order or

notice should be served upon any person in a foreign country. Furthermore the decision in *Hewitson's* case (1) was regarded as being of doubtful correctness by the Court of Appeal in England in *Gohoho v. Guinea Press Ltd.* (2). Rule 26, however, still forms portion of O. 5 and it is necessary therefore to consider how far, if at all, it applies to the present case.

The terms of r. 25 make it clear that that rule was intended, at the time of the making of the Civil Procedure Rules in 1948, to apply to every part of the British Commonwealth of Nations as then constituted, which consisted of the United Kingdom, the self-governing Dominions of Australia, New Zealand, South Africa, Eire, India and Pakistan, and numerous Colonies, Dependencies, Protectorates and mandated territories. Rule 26, which, although not quite so comprehensively expressed, must, I think, be read with r. 25, would therefore seem at that time to have had no application to any part of the Commonwealth. The criterion whereby to determine whether r. 25 or rule 26 is to be applied in regard to any particular country was not in 1948, and is not today, as suggested by the defendant, whether the country in question is a sovereign and independent country, for at that time, as today, the United Kingdom and each of the Dominions were already sovereign and independent countries. The true criterion in 1948 was simply whether the country in question was or was not within any of the categories of Commonwealth countries referred to in r. 25. Uganda in 1948 was a Protectorate within the Commonwealth and so remained until 1962 when, by virtue of the Uganda Independence Act of that year, she became a Dominion and so continued until October 9, 1963, upon which date she ceased to be a Dominion though remaining a member of the Commonwealth.

I have not been referred to any specific legislative provision expressly preserving or adapting for Kenya, in relation to the new status of Uganda, the operation of pre-existing Kenyan laws comparable to those provisions to be found in the India (Consequential Provisions) Act, 1949, and the Ghana (Consequential Provisions) Act, 1950. which preserved and adapted for the United Kingdom its pre-existing legislation in relation to India and Ghana respectively, consequent upon their adopting a republican form of government. Nevertheless I am of the opinion that, notwithstanding the constitutional developments which have since taken place in Uganda, including the new constitution promulgated during this present year, that country should be regarded as continuing still to be within the ambit of O. 5, r. 25 to no less an extent than when it was a Dominion.

Some support for this conclusion is to be found in the decision of the Supreme Court of Kenya in *Bhagwan Kaur v. Kesar Singh* (3), where the plaintiff obtained leave to serve an originating summons upon the defendant in India. The application, being ex parte, was not opposed or argued but the learned judge, before granting leave, considered the effect of the United Kingdom legislation leading to India becoming a republic within the Commonwealth and held that O. 5, r. 25 continued to operate in Kenya in relation to the Republic of India in the same way as it had operated while India was a self-governing Dominion and accordingly that the summons and not a mere notice of it was the proper document to be served.

More important still, perhaps, is the clear indication of the recognition by the Legislature of this country of the transition from Dominion status, as such, to the status of membership of the Commonwealth, as such, to be found in the revised edition of the Laws of Kenya prepared under the authority of the Laws of Kenya (Revision) Act, 1962. By s. 5 (1) of that Act the Commissioners appointed to prepare the revised edition were empowered "to make such adaptations of or amendments to any law as appear to be necessary or proper as a consequence of changes in the constitutions of Commonwealth countries or the composition of the Commonwealth". It was, no doubt, in the exercise of

this power that reference to “Her Majesty’s dominions” in the ordinances in force

prior to the publication of the revised edition, such as the British and Colonial Probates Ordinance (now the Commonwealth Probates Act) were replaced in that edition by references to “the Commonwealth” and so remain. No similar revision of the Civil Procedure Act or Rules has yet been completed but it is difficult to suppose that if such an exercise had taken place a corresponding adaptation would not have been effected. It is no less difficult seriously to suggest that, while for the purpose of the Acts of Parliament of Kenya, the expression “Her Majesty’s dominions” has been replaced by the term, “the Commonwealth”, a similar replacement should not, in the absence of an express amendment, be implied in the construction of subsidiary legislation such as the Civil Procedure Rules.

A further difficulty facing counsel for the defendant is that he was unable to show that r. 27 of O. 5 had ever been applied by order to Uganda, with the result that, in contending that the procedure laid down by that rule should have been followed in the present case, he could do so only by relying upon r. 28. This rule, however, runs contrary to the whole tenor of the defendant’s argument inasmuch as, in apparent conflict with r. 26, it expressly declares that the court may direct that “any summons . . . shall be served on any party or person in a foreign country.”

For these reasons I am of the opinion that the contention that the procedure laid down in O. 5, r. 25 no longer applies to service upon a defendant resident in Uganda is unsustainable.

Lest, however, I be incorrect as to this, and the procedure followed by the plaintiff was, in fact, defective, it becomes necessary to consider whether the defect rendered the subsequent proceedings null and void or amounted only to an irregularity against which the court in its discretion can grant relief. In *Hewitson’s* case (1) it was held that the defect there was such as to render the proceedings void and not merely irregular, but, as I have mentioned, in *Gohoho’s* case (2) both Lord Denning, M.R., and Diplock, L.J., expressed reservations as to the correctness of that decision, while Upjohn, L.J., in *Re Pritchard* (deceased) (4), expressed the view that the irregularity in *Hewitson’s* case (1) could have been waived. In *Marsh v. Marsh* (5), the Privy Council, ([1945] A.C. at p. 284) while disclaiming any intention to lay down a decisive test for distinguishing between the two classes of irregularity, said that one test is to inquire whether the irregularity in question has caused a failure of natural justice, for there is an obvious distinction between, on the one hand, obtaining judgment on a writ which had never been served on the defendant or come to his knowledge and, on the other hand, obtaining judgment on a writ in regard to which there was a defect in the service but which had in fact come to his knowledge. It is, of course, conceded that, in the present case, the summons came fully to the knowledge of the defendant.

Again, in *Fry v. Moore* (6), where a writ was properly issued but improperly served, the Court of Appeal in England held that the irregularity was such as could be waived by the subsequent conduct of the defendant. In the present case the summons was correctly issued under O. 5, r. 1 and what is challenged is merely the service. In my opinion the irregularity here (if there be an irregularity) is of such a nature that it is capable of being waived, and the next question, therefore, is as to whether the defendant, by its conduct, should be deemed to have waived it.

The summons, when tendered to the defendant in Kampala by way of service, was accepted without demur, after which, within the time specified on the face of the summons, the defendant entered an appearance, not conditionally or without prejudice, through its advocate in Mombasa. In this respect *Hewitson’s* case (1) is distinguishable for there no appearance was entered nor other step

taken that could have had the effect of waiving the defect in the service of the writ. In the present case counsel for the defendant stated that had appearance not been entered judgment might have gone against the defendant in default and that there is no provision in this country expressly authorising the entry of appearance to be made either “conditionally” or “without prejudice”. In that he may well be correct, but nevertheless in practice an appearance can be and not infrequently is entered in that form or subject to some specified condition stated on the face of the memorandum and there is nothing in the rules to preclude this course being followed or to justify the Registry in declining to accept such a memorandum. Furthermore the course followed by the defendant suggest that the point now taken in regard to r. 26 is in the nature of a last-minute effort, for, as already mentioned, this issue was not raised in the present summons. Indeed the grounds therein stated for challenging the service under r. 25, namely, that the defendant is incorporated in Uganda and has no residence or place of business in Kenya, are clearly untenable, for that rule, which must be read with rr. 21 and 23, is expressly designed to cover the case of a defendant who is not to be found within the jurisdiction.

For the reasons which I have endeavoured to state I hold, first, that the defendant’s contention that the procedure laid down by r. 25 of O. 5 no longer applies to a defendant resident in Uganda is unsustainable, and, secondly, that even if that contention were correct and the service here irregular, the irregularity was such as could be waived by the defendant and has in fact been so waived. From this it follows that the order sought by the defendant in this regard must be refused.

In its summons the defendant asked, in the alternative, for an order extending the time for filing its defence. I direct that his part of the summons do stand over to enable Wicks, J., to hear it on his return from vacation together with the motion by the plaintiff for judgment, notice of which was filed on July 13, 1966, since it is clearly desirable that these two matters be heard together.

The defendant must pay the plaintiff’s costs of the application before me in any event.

Order accordingly.

For the plaintiff:

Atkinson, Cleasby & Co.

A. G. Mehta and C. K. Kanji

For the defendant:

A. B. Patel and Patel, Mombasa

R. P. Cleasby and Talati

Mulji Jetha Ltd v Commissioner of Income Tax [1967] 1 EA 50 (HCK)

Division: High Court of Kenya at Nairobi

Date of judgment: 29 July 1966

Case Number: 594/1966

Before: Harris J

Sourced by: LawAfrica

[1] Estoppel – Equitable estoppel – Whether applies against enforcement of contractual obligations only.

[2] Estoppel – Equitable estoppel – Whether can be invoked against Commissioner of Income Tax.

[3] Estoppel – Equitable estoppel – Cannot be used to found a cause of action.

[4] Estoppel – Equitable estoppel – Effect of laches on.

[5] Income Tax – Estoppel – Whether equitable estoppel applies against Commissioner of Income Tax.

Editor's Summary

The plaintiff company sought a declaration that the Commissioner of Income Tax was estopped from enforcing his legal rights to collect tax owed by the plaintiff under estimated assessments, on the ground that an oral agreement had been made between it and the Commissioner by which he was to examine certain further accounts to be produced by the plaintiff at his request and, if the plaintiff co-operated fully and fulfilled various other conditions and if he was satisfied by representations made to him that the amount due was less than that already estimated, then he would accept such lesser amount in settlement of the plaintiff's legal liability for tax.

Held – on the facts:

- (i) the plaintiff had failed to discharge the onus resting on it to establish that the Commissioner had failed to fulfil his obligations under the agreement or that he should have been satisfied that a lesser amount of tax would have been due; and had also failed to establish that it had itself fulfilled its part of the agreement;
- (ii) the plaintiff had been guilty of laches;

and on the law:

- (iii) equitable estoppel probably does not apply only to afford protection against the enforcement of contractual obligations;
- (iv) equitable estoppel could be invoked against the Commissioner, who could not be permitted to say that the agreement was made in excess of his authority; but,
- (v) the claim must fail, because the plaintiff was seeking to use the principle of equitable estoppel to found a cause of action.

Action dismissed.

Cases referred to in judgment:

- (1) *Hughes v. Metropolitan Railway Co.* (1877), 2 App. Cas. 439.
- (2) *Robertson v. Minister of Pensions*, [1949] 2 K.B. 227.
- (3) *Central London Property Trust Ltd. v. High Trees House Ltd.*, [1947] 1 K.B. 130.
- (4) *Bob Guinness Ltd. v. Salomonsen*, [1948] 2 K.B. 42.

- (5) *Maritime Electric Co. Ltd. v. General Dairies Ltd.*, [1937] A.C. 610.
- (6) *Brodie's Trustees v. Commissioners of Inland Revenue* (1933), 17 Tax Cas. 432.
- (7) *Cockerline & Co. v. Commissioners of Inland Revenue* (1930), 16 Tax Cas. 1.
- (8) *Combe v. Combe*, [1951] 2 K.B. 215.

(9) *Century Automobiles Ltd. v. Hutchings Biemer Ltd.*, [1965] E.A. 304.

(10) *Nurdin Bandali v. Lombank Tanganyika Ltd.*, [1963] E.A. 304.

Judgment

Harris J: This is an action in which the plaintiff, a limited liability company, seeks a declaration that the defendant, the Commissioner of Income Tax, is estopped from enforcing his legal rights to recover from the company certain sums by way of tax in respect of the years of income 1951 to 1961 inclusive.

The plaintiff's claim is based on an oral agreement entered into at a conference held on March 27, 1962, in the office of Mr. Dobbie, then one of the regional commissioners of income tax, between Mr. Dobbie, Mr. K. Bechgaard, who was the advocate representing the plaintiff company instructed by Mr. A. B. Patel, and Mr. Lalji Mulji, a director of the company, whereby, it is alleged in the plaint, the company agreed, at the request of the defendant, to prepare and submit to the defendant audited accounts of its trading operations for the years 1959, 1960 and 1961, and the defendant agreed to examine these accounts, take an "overall view of the liability of the plaintiff in respect of all income tax claims by the defendant and discuss the question of an overall settlement on an equitable basis" and, if the true liability to tax assessed upon examination of such accounts should be less than that charged under certain estimated assessments already issued, then the defendant would accept such lesser amount in settlement of the company's legal liability. The defendant does not accept in full the company's version of the terms of this agreement and it is therefore necessary, in the first place, to ascertain precisely what those terms were.

It is unfortunate that no agreed minute of the conclusions reached at this conference appears to exist, and there is even some doubt as to who participated. Mr. Dobbie, in a short but fairly detailed memorandum of the proceedings, signed by him and dated the following day, records those present as being himself, Mr. Bechgaard and Mr. Lalji Mulji, while Mr. Bechgaard, who was called as a witness by the company and gave evidence before me, stated that he thought Mr. Thakarbhai Patel, a member of a firm of accountants employed by the company, was also present. Mr. Bechgaard's instructing advocate, Mr. A. B. Patel, appears to have been absent, which may account for the fact that apparently no minutes were exchanged. Whatever be the true position the only evidence produced at the hearing as to what was decided was the oral testimony of Mr. Bechgaard (supported by a very brief note made by him at the time), Mr. Dobbie's memorandum (which was admitted without objection by reason of his not being available to give evidence), and a letter written by Mr. Dobbie to Mr. Mulji on March 29, 1962, that is, two days after the conference. Neither Mr. Mulji, Mr. Thakarbhai Patel nor Mr. A. B. Patel was called as a witness.

Mr. Bechgaard in his evidence said that on March 9, 1962, the defendant filed a petition in this court for the winding up of the company and that, following an interview with a regional commissioner of income tax named Stump on March 16, he wrote a letter to the defendant on March 20 pointing out the damaging effect of the petition on the company and requesting that it be withdrawn. This in turn was followed by the conference of March 27 which, after a lengthy discussion, concluded, according to his recollection, with a four-fold arrangement to the effect that (a) the petition should be allowed to stand over generally; (b) the company's accounts for the year 1959 were to be furnished to the defendant within fourteen days and those for the year 1960 by the end of May; (c) the company would co-operate with the defendant in clearing up any queries that might arise on the accounts; and (d) the defendant

would reconsider the position in the light of the letter of March 20. Mr. Bechgaard said that a further meeting

was arranged for April 23 but this did not take place and he spoke to Mr. Dobbie on the telephone on April 24 when the latter agreed to have the hearing of the petition adjourned for three months.

Mr. Dobbie's memorandum of the conference of March 27 reads as follows:

- “1. Mr. Bechgaard stressed the damage which was being done to his client's business by the present petition to the courts for the winding up of the company. He said that his client accepted that in the past there had been failures to submit returns and accounts. Mulji intervened to say that the delays had not been caused by the wish to avoid tax or to deceive the tax department, but were wholly due to family difficulties and disputes following the death of his uncle Shivji Jetha in 1951.
2. Dobbie said that he accepted that there might have been difficulties in continuing the affairs of the company after the death of the managing director but that could not explain a seven-year delay in the submission of accounts. Bechgaard said that since 1960, Lalji Mulji had been co-operating with the department and had practically brought the accounts and returns of the company up to date. He had also paid considerable sums of tax in the last two years. Bechgaard referred to his letter of March 20, 1962, in which he stresses the profits shewn by the accounts and refers to the liability on an “equitable basis”.
3. Dobbie reminded Bechgaard of the history of this case, drawing attention to the fact that assessments for 1952, 1953 and 1954 had been the subjects of appeals as far as the Court of Appeal, and that the appeals had been dismissed. For 1955, 1956 and 1957 there had been appeals to Local Committee, and the assessments had been confirmed. For 1958 there was no objection to the assessment. For 1959 there was an appeal to Local Committee and a decision that the assessment was to be confirmed if the 1959 accounts were not received by September 30, 1961.
4. Bechgaard accepted that the Income Tax Department had the technical right to deem the tax final and proceed with collection. He said that it was not his understanding that the tax department would proceed to deprive a taxpayer of his means of livelihood where facts were presented to show that tax had been substantially over-assessed.
5. Dobbie said that at the present juncture he did not accept the accounts as conclusively showing that equitable liability. There were good grounds even on the basis of the delay in submitting the accounts for a full investigation into the affairs of the company and of Lalji Mulji. As to co-operation, this had been wrung out of Lalji Mulji, by the constant pressure of collection action including a previous proposal to wind up the company. At the present date the returns of Lalji Mulji for years 1957 to 1961 had not been made (Lalji intervened to say that his returns had been forwarded on the previous day). Assessments on Lalji Mulji were final and tax liability on him amounted to over £30,000. The affairs of Lalji and the company were so interwoven that there could be no acceptance of any figure as equitable liability until there had been a very full examination of the affairs both of the company and Lalji Mulji.
6. Lalji Mulji pleaded that whilst any examination was being made the petition should be withdrawn. Dobbie refused to consider the withdrawal of the petition. He said that he would examine the information and returns so far produced for the company and Lalji Mulji and would discuss the position again towards the end of April with Messrs. Bechgaard and Mulji. By the date of the discussion Dobbie would expect to have received the 1959 accounts and any information which had in the meantime been sought, following the examination of returns, etc.”

When asked to comment on this memorandum Mr. Bechgaard at first said that he saw nothing wrong anywhere in it except that in the final paragraph the sentence “Dobbie refused to consider the withdrawal of the petition” would have been more accurate if there had been added to it the words “there and then”. On his attention being specifically directed to the fifth paragraph, however, he said that he did not agree with the last sentence of that paragraph in as much as, although the inter-relation between Lalji Mulji and the company was mentioned, the terms of the paragraph went too far and he thought Mr. Dobbie had put more into it than he had intended to do. Mr. Bechgaard tendered in evidence the note made by him in his own handwriting at the meeting which contains the words “D will examine L’s returns”, meaning “Dobbie will examine Lalji Mulji’s returns”, but which, he said, did not form part of the agreed conditions and was merely a note by him as to Mr. Dobbie’s intentions.

Mr. Dobbie’s letter to Lalji Mulji of March 29, 1962, commences by saying:

“Following our recent interview in connection with the affairs of Mulji Jetha Limited, I have examined the returns of income forwarded by you for the years 1957 to 1960. I informed you that in view of the close connection between your affairs and those of Mulji Jetha Limited there might be information sought following such an examination.”

The remaining paragraphs of the letter of March 29 set out particulars of a considerable amount of information required by Mr. Dobbie, all apparently relating to the income of Lalji Mulji personally rather than to that of the company, which would seem to confirm that the contents of the fifth paragraph of the memorandum of March 28 correctly represented at least what Mr. Dobbie understood to have been said by him at the meeting.

Finally Mr. Bechgaard was asked in his examination-in-chief if he agreed with para. 5 of the amended defence and he replied that, except for the reference to the year 1961 in regard to the accounts required to be submitted, the paragraph could not be said to be actually incorrect but that it was expressed in rather a complex way though it meant the same thing as what the actual position was.

This paragraph reads as follows:

“5. That he denies the averments in para. 5 of the plaint and says that in or about the month of April, 1962, and subsequently, the defendant agreed with the plaintiff that he would receive or entertain representations by the plaintiff that the true liability to tax of the plaintiff, had it filed returns and accounts and otherwise complied with its obligations by law, would have been less for the years of income 1951 to 1961 than the tax lawfully assessed upon him by estimated assessment for those years, which assessments were in law final and conclusive, with the intention that if and only if, the plaintiff satisfied the defendant by such representations that a less amount of tax would have been charged, the defendant would consider enforcing payment of only the appropriate proportion of the tax lawfully due. The plaintiff undertook as a condition of such agreement to submit audited accounts for the years of income 1959, 1960 and 1961. The defendant avers that he merely agreed to consider the representations and the accounts.”

Giving the best consideration that I can to the matter I find that the material provisions of the agreement between the parties were to the following effect:

- (a) the petition to wind up the company would not be withdrawn but the defendant would consent to its being adjourned for three months;
- (b) the company would submit to the defendant within fourteen days from March 27 audited accounts for the year 1959, by the end of May audited

accounts for the year 1960, and also without delay audited accounts for the year 1961;

- (c) the company should be at liberty to make, and the defendant would receive and entertain, representations to show that its true liability to tax for the years of income 1951 to 1961 inclusive, had it duly filed such returns and accounts as were required by law and otherwise complied with its legal obligations, would have been less than the total amount of tax already lawfully assessed upon the company for those years on the basis of estimated assessments;
- (d) the company would co-operate in every way with the defendant in enabling the latter, in considering such representations, to make a very full examination of the financial affairs both of the company and of Lalji Mulji personally;
- (e) strictly upon the condition that the company satisfied the defendant by such representations that the total amount of tax already assessed upon it for the years of income from 1951 to 1961 in fact exceeded the amount that would have been chargeable had the company duly filed its returns and accounts and otherwise complied with its legal obligations then, notwithstanding that, as the company conceded, the assessments already issued had become legally final and conclusive, the defendant would consider enforcing payment of only a reduced amount of the tax still outstanding.

It is desirable at this point to consider in some detail the claim put forward by the company. In the first place the plaint itself would appear to be inaccurate so far as it states that the defendant is claiming income tax for the years of income 1951, 1952, 1953, 1954 and 1956, for the tax assessed in respect of those years (including additional tax and penalties) seems already to have been paid in full. Secondly it is common case that the defendant is empowered by s. 125 of the East African Income Tax (Management) Act, 1958, to levy distress on the goods and effects of a defaulting taxpayer for the recovery of tax lawfully due by him, and that tax (including additional tax and penalties) amounting to Shs. 473, 500/- is lawfully due by the company in respect of the years of income 1955, 1957 and 1958.

The assessments under which this tax has become due were estimated assessments issued by the defendant by reason of the company having failed to furnish returns of income for the years in question. Tax is also due in respect of the years of income 1959, 1960 and 1961, and the amount of the tax so due for each of these six years has become final and conclusive by virtue of s. 114 of the Act. It may be assumed that the "overall settlement on an equitable basis" to which the company was looking forward would have taken into account all the relevant figures covering the years 1951 to 1961.

Presumably for the reason that it would appear to be unenforceable for want of consideration the company does not seek a decree for specific performance of the agreement of March, 1962, but claims a declaration that the defendant is "estopped from enforcing his legal rights to recover the tax" stated in the plaint to amount to the sum of Shs. 2,716,650/- the basis of the claim being that, by reason of the agreement and the steps taken thereunder the company is entitled to rely upon the principle of promissory or equitable estoppel as formulated in 1877 by Lord Cairns in *Hughes v. Metropolitan Railway Co.* (1), and further developed in several more recent cases, using the principle as a shield to protect it from the effect of the defendant's statutory power of distraint and possibly any of his other means of recovery.

It is now necessary to consider the extent to which the obligations on either side created by the agreement can be said to have been fulfilled. It is admitted

that the adjournment of the petition for three months was duly effected under an order of the court made by consent and that the company submitted audited accounts for the years 1959, 1960 and 1961 within an extended period agreed upon by the defendant. It is also clear on the evidence that the company made representations to the defendant both in writing and by interview regarding its tax liability for the years of income 1951 to 1961 inclusive, and it may be assumed that these representations dealt with the tax position as it would have been had the company filed such returns and accounts as were required by law and otherwise complied with its legal obligations. In para. 10 of the amended plaint it is averred that the defendant did not challenge any of the accounts submitted to him or give any reason for their non-acceptance but no basis has been shown for saying that he was obliged to do so nor was such an obligation pleaded.

A remarkable feature of the case is that, apart from Mr. Bechgaard, who could speak only as to the facts leading up to the conclusion of the agreement of March, 1962, no witness was called to give evidence on behalf of the company, nor was any explanation suggested as to why Mr. Lalji Mulji or some other member of the company familiar with the matter or a member of the firm of accountants employed by the company in the preparation of the accounts and no doubt in the making of the representations to the defendant, was not available to assist in the determination of the question at issue.

Evidence was called by the defendant for the purpose of showing that the representations made on behalf of the company had failed to satisfy him that he would be justified in enforcing payment of portion only of the tax lawfully due. Mr. Goslin, the collector of income tax at Nairobi, and an affidavit from whom (subject to certain immaterial exceptions) was with the consent of the parties admitted as part of his evidence, said that he had made a meticulous examination of the relevant files concerning the company and that the accounts for the years 1959, 1960 and 1961, submitted by the company's auditors, were examined in detail and that numerous enquiries, some of them of a very complicated nature, were raised thereon. Although a portion of his evidence was difficult to follow, as when he said, first, that the accounts for the years 1951 to 1958 were examined and found not to be satisfactory in their present form, then that no queries arose on those accounts, and finally that the reason why no queries had been raised was because the assessment for those years had already become final and conclusive, the impression created by his evidence as a whole was that a considerable degree of investigation into the company's accounts had been carried out as agreed.

Evidence was given also by Mr. Robertson, a principal investigation officer in the income tax department with nearly fifty years experience of such work in this country or elsewhere, who said that in January, 1964, he took over this matter from a predecessor named Brown and found on the file a report dated November 7, 1963, dealing with the company's tax position and its accounts from 1952 to 1961 and also a report dated October 30, 1963, by a Mr. Fox, a former regional commissioner of income tax. He said that he read the interdepartmental correspondence on the case together with a draft letter prepared by Brown which had been lying on the file for some time, and that, having come to the conclusion that the substance of the letter was correct, he brought the figures up to date and signed and dispatched it to the company on April 29, 1964. I shall revert to this letter later.

Mr. Robertson said that he had not personally examined the company's accounts and that from his reading of the file he did not think that a detailed examination of the accounts had in fact been carried out and that Brown had relied rather on a general examination of the accounts and on information given to him by Fox. Although he conceded that, in accepting as correct Brown's draft of the letter of April 29, 1964, he was actuated by his assumption as a

business-man that the company was hiding something, he could not agree with the suggestion that the defendant or his officials had not examined the company's position in good faith with regard to seeing whether some of its tax liability could be remitted.

Taking everything into account I am unable to find that the company has discharged the onus resting on it of establishing that the defendant failed to fulfil his obligations under the agreement in the matter of entertaining and considering the company's representations or that he should have been satisfied by such representations that the tax actually assessed on the company in fact exceeded what would have been chargeable had the company not defaulted in complying with its obligations under the Act.

Regard must also be had to the requirement in the agreement that the company should co-operate in every way with the defendant in the matter of considering the accounts, but no evidence whatever was adduced by the company dealing with the matter and from the testimony of Mr. Goslin it would appear that the company or its accountants were at times quite dilatory in dealing with queries raised by the defendant. In reply to a specific question put to him in cross-examination he said that in his view there was no co-operation by the company, and, although this almost certainly was an exaggeration, from the evidence before me I am unable to say that the company has discharged the onus of establishing that it fulfilled the conditions of the agreement in this respect.

Lastly consideration must be given to the terms of the letter of April 29, 1964, to which I have already referred, for whatever may be the true facts as to the discussions and negotiations between the parties consequent upon the agreement of March, 1962, Mr. Robertson in that letter, very clearly put the resultant position as he saw it when he wrote to the company saying:

"Various discussions took place between Mr. Lalji Mulji and Mr. Dobbie of this Department regarding the very large amount of tax due by the Company.

Collection processes were suspended and a petition for winding up the Company was adjourned pending the examination by the Collector of Income Tax of certain accounts and figures which were submitted.

The Commissioner has decided, after the examination of these accounts and figures, that they are not acceptable as any basis for modifying the collection processes of the Department and has instructed the Collector to this effect.

The total debt to the Department which is final and conclusive amounts to Shs. 1,042,726/- and there is a further amount of Shs. 495,000/- which is at present under objection, of which one half is due for payment, i.e. Shs. 247,500/-.

It is proposed to instruct our legal representatives to continue with the petition for winding up."

Although the receipt of that letter is not denied no evidence has been adduced of any reply to it having been sent or of any protest or further representations having been made in regard to its contents by or on behalf of the company such as might reasonably have been expected had the company at that time considered that the agreement of March, 1962, had not been fully honoured on the part of the defendant. In the light of all that has happened between the parties I can see no basis for the proposition that the defendant is still, more than two years after the writing of that letter, to be precluded by virtue of the agreement from pursuing the remedies allowed to him by law for the recovery of the arrears of tax admitted to be legally due by the company. Equitable estoppel is not a

principle to be applied by the court in an arbitrary or mechanical way without regard to the factors which normally influence the exercise of its inherent discretion in the granting of equitable relief, and in my opinion, even if there were no other relevant consideration, the company has been guilty of laches to such an extent as would render it inequitable to grant the relief which it seeks.

I should add that in arriving at my decision on the facts I have disregarded in their entirety three notes of interviews between a Mr. Dempster and representative of the company which were sought to be put in evidence by the witness Mr. Goslin, to the admission of which counsel for the plaintiff objected. The notes were not in fact put in evidence pending my ruling and I now rule that they are inadmissible.

Lest I be mistaken in my evaluation of the evidence as a whole and in my conclusion that the company has failed to discharge the onus of proof resting upon it I shall now consider shortly, in deference to the arguments submitted to me, the legal defences raised by the defendant.

First he says that the principle of equitable estoppel applies only to afford protection against the enforcement of contractual obligations. Although the passage from the sixth edition of Cheshire and Fifoot's Law of Contract to which I was referred, states at p. 86 that to succeed in the defence of equitable estoppel "the promisee must satisfy the court that it is inequitable to allow the promisor to sue on the original contract", the decision of Denning, J. (as he then was) in *Robertson v. Minister of Pensions* (2), recognises an extension of the principle to matters not connected with contract. In that case the appellant, a serving army officer suffering from a disability, in reliance upon a letter written to him by the War Office assuring him that his disability had been accepted as attributable to military service, forbore to obtain at the time an independent medical opinion and the respondent later decided that the disability was not due to war service. On the pensions appeal tribunal affirming that decision the appellant appealed to the High Court and his counsel expressly relied ([1949] 1 K.B. at p. 229) upon the fact that he had not contracted with the respondent and at the time of the War Office letter he could not have done so because he was still a serving officer. Denning, J., held, applying *Central London Property Trust Ltd. v. High Trees House Ltd.* (3) and *Bob Guinness Ltd. v. Salomonsen* (4), that the case fell within the principle that if a man gives a promise or assurance which he intends to be binding on him and to be acted on by the person to whom it is given, then, once it is acted upon, he is bound by it. Looking at the matter objectively it is not easy to see why the exercise of contractual rights should alone be amenable to restraint at the instance of equitable estoppel and I am not persuaded that the defendant would be entitled to succeed on this ground.

The defendant next submitted that equitable estoppel cannot be invoked to afford protection against the performance of a statutory duty, and he relied upon the decision of the Judicial Committee in *Maritime Electric Co. Ltd. v. General Dairies Ltd.* (5). That case, however, turned upon the effect of an inference drawn by one party from a long-continued mistake made by the other and was not concerned with equitable estoppel by express representation as is the present case. In *Brodie's Trustees v. Commissioners of Inland Revenue* (6), Finlay, J., in holding that where the trustees were misled by an Inspector of Taxes who, in reply to an enquiry, mistakenly expressed the opinion that no income tax would be claimed, the Commissioners were not estopped from claiming tax, based his decision, first, upon the fact that there was no evidence that the trustees had altered their position by reason of what they had been told, and, secondly, on the ground that it was not "any part of the duty of officials of the inland Revenue to make contracts or to make declarations", and that therefore the Crown was not bound by the statement made to the trustees. On the other hand, in *Cockerline & Co. v. Commissioners of Inland Revenue* (7), which was concerned with the

somewhat special procedure in use in relation to excess profits duty, Rowlatt, J., said ((1930) 16 Tax Cas. at p. 9):

“It is true that no agreement can be made by its officers binding the Crown or binding the subject without an assessment, as Mr. Greene says, but up to this point there must be the power of agreement, that is to say, the officers who are charged with the collection of the revenue must be able to see the people on the other side and come to an accord about figures either covering the whole ground or partially, in order that if the matter was strictly carried through those figures might be put before the assessing authorities and accepted as agreed figures and receive the approval of the assessing authorities, and then if there be an assessment it would be an assessment which would carry out the agreement and there would be the protection of the approval of the authority behind it.”

In the present case, the question must be considered in the light of the practice adopted under the provisions of the Exchequer and Audit Act (now Cap. 412 of the Laws of Kenya). By s. 4 (1) of that Act it is provided that all persons concerned in the collection and receipt of public moneys shall obey all such instructions as they may from time to time receive from the Treasury, and by s. 31 the appropriate Minister is empowered to make regulations for the proper carrying out of the intent and provisions of the Act. Through the courtesy of counsel for the defendant there was made available for the use of the court a copy of the “Financial Orders” printed by the Government Printer and apparently constituting regulations under s. 31. By reg. 13 in s. E it is stated that remissions or abandonments of revenue can be made with Treasury authority and it would appear (and I understood counsel for the defendant so to concede) that the “writing off” of sums due for income tax which, as was stated in evidence occasionally takes place, is effected by means of the defendant submitting to the Treasury a proposal for such action, to which the Treasury or the Government, in its discretion, may give approval.

I think it must be assumed that in arriving at the agreement of March, 1962, the defendant and probably also Mr. Bechgaard had in mind that any reduction in tax which might result from the ensuing representations by the company would or might be effected by means of the procedure to which I have referred. This procedure, however, enables the defendant to do no more than, in a proper case to submit a proposal to the Treasury and, following *Cockerline’s Case* (7), I do not consider that the defendant should be permitted to say that the agreement, when read in this light, was made in excess of his authority and, for that reason, that there is no room for the application of the principle of equitable estoppel. My opinion therefore is that this ground of defence would also fail.

Lastly the defendant contends that the company is, in essence, seeking to rely upon equitable estoppel as a means of founding a cause of action, or, as it is sometimes expressed, using it as a sword and not merely as a shield. It is well settled that the principle cannot be so used and to this there appears to be no true exception. Admittedly it would be an over-simplification to say that equitable estoppel can be used only by a defendant and not by a plaintiff, for in *Robertson’s case* (2) it was successfully called in aid by the appellant (who was virtually in the position of a plaintiff) in his proceedings against the respondent but, as Asquith, L.J., said in *Combe v. Combe* (8) ([1951] 2 K.B. at p. 226), the claim, though brought by the promisee, was brought upon a cause of action which was not the promise itself, but was an alleged statutory right. In the present case the plaintiff is seeking, not to protect a legal right conferred upon him, but to defend himself against the exercise of a right conferred by law upon the defendant. If the agreement of March, 1962, by importing the element of consideration or otherwise, had conferred legal rights upon the company the

present action, no doubt, would have been so framed as affirmatively to assert those rights and there would have been no need to rely upon estoppel. In my opinion the defendant is correct in his contention that the company is endeavouring to use the principle as a sword rather than as a shield, and that, for this reason, its claim should fail.

One other matter should be mentioned. Equitable estoppel, as enunciated in the year 1877 in *Hughes v. Metropolitan Railway Co.* (1), was numbered among the doctrines of equity imported into this country by the East Africa Order in Council, 1911, and although I have been unable to find any instance of its being successfully relied upon here prior to the decision of the Court of Appeal for Eastern Africa in *Century Automobiles Ltd. v. Hutchings Biemer Ltd.* (9), it would appear from the judgments in that case, and in the earlier appeal from Tanganyika in *Nuridin Bandali v. Lombank Tanganyika Ltd.* (10), that no material distinction is to be drawn between the principle as illustrated by the English decisions to which I have had occasion to refer and the principle as applicable in Kenya.

For the reasons which I have endeavoured to state the action is dismissed with costs. I should add that the court is considerably indebted to counsel for each side for the careful manner in which the case was presented.

Immediately after the filing of the plaint the company applied ex parte for and obtained on June 10, 1966, an order by way of interim injunction restraining the defendant from proceeding with the distraint pending the hearing of a formal application in that behalf and undertook therein to indemnify the defendant against loss. The formal application by agreement was not proceeded with and the interim order has by consent been continued in operation pending the result of the action. I will now hear counsel as to any relief that may be required in this regard.

Action dismissed.

For the plaintiff:

E. P. Nowrojee and B. C. Syal, Nairobi

For the defendant:

Legal Secretary, E.A.C.S.O.

Treadwell and Maynard

Nakabugo v The Attorney-General of Uganda [1967] 1 EA 60 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	28 February 1967
Case Number:	444/1965
Before:	Sir Udo Udoma CJ
Sourced by:	LawAfrica

[1] Infant – Damages awarded to – Administration of, by Public Trustee – Public Trustee Act, s. 5 (b) (U.) – Civil Procedure Act, s. 101 (U.) – Civil Procedure Rules, O. 24, r. 11 (U.).

[2] Infant – Damages awarded to – Administration of – Principles applicable.

[3] Practice – Review of decree or order – Procedure for – Civil Procedure Rules, O. 42, rr. 1 and 8 (U.).

[4] Practice – Review of decree or order – Observations on when to be granted – Civil Procedure Rules, O. 42, r. 1 (U.).

Editor’s Summary

In an action following the death of a deceased his illiterate Muslim widow and his eight minor children were awarded damages. By the decree the children’s shares (totalling Shs. 50,000/-) were ordered to be paid to the Public Trustee to be held in trust for them and administered for their benefit. The widow, having fallen out with the Public Trustee over the administration of the fund, now applied by chamber summons for an order deleting him from the decree and substituting as trustee some other person (stated at the hearing as the Administrator of Buganda). She alleged (inter alia) that the decree was ultra vires because there was no provision in the Public Trustee Act for it.

Held –

- (i) the application was incompetent, being outside the scope of O. 42, r. 1 of the Civil Procedure Rules; and for failure to comply with O. 42, r. 8 of those Rules;
- (ii) the decree was intra vires under s. 5 (b) of the Public Trustee Act; under s. 101 of the Civil Procedure Act; or under O. 24, r. 11 of the Civil Procedure Rules;
- (iii) the decree was properly made, the widow being young, likely to remarry, illiterate and incapable of managing the fund herself.

Observations on when a review of a decree or order should be granted.

Application dismissed.

No cases referred to in judgment.

Judgment

Sir Udo Udoma CJ: This is an application by chamber summons for an order of this court deleting the name of the Public Trustee from the decree of this court dated June 7, 1966, and substituting therefore the name of some other person to act as trustee in respect of the total sum of Shs. 50,000/- awarded by this court as damages in favour of the minor children of Ali Kalungi (deceased).

It is not stated in the summons the rule of this court under which the application has been brought, nor is the name of the person to be substituted in the place of the Public Trustee named in the application itself.

In the course of his submissions, however, counsel for the applicant, stated from the Bar that the application was brought under O. 42, r. 1 of this court which

empowers the court to review its orders and decrees and that the present Administrator of Buganda Kingdom should be substituted in the place of the Public Trustee. There was not produced before this court consent in writing on the part of the Administrator of Buganda Kingdom of his willingness to act, if appointed.

By seeking to have the name of the Administrator of Buganda, whose name, incidentally, was never supplied to this court, substituted for the Public Trustee to act in the capacity of a trustee of the sum of Shs. 50,000/-, property of a large number of minor children, counsel for the applicant apparently abandoned the averment and request contained in para. 8 of the affidavit dated September 29, 1966, sworn to by him personally, and, in paras. 4 and 7 of the affidavit of the applicant dated October 1, 1966. The averment and the request therein contained were to the effect that the applicant be appointed Trustee for the purpose of the administration of the fund.

The circumstances under which the decree sought to be amended or varied or reviewed was made by this court may briefly be summarised as follows.

As a result of an action instituted by the applicant under the provisions of s. 7 of the Law Reform (Miscellaneous Provisions) Act damages amounting to the total sum of Shs. 63,000/- were awarded to the applicant, a widow of Ali Kalungi (deceased) and eight minor children of the deceased aforesaid. The damages were apportioned as follows:

1. To the widow herself, the applicant, Shs. 13,000/-.
2. To Badru, fourteen years of age, Shs. 6,500/-.
3. To Mastula Namfuka, twelve years of age, Shs. 5,000/-.
4. To Hamad Kalule, ten years of age, Shs. 6,000/-.
5. To Asa Nabunya, nine years of age, Shs. 5,500/-.
6. To Silimu Kalungi, six years of age, Shs. 6,000/-.
7. To Musa Jjingo, four years of age, Shs. 7,000/-.
8. To Ali Ssebunya, 2 1/2 years of age, Shs. 7,000/-; and
9. To Ziana Nakubulwa, two years of age, Shs. 7,000/-.

In terms of the decree the sum of Shs. 13,000/- were ordered to be paid out forthwith with interest due thereon at six per cent. per annum together with taxed costs of the proceedings to the applicant.

It was further ordered that the award made in favour of the minor children amounting to the sum of Shs. 50,000/- be paid to the Public Trustee to be held in trust for the children and to be administered according to their respective shares for the benefit of each of them; and that applications for withdrawal be made to the Public Trustee from time to time by either the plaintiff or other recognised guardian or any of such of the children, as shall attain majority before the exhaustion of his or her shares. It is to be noted that the applicant did not at any time apply to be appointed guardian at law for the minor children.

The total sum of Shs. 13,000/- was immediately paid out to the applicant through her advocate.

The present application is in respect of the shares allotted to the minor children. The ground for the application is firstly that a close scrutiny of the provisions of the Public Trustee Act has revealed that there is no provision in the said Act under which the order vesting the Public Trustee with administration of the damages awarded to the minor children would be made by this court. Therefore the order made in that respect by the court was ultra vires.

Secondly that it has been difficult for the applicant to receive payment in terms of her application from the Public Trustee for the maintenance and education of the minor children concerned.

The Public Trustee has opposed this application. He has maintained that the order made by the court was competent and intra vires; and that he had willingly

assumed the office of trustee in respect to the damages awarded the minor children, the amount having since been paid over to, and deposited with him by, the Government.

The Public Trustee, who is incidentally the Administrator General, has filed a counter-affidavit to the affidavits filed by the applicant and her counsel.

For the purpose of this application paras. 4, 5, 6, 8 and 13 of the counter-affidavit are instructive and of considerable importance. They are relevant to the issues raised in this application and are set forth as hereunder:

- “4. That soon after the receipt of the said sum I received a request from Messrs. Kiwanuka & Co. the plaintiff’s advocates, to pay to them out of the said sum Shs. 50,000/- a sum of 8,850/- as per a copy of their bill of costs annexed hereto and marked ‘A’.
5. That I resisted any payment of costs without taxation of the said bill and an order of the court authorising such payment, and on July 21, 1966, the Chief Registrar upheld my said objection. A copy of my letter dated August 1, 1966, addressed to the said advocates explaining the position is annexed hereto and marked ‘B’.
6. That on August 26, 1966, I received a letter from the said advocates enclosing an application by the plaintiff claiming a total sum of Shs. 5,490/- for alleged expenses of maintenance and education of the said children. A copy of the said letter and application are annexed hereto and marked ‘C’ and ‘D’ respectively.
8. That on September 16, 1966, the plaintiff and B. K. M. Kiwanuka, Esq., called at my office and were interviewed by me. At the interview I explained to them the amount of money desired as per statement submitted, appeared excessive and unreasonable.
13. That I refer to paras. 7 and 8 of the said affidavits of the plaintiff and Mr. Kiwanuka respectively and state:
 - (a) The damages awarded to the minor dependent children are a sum of money which could be easily misappropriated or exhausted in a very short time on any luxurious or unrestricted spending for the minors.
 - (b) I have interviewed the plaintiff and am of the opinion that she is not a fit person to whom the money should be entrusted and such entrustment would not be in the best interests of the said minor children under all the circumstances of this case.
 - (c) On the facts stated in the said two affidavits of the plaintiff and Mr. Kiwanuka there is no sufficient cause shown or legitimate grounds raised to revoke the appointment of Public Trustee as the Trustee for the said fund of Shs. 50,000/- and to appoint the plaintiff instead.”

As already stated, according to counsel this application is brought under O. 42, r. 1. This court is called upon to review its decree on the ground that the decree was ultra vires the powers of the court. I do not think that there is any substance in this submission. The order made by this court was prompted by the desire to safeguard the interests of, and the future education and maintenance of the children, which in a matter of this kind must be considered paramount.

As I pointed out to counsel for the applicant, if the order was ultra vires surely that should be a good ground to take this matter to the Court of Appeal; as it is doubtful whether this court would be competent to sit as a Court of Appeal on its own order and decree.

It is also doubtful whether the provisions of O. 42, r. 1 were ever intended to deal with a matter where a court had made an order which is ultra vires its power.

It seems to me that the provisions of the order aforesaid would apply only where there has been a discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge or could not be produced by the applicant at the time when the order or decree complained of was made; or on account of some mistake or error of fact apparent on the face of the record.

The application is not brought because of an error apparent on the face of the record. There is no such error. If even there was such an error, the application itself is misconceived for non-compliance with O. 42, r. 8 of the Rules of this Court. The application, not having been brought by motion on notice, is therefore incompetent, and I hold that it is not properly before this court.

The Public Trustee is certainly right in opposing this application. The grounds advanced by him are very weighty with special reference to the fitness of the applicant to act as trustee for the minor children.

It is not without significance that in spite of the fact that the applicant was paid the sum of Shs. 13,000/- due to her with interest and costs, her counsel soon thereafter applied to the Public Trustee for costs amounting to the large sum of Shs. 8,850/-. Those costs were to be paid out of the sums due to the minor children.

Not content with that, however, the next move was for counsel to claim on behalf of this illiterate Muslim widow, the applicant, that is, the large sum of Shs. 5,490/- purported to be expenses for the maintenance and education of the children. As pointed out by the Public Trustee no bill for the school fees issued by the teacher or headmaster of the school alleged to have been attended by the children, if they do attend any school, was produced despite repeated demands therefore.

The order of this court, from which the decree the subject-matter of this application was extracted, was made after the court had given very careful and serious consideration and thought over the surrounding circumstances of this particular case.

The applicant is a young woman and is likely to be married again; especially is this so as she is a Muslim by religion. In which event the interest and future of the children of the deceased might be in jeopardy.

The applicant is also illiterate and the management of trust funds of this kind would, in my view, be beyond her comprehension. She is not in a position to maintain any account.

Having seen and heard her give evidence in the witness box in the course of the trial of this case, I was left in no doubt that she would be completely incapable of managing the amount awarded to the children, especially as she is not the mother of all the children. The view which I took then has now been reinforced by the observation contained in para. 13 of the counter-affidavit filed by the Public Trustee in these proceedings.

I am satisfied and hold that the order of this court from which the decree was extracted was intra vires the powers of this court, the same having been made pursuant to s. 5 (b) of the Public Trustee Act, (cap. 141). Section 9 of the Act, which was cited and relied upon by counsel for the applicant, is completely irrelevant to the issue involved in this matter.

A Public Trustee once appointed by a court of competent jurisdiction is bound to exercise his power

inter alia in accordance with s. 32 of the Trustees Act (cap. 142) the provisions of which it is unnecessary to reproduce in this ruling.

In any case, if even it were right that it was incompetent for this court to have vested the administration of the award made to the minor children in the Public Trustee under s. 5 (b) of the Public Trustee Act (cap. 141), this court is empowered under s. 101 of the Civil Procedure Act to make any order as may be necessary for the ends of justice.

Furthermore, this court is entitled to take judicial notice of the fact that the Administrator General is also the Public Trustee of Uganda; and, under O, 24, r. 11 of the Rules of this Court it was therefore competent for the court to order that the damages awarded the minor children be paid to and be administered by the Administrator General as the Public Trustee for the benefit of the children. The action in this case was not brought in the name of the next friend of the minors, none having been appointed.

This application is therefore dismissed with costs to the Administrator General.

Application dismissed.

For the applicant:

Kiwanuka & Co., Kampala

B. K. Kiwanuka

For the respondent:

Attorney-General, Kampala

G. S. Lule

Re Kamata
[1967] 1 EA 64 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	25 November 1966
Case Number:	1180/1966
Before:	Harris J
Sourced by:	LawAfrica

[1] *Infant – Guardianship – Custody awarded to African widow.*

[2] *Infant – Damages awarded to – Directions as to disposal.*

[3] *Fatal accident – Damages – Disposal of damages awarded to infant dependant – Directions.*

[4] *Practice – Infant – Sum of money awarded to infant – Directions for disposal.*

[5] *Trust and trustee – Damages awarded to infant – Principles of Trustee Act applicable.*

Editor's Summary

The applicant, an African widow aged about twenty-seven, had brought proceedings under the Fatal Accidents Act on behalf of herself and her infant son aged two, as dependants of her late husband. In those proceedings a settlement was approved by the court under which the defendants paid Shs. 40,000/- into court to the credit of the infant in discharge of their liability to him. The applicant then applied in these proceedings for directions regarding the management of this fund.

Held –

- (i) having regard to the age of the infant and the inexperience of the widow the entire fund (after deduction of costs) to be paid into a savings account with a building society in the joint names of the applicant as trustee of the fund and the Registrar of the High Court;
- (ii) the income to be paid to the applicant for the maintenance of the infant;
- (iii) the custody of the infant to be given to the applicant;
- (iv) the applicant to have liberty to apply;

(v) the position to be reviewed and reported on by the Registrar after three years.

Directions issued.

No cases referred to in judgment.

[**Editorial note:** This case departs from the usual practice of adjourning the disposal of damages awarded to a minor under the Fatal Accidents Act into chambers to make an order under O. 26, r. 11 of the Civil Procedure (Revised) Rules, 1948, for payment of the damages (less all costs) to trustees to hold for the minor under a trust deed approved by the judge.]

Judgment

Harris J: This is an application by Njeri Njogo, the mother and guardian of her infant son, Dominic Kamata, seeking directions regarding the management of his estate to which he has become entitled by virtue of an order of this court dated October 7, 1966. The order was made in a suit filed by her on behalf of herself and the infant (Civil Case No. 505 of 1966) under the Fatal Accidents Act (Cap. 32) as the dependants of her late husband, Stephen Nojogo, who was killed in a road accident on or about August 17, 1965. In that suit a settlement was arrived at whereby, with the approval of the court, a sum of Shs. 40,000/- (over and above all costs and expenses of the suit) was paid by the defendants into court to the credit of the infant in full discharge of their liability in the matter. The infant is accordingly absolutely entitled to the said moneys subject to payment of certain expenses referred to below.

The application is brought by an originating summons under the Guardianship of Infants Act pursuant to liberty granted in the suit and is, in my opinion, correctly intitled in the matter of that Act. The present proceedings, however, are quite distinct from those in the suit and I consider that the title should not include the names of the parties to that suit. In addition, since the order which I propose to make constitutes in part an exercise of the jurisdiction conferred upon the court by the Trustee Act, I am of the opinion that the title of the proceedings may properly include a reference to that Act. I therefore direct that the present proceedings should be intitled:

“In the matter of the Guardianship of Infants Act (Cap. 144)

And in the matter of the Trustee Act (Cap. 167)

And in the matter of Dominic Kamata, an infant.”

The infant is less than two years of age and is the applicant’s only child, she herself being aged about twenty-seven years. The period of his legal infancy may therefore be expected to continue for a considerable number of years, and I am told that there is no precedent in this country from which guidance can be sought as to the most appropriate order to make where so large a sum of money and so young a beneficiary are involved, bearing in mind the continuing depreciation in the value of money which, over such a period, would probably be substantial.

The applicant’s initial proposal was that both she and the infant should contribute a sum of Shs. 20,000/- each to enable the purchase to be effected, with the sanction of the court, of a freehold residential property in Nairobi, let out to a number of occupying tenants and yielding a favourable profit rent. This proposal, although not unattractive, failed to secure the approval of the court owing to doubts as to her ability to manage the property to its best advantage having regard to her lack of experience in

such matters.

Her present proposal is that, as an interim measure, the entire of the fund in court, after deduction of costs and expenses, be placed in a savings account with a

building society registered in this country and known as Savings and Loans (Kenya) Limited until such time as an opportunity presents itself for investment of the fund in a more suitable form of security. The income to be obtained in this way is stated to be at a rate of not less than six per cent per annum and in my opinion this investment, if effected in the joint names of the registrar for the time being of this court and the applicant, would be for the infant's benefit and should be approved subject as hereinafter provided and on the understanding that the position be reviewed from time to time.

The next question is as to the desirability of authorizing the entire of the income from this fund, which is expected to amount to slightly more than Shs. 2,000/- per annum, to be paid to the applicant as guardian and expended by her on the maintenance of the infant. I think that this course is reasonable, at least for the present and subject to her being prepared, if called upon to do so, to account generally for her expenditure of the said income. It will, of course, terminate upon the infant's coming of age.

A further question arises as to the desirability of conferring on the applicant the powers and duties of a trustee of the fund on behalf of the infant. It is clear that such a course might facilitate future dealings with the fund, particularly in the event of it being decided to invest the whole or any part of it in the purchase of immovable property, and I therefore will direct under the provisions of ss. 42 and 52 of the Trustee Act that, upon its transfer to Savings and Loans (Kenya) Limited, the applicant be appointed to be a trustee of the fund which shall thereupon vest in her as such trustee jointly with the said Registrar.

Section 7 of the Guardianship of Infants Act enables the court, in its discretion, to make an order for the custody of the infant and I am of the opinion that, lest any question should arise in the future touching his custody, the necessary order should be made at this stage.

It is implicit in what I have said that the applicant should be empowered to apply to the court from time to time for its directions as to any matters arising out of this present order or in the course of the proceedings thereunder, and I will so direct.

Lastly, there arises the question of costs. There can be no doubt that the applicant is entitled to her costs of these proceedings. I understood from what was said by Mr. G. S. Vohra, her advocate, however, that since the application was commenced, quite properly, by originating summons, the costs, if taxed by the taxing officer, would fall to be dealt with under Sched. 6 of the Remuneration of Advocates Order, 1962, and might well be certified at something in the region of fifty pounds. This sum would be quite excessive having regard to the extent of the professional work involved and Mr. Vohra very properly submitted that, instead of directing the costs to be taxed, I should myself determine the amount proper to be allowed, as I am empowered to do by s. 27 (1) of the Civil Procedure Act and r. 79 of the above-mentioned Order, and he suggested that a sum of Shs. 105/-, inclusive of disbursements, might be appropriate. I agree with his submission that if, on taxation, the costs would have to be dealt with under Sched. 6 of that Order as it now stands, it is preferable that they be covered by my present order. The disbursements to be provided for will exceed Shs. 40/- and I do not consider that the work already carried out in this matter by Mr. Vohra would be fairly remunerated by an inclusive fee of Shs. 105/-. I fix the costs of the application and of this order at the sum of Shs. 210/- to include disbursements, which sum, together with the sums of Shs. 105/- and Shs. 100/- already directed to be paid by the order of October 26 last in the said Civil Case No. 505 of 1966, will be paid as hereinafter directed.

For the reasons which I have indicated I direct that the order to be made herein will be to the following effect:

1. The said Njeri Njogo do have the custody of the said infant until further order.
2. The registrar of this court shall forthwith out of the sum of Shs. 40,000/- paid into court to the credit of the said infant pursuant to the order October 14, 1966, made in Civil Case No. 505 of 1966 between Njeri Njogo (plaintiff) and Ndarua and Company (defendants) and any interest which may have accrued thereon (hereinafter collectively referred to as "the funds in Court") cause to be paid the following sums, namely:
 - (a) To Mr. G. S. Vohra, as Advocate for the plaintiff in the said Civil Case No. 505 of 1966, the sums of Shs. 105/- and Shs. 100/- mentioned in the order in that suit dated October 26, 1966, the same to be applied by him as in the said Order provided;
 - (b) To the said Mr. Vohra, as advocate for the guardian of the said infant, the sum of Shs. 210/- as and for his costs (including disbursements) of the present proceedings;
 - (c) To Savings and Loans (Kenya) Limited (hereinafter called "the Company") at its principal office in Nairobi the balance of the funds in court after deduction of all proper charges (if any) arising in respect of the same.
3. The Company, upon receipt of a sealed copy of this order from the said Mr. Vohra and of the moneys so directed to be paid to it, shall without delay cause the said moneys to be paid into such savings account as shall be notified to it by the said Mr. Vohra and placed in the joint names of the Registrar of the High Court of Kenya and of the said Njeri Njogo, and shall not permit any dealings with the principal of the said moneys to take place without an order of this court.
4. Upon the placing of the said moneys in a savings account as hereinbefore directed the said Njeri Njogo shall become and be until further order the trustee thereof for and on behalf of the said infant and the same shall, subject to the provisions of this order, vest in her as such trustee, jointly with the said registrar.
5. The Company shall from time to time as the same accrues due until further order of this court pay the interest to accrue on the said moneys to the said Njeri Njogo as such guardian but shall not be obliged to see to the application thereof by her.
6. The said Njeri Njogo as such guardian shall until further order apply all monies to be received by her from the Company under this order for the maintenance and education of the said infant and shall account therefore to the said Registrar if so required by him.
7. The said Njeri Njogo as such guardian and trustee shall until further order have liberty from time to time to apply to the court by chamber summons in these proceedings for such further or other directions as may be required.
8. The provisions of this order shall within three years from this date be reviewed by the said Registrar who shall report thereon to the court as to any action which in his opinion should be taken in the matter.
9. Nothing herein shall preclude the said infant when he shall have attained his majority from applying to have this order discharged or varied but without prejudice to anything lawfully done thereunder.

Order accordingly.

For the applicant:

G. S. Vohra

[1967] 1 EA 68 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	3 November 1965
Case Number:	163/1965
Before:	Biron J
Sourced by:	LawAfrica

[1] Criminal Law – Procedure – Trial held in chambers – Doors and windows open and public having access – Whether “in open court” – Criminal Procedure Code s. 76 (Cap. 20) (T.).

Editor’s Summary

The accused was convicted on a plea of guilty of stealing postal matter. He appealed, mainly on the ground that the magistrate erred in trying the case in his room in the District Office at Mbeya contrary to s. 76 of the Criminal Procedure Code (Cap. 20). The magistrate, on affidavit, stated that the case was heard on two occasions in his chambers and that on both occasions the doors and windows of his chambers were open and the public had access. The court took judicial notice of the fact that in Tanzania, because of the shortage of courtroom accommodation, proceedings are regularly heard in chambers.

Held – members of the public were aware that when proceedings are so heard in chambers, they have access thereto and accordingly the proceedings are conducted “in open court” within the meaning of s. 76 (1) of the Criminal Procedure Code.

Appeal dismissed.

Cases referred to in judgment:

- (1) *Biffo Mandirire v. R.*, [1960] E.A. 965.
- (2) *Karisa Thuri v. R.*, [1958] E.A. 8.
- (3) *Willy John v. R.* (1956), 23 E.A.C.A. 509.
- (4) *R. v. Lewes Prison (Governor), Ex parte Doyle*, [1917] 2 K.B. 254.
- (5) *Scott v. Scott*, [1913] A.C. 417.
- (6) *McPherson v. McPherson*, [1936] A.C. 177.

Judgment

Biron J: The appellant was convicted on his own plea of stealing postal matter, to wit a registered letter containing Shs. 250/- cash, and he was sentenced to imprisonment for nine months. He is now appealing from the conviction.

The appellant’s plea as recorded was:

“Yes, I admit it. I plead guilty”.

The case was then stood over as apparently the prosecutor was not ready with the facts. At the resumption of the proceedings on the very same day, the facts were furnished by the prosecutor to the effect that the appellant, who was employed as head teacher and in charge of Magoye Upper Primary School, in the course of his duties received a locked mailbag from the Chimala sub-post office. The appellant was the only person who had the key to the bag, and on opening it he found and kept a registered letter addressed to a pupil at the school, one Elisha Thomas. This letter contained Shs. 250/-, which, in the words of the prosecutor, the appellant “used it at his own accord”. Subsequently, when the letter was missed and investigations made, it was disclosed that the appellant had taken the money, and again in the words of the prosecutor:

“He agreed to have taken the money and paid to Elisha the said amount. Elisha decided to report the matter to the police, who arrested the accused and charged him accordingly.”

The appellant is recorded as agreeing with the facts of the case. He was then duly convicted on his own plea.

The first ground of appeal as set out in the petition of appeal is that:

“The learned district magistrate erred in law in treating the appellant’s answer to the charge as an unequivocal plea of guilt and erred in law in convicting the appellant on such a plea”.

Although the plea considered in isolation is defective in that, as repeatedly stressed by this court, a plea of guilty should contain an admission to all the ingredients of the offence with which an accused is charged, any defects in the plea – and in this connection the status and the position of the appellant, that he was by no means an illiterate peasant, are relevant – were more than cured by the appellant’s agreeing to the facts furnished by the prosecutor, which unequivocally established the guilt of the appellant. If anything more were wanted, it is to be found in the appellant’s plea in mitigation, in that he stated *inter alia*:

“I therefore request you to release me without punishing me, and I promise the court that I will never do it again.”

There is no substance at all in this first ground of appeal, which is in fact, conceded by counsel for the appellant, and he has not pressed or canvassed such ground. He relies on the second ground of appeal, that:

“The learned district magistrate erred in trying the appellant in his room in the district office at Mbeya contrary to the provisions of s. 76 of the Criminal Procedure Code (Cap. 20).”

In support of this ground of appeal the appellant has filed an affidavit which reads:

- “1. I am the appellant in this appeal and was convicted in Mbeya District Court Criminal Case No. 259 of 1965.
2. The proceedings in the said case commenced on March 16, 1965, and were held by the district magistrate in his room in the district office.
3. I appeared before the said district magistrate in his room at about 1 p.m. I do not recall if the door was left open but I do recall that the windows were closed and that the public generally did not have access to the said room.
4. As a result of what I said in answer to the charge against me, the district magistrate found me guilty of the offence I was charged with.
5. The Public Prosecutor then asked for a short adjournment in order that another prosecutor who had investigated the case could state the facts of the case to the court. The adjournment was granted and the prosecutor was sent for.
6. After about half an hour another prosecutor arrived and I was again taken into the district magistrate’s room in the district office.
7. On this occasion I distinctly recall that the door and the windows of the room were closed and the public generally did not have access to the said room.
8. To the extent that the matters stated above do not appear in the court record of the proceedings that record is inaccurate or incomplete.
9. What is stated above is to my knowledge true.”

Counsel submitted that the trial was a nullity relying on the ruling in *Biffo Mandirire v. R.* (1), and also on the judgment in *Karisa Thuri v. R.* (2). It would be convenient at this stage to set out the authorities relied on by learned counsel for the appellant. In *Biffo Mandirire* (1) the facts as stated in the headnote were that:

“The appellant, a room-boy employed at Government House, Dar-es-Salaam, was convicted of attempting to steal a wallet, the property of a guest staying there overnight. The trial was opened by the resident magistrate and the whole evidence of the complainant was taken at 9.30 p.m. on the day of the incident in the library of Government House. Thereafter the trial was adjourned to the following day, when it was continued and completed, in the district court building.”

It was held:

- “(i) notwithstanding that the latter part of the trial was conducted in a regular court house, the trial as a whole was not held ‘in open court’ as required by s. 76 (1) of the Criminal Procedure Code.
- (ii) non-compliance with s. 76 (1) was an irregularity not curable under s. 346 of the Criminal Procedure Code, and consequently the whole trial was a nullity.”

In his judgment Sir Ralph Windham, C.J. (as he then was) considered and applied s. 76 (1) of the Criminal Procedure Code, which reads:

“(1) The place in which any court is held for the purpose of inquiring into or trying any offence shall be deemed an open court to which the public generally may have access, so far as the same can conveniently contain them:

Provided that the presiding judge or magistrate may, if he thinks fit, order at any stage of the inquiry into or trial of any particular case that the public generally or any particular person shall not have access to or be or remain in the room or buildings used by the court.”

After dealing with the proviso to the sub-section, which is not relevant to this case, the learned Chief Justice went on to say, and it is only fair, in fact necessary, to quote in extenso, as learned counsel also relied on cases cited therein for the principles enunciated:

“The question that does arise, then, is whether the library of Government House, at 9.30 p.m., was an ‘open court to which the public generally may have access’. One point may be disposed of at the outset. The words ‘shall be deemed an open court’ in s. 76 (1) might possibly be construed to mean, but cannot, either in their context or upon any reasonable interpretation, mean

‘shall be irrebuttably presumed to be an open court, even if not in fact an open court’.

The words must mean ‘shall be treated as an open court and made accessible to the public as such’. Such was the meaning given to the identical words in s. 64 of the Seychelles Criminal Procedure Code, by the Court of Appeal for Eastern Africa in *Willy John v. R.* (3) where they were held to require the place of trial to be ‘treated as an open court to which the public had access’.

Now no doubt, upon the presumption of regularity, a court-house may ordinarily be presumed to be open to the public, and thus an ‘open court’, until the contrary is shown. Such would be the case where a trial was

conducted in ordinary working hours in a court-house regularly used as such. Nor is there any legally necessary ceremony in the nature of the 'consecration' of a building as a court house. Any building can be so used. But in order to establish that it is an 'open court', for the purpose of s. 76 (1) of the Criminal Procedure Code, it must be shown, either by presumption or by proof: first, that it is open, as of right, to any of the public who may present themselves for admission (though nobody need have so presented himself); vide *R. v. Lewes Prison (Governor), Ex parte Doyle* (4), [1917] 2 K.B. at pp. 270-271; *Willy John v. R.* (3), secondly, that the public are aware that the building or room in question is either habitually used for the trial of cases or is being or about to be used for the trial of a particular case. Without this second requirement being satisfied, it would be but an empty form of words to say that a room or building seldom or never before used as a place of trial was an 'open court' merely because the public would not be excluded from it if they should come. They must know that there is something for them to come for; there must be publicity. Without it, justice cannot be 'open'. In this connection it may be noted that in England, under s. 123 of the Magistrates' Courts Act, 1952, a place may be appointed as an 'occasional court-house' (i.e. as opposed to a regular petty-sessional court-house), but that it

'shall not be used as such unless public notice has been given that it has been appointed'.

The vital importance of publicity was emphasized in the following strong language by Lord Shaw of Dunfermline in the House of Lords in *Scott v. Scott* (5) ([1913] A.C. at p. 477):

'It is needless to quote authority on this topic from legal, philosophical, or historical writers. It moves Bentham over and over again. "In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice". "Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial". "The security of securities is publicity". But amongst historians the grave and enlightened verdict of Hallam, in which he ranks the publicity of judicial proceedings even higher than the rights of parliament as a guarantee of public security, is not likely to be forgotten: "Civil liberty in this kingdom has two direct guarantees; the open administration of justice according to known laws truly interpreted, and fair constructions of evidence; and the right of parliament, without let or interruption, to inquire into, and obtain redress of, public grievances. Of these, the first is by far the most indispensable; nor can the subjects of any state be reckoned to enjoy a real freedom, where this condition is not found both in its judicial institutions and in their constant exercise".'

Applying these principles to the present case, there is nothing on the record to show that the library of Government House was open to the public from 9.30 p.m. onwards on the night in question, nor that the public had been informed that a trial was to be held, or at least begun, at that hour and place. And the hour and place were such that it certainly cannot be presumed that the public would know this or, even if they knew, that they would realise that they had a right to attend the trial in so normally very private a spot. In *McPherson v. McPherson* (6), a divorce action was tried in the Judges' Law Library in the regular court-house. The judge announced that the trial would be 'in open court'. Entry to the library was by two unlocked swing-doors, on the outer of which was

a brass plate with 'Private' written on it. It was held by the Privy Council that, by reason of this notice alone, the judge was, albeit unconsciously, denying his court to the public in breach of their right to be present, and that accordingly the trial had not been 'in open court' as the law required it to be. In the present case the privacy of the forum was announced not, perhaps, by any explicit notice saying 'private', but tacitly by the very fact of its being situated in a private house, and especially in the particular house in question.

For these reasons, and notwithstanding that the latter part of the appellant's trial was conducted in a regular court-house. I hold that the trial as a whole was not held 'in open court' as required by s. 76 of the Criminal Procedure Code."

The learned Chief Justice concluded his judgment with:

"In these circumstances, and particularly by reason of the complainant's evidence having been not merely of a formal or unimportant nature but the sole incriminating evidence in the case, I cannot hold that the non-compliance with s. 76 of the Criminal Procedure Code was an irregularity curable under s. 346 of that Code, but must hold that it was such as to render the whole trial a nullity. I do so hold. The appeal is accordingly allowed, and the conviction and sentence are set aside."

The second authority relied on by counsel for the appellant is a judgment of the Court of Appeal for Eastern Africa. In that case (*Karisa Thuri v. R. (2)*), the magistrate held a preliminary enquiry in his chambers, and although the court had been notified that the accused was represented his counsel was not apparently given an opportunity of being present at the proceedings. The court held, quoting from the headnote:

- "(i) whilst there is no hard and fast rule that a court is required to notify the date of proceedings to a prisoner's advocate when the prisoner himself has been notified and has an opportunity to notify the advocate himself, in the present case the circumstances surrounding the holding of the preliminary inquiry had prejudiced the defence.
- (ii) the procedure of holding the preliminary inquiry in the office of the magistrate was most unfortunate."

In respect of the proceedings being held in the magistrate's chambers the court had this to say in its judgment ([1958] E.A. at p. 10):

"There were other respects in which the preliminary inquiry was unsatisfactory. It was, apparently, conducted in the third class magistrate's office, with the third class magistrate and the prosecutor sitting at the same desk. Section 233 (4) of the Criminal Procedure Code was not complied with. We will assume in favour of the Crown that the court was open and that the public were not denied access to it. If they were, the proceedings were illegal. Even if they were not actually denied access, members of the public would not think that they could freely enter the office of the third class magistrate. The procedure of holding the preliminary inquiry in his office was unfortunate.

We think that the circumstances surrounding the holding of the preliminary inquiry in this case were unsatisfactory and that substantial prejudice was caused to the appellant in the conduct of his defence."

When this appeal first came up for hearing learned State Attorney expressed himself as agreeing with the submissions of learned counsel for the appellant that the proceedings were a nullity, and he submitted that a retrial should be

ordered. However, I considered that it would be wrong for this court to determine the appeal without giving the magistrate an opportunity of being heard and thus offending against the cardinal principle of audi alteram partem. A copy of the appellant's affidavit was thereupon forwarded to the magistrate, who submitted an affidavit in response which reads:

"I, Julius Frank Mnengo, District Magistrate, make an oath as follows: –

That being the trial magistrate of Mbeya Criminal Case No. 259/65 Republic Vrs. Esaiiah Chunga did hear the case on 16/3/65 in my chamber with doors and windows open. This was conveniently done because, we were three magistrates at the station and all of us could not use the court at the same time. The public were not denied access to the chamber and they could freely enter into the chamber since the doors were wide open.

The above statement is to my knowledge true."

This affidavit can be construed as referring to one appearance only whereas there were in fact two appearances before the magistrate. A further affidavit was therefore requested and the request was made by learned State Attorney in a telegram which was somewhat unfortunately phrased, and as it has been made the subject of complaint by learned counsel for the appellant that it is 'rather leading' it must be set out. It reads:

"High Court desire fresh affidavit to state whether other cases also were heard in chambers in addition to Mbeya Criminal Case 259/65. Also whether any such habitual use of chambers as court would make public aware that room was often treated as court room. Please expedite fresh affidavit to Registrar High Court with copy to D.P.P."

The affidavit in response to this request reads:

"I, Julius Frank Mnengo, District Magistrate make an oath as follows:

That my chambers was habitually used as court not only by me alone but even by the other magistrates at the station. I further swear that my office was very often used as court room and the public was aware of that and several other cases have been decided in that room not only by me but even by other magistrates.

The above statement is to my knowledge true."

As this affidavit did not deal with the appellant's allegations yet a further affidavit was requested and submitted. This reads:

"I, Julius Frank Mnengo, district magistrate make an oath as follows:

That the Accused in Criminal Case No. Mbeya Criminal Case No. 259/65 appeared before me in my chambers first when I was taking his plea and the court had to adjourn to allow the prosecution to prepare the facts of the case, and after an interval of half an hour he appeared again before me in my chambers.

The above statement is to my knowledge true."

On receipt of this affidavit it was pointed out to the magistrate that he had not dealt with the appellant's specific allegations and he submitted a fourth and final affidavit, which reads:

"I, Julius Frank Mnengo, district magistrate make an oath as follows:

That the accused in Mbeya Criminal Case No. 259/65 appeared before me in my chambers, first when I was taking his plea and the court had to adjourn to allow the prosecution to prepare the facts of the case and after an interval of half an hour he appeared again before me in my chambers.

On all these two appearances the doors and windows of my chambers were open and public had access.

The above statement is to my knowledge true.”

On first adjourning the hearing of the appeal in order to give the magistrate an opportunity of being heard I anticipated that some delay might ensue – though the inordinate and unnecessary delay that has ensued was beyond contemplation – and I directed that the appellant be released on bail pending the determination of his appeal. I am informed that the appellant was in fact immediately released on bail and has been so to date.

The appellant in his affidavit could not recall whether at his first appearance in the magistrate’s chambers the door was left open, but at his second appearance he alleges, and I quote:

“On this occasion I distinctly recall that the door and the windows of the room were closed and the public generally did not have access to the said room.”

This is categorically denied by the magistrate in his affidavits, and he asserts that at both appearances “the doors and windows were open and the public had access”. Apart from the fact that there is a presumption in the magistrate’s favour that omnia praesumuntur rite et solemniter esse acta, or as provided for by s. 114 of the Indian Evidence Act, illustration (e), “that judicial and official acts have been regularly performed”, as the magistrate has stated that court proceedings are regularly held in chambers I consider that his version should be accepted. Even so, it is submitted by learned counsel for the appellant that this would not constitute the chambers an open court within the meaning of s. 76 (1) of the Criminal Procedure Code above set out. I ought to add that learned State Attorney at this last hearing, who was not the one who had appeared at the first hearing, supports the conviction and submits that the proceedings were in order in that in the circumstances the chambers constituted an open court within the meaning of the section.

Although the case of *Biffo Mandirire* (1) can easily be distinguished from this instant case as on the facts they are poles apart, and also the cases cited in the judgment can be so distinguished, it must be conceded that the issue is not without difficulty, particularly in view of the remarks of the Court of Appeal for Eastern Africa in *Karisa Thuri* (2), the Kenya case above set out, on hearings in chambers. Although one may be tempted to make a distinction between proceedings on a plea of guilty and a trial or a preliminary enquiry, no distinction should I think be made, nor do I propose to make any. Whatever may be the position in Kenya, apart from the repeated assertions by the magistrate that his chambers are habitually used as a courtroom by both him and the other magistrates at the station, this court can, should and does take judicial notice that in this country, where there are more magistrates than properly constructed courtrooms, at many, if not most, stations in this country, proceedings are regularly heard in chambers. I myself, when sitting as a magistrate, have constantly heard cases in chambers in various stations, including the very station whence this instant case originates. The magistrate has further stated that the public are aware of the chambers being used as an open court. As this procedure of hearing cases in chambers is so widespread and of such long standing, I am satisfied that the public are aware that when proceedings are so heard in chambers they have access thereto. I accordingly hold that the proceedings in this case were conducted in open court within the meaning of s. 76 (1) of the Criminal Procedure Code, and that the conviction is therefore perfectly proper and in order.

With regard to sentence, it cannot by any stretch be considered excessive, nor is the appellant apparently appealing from the sentence. In fact, the appellant

is fortunate in not having been charged with theft by a public servant, a scheduled offence under the Minimum Sentences Act, 1963.

In order to avoid further complaints in respect of proceedings being held in chambers, and I would add that this is the first that has come to my notice, I would suggest that when a magistrate is holding court in chambers some sign to that effect should be exhibited in a prominent place so as to make it clear beyond peradventure that the chambers are an open court accessible to the public.

Appeal dismissed.

For the appellant:

A. A. Lakha, Dar-es-Salaam

For the respondent:

The Attorney General, Tanzania

O. T. Hamlyn

Re Lowenthal and Air France [1967] 1 EA 75 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	13 December 1966
Case Number:	695/1966 (O.S.)
Before:	Rudd J
Sourced by:	LawAfrica

[1] *Foreign Judgment – Zambia registration in Kenya of judgment of High Court of Zambia – Not enforceable under Part II of the Foreign Judgments Enforcement Act (Cap. 43) (K.).*

[2] *Foreign Judgment – Setting aside registration of – Principles applicable where no proper service of claim and where unliquidated damages not assessed by foreign court – Foreign Judgments Enforcement Act (Cap. 43), s. 3 (2) (c), s. 13 and Part II (K.).*

Editor's Summary

Air France, a company, applied to set aside the registration in Kenya of a decree of the High Court of Zambia under the Foreign Judgments Enforcement Act (Cap. 43). Part II of the Act was applied to judgments of the Superior Courts of Northern Rhodesia and the main question was whether the Act could therefore apply to judgments of the courts of Zambia. The second point raised was whether the registration should be set aside under s. 3 (2) (c) of the Act in that the defendant was never duly served with the process of the original court and did not appear. The third point considered was whether it was

just and convenient that the judgment should be enforced in Kenya.

Held – the registration must be set aside because:

- (i) the Superior Courts of Zambia are not, since the independence of Zambia, the Superior Courts of Northern Rhodesia and no legislation has been passed in Kenya to apply Part II of the Act to Zambia;
- (ii) service on the forwarding agent of Air France in Zambia was not service on the company and the substituted service was not due service for the purpose of enforcing the judgment outside Zambia;
- (iii) the judgment was a claim for unliquidated damages which should have been assessed after proof and should not have been registered under the Act.

Application allowed.

Cases referred to in judgment:

- (1) *Schibsby v. Westernholz* (1870), 6 Q.B.D. 155.

(2) *Buchanan v. Rucker* (1808), 9 East. 192.

Judgment

Rudd J: This is an application by Air France, a French company or corporation, to set aside the registration of a decree of the High Court of Zambia which was registered in Kenya under the Foreign Judgments Extension Act (Cap. 43).

Air France was the defendant in the suit in Zambia but did not appear.

The judgment was ordered to be registered in Kenya by Chanan Singh, J., on an ex parte application by the judgment creditor, and the judgment debtor was allowed sixty days from service of the order in which to apply to set aside the registration.

There appears to have been some confusion as to the particular part of the Foreign Judgments Extension Act under which the judgment was registered.

Part II of the Act was applied as regards the judgments of the superior courts of Northern Rhodesia. Part IV of the Act was never applied to Northern Rhodesia or Zambia or any courts there.

The application was made and supported by affidavit in terms appropriate to an application under Part II. The affidavit referred to s. 3 which is contained in Part II. But the notice of the order made by this court which was to be served on the judgment debtor invited an application to set aside the registration in accordance with s. 13 which is contained in Part IV of the Act.

In law the judgment, if it could be registered at all, could only be registered under Part II. The first question to be decided is as to whether judgments of the High Court of Zambia can be registered in Kenya under Part II of the Act as the law at present stands.

This part was applied to the judgments of the superior courts of Northern Rhodesia. It was never in terms applied to any courts of Zambia.

Kenya attained independent status in 1963. Thereafter no act or instrument enacted or made in Britain after 1963 has legislative force in Kenya.

The British Protectorate of Northern Rhodesia attained independence in 1964 and became the independent Republic of Zambia within the Commonwealth.

The question is whether the application of Part II of the Act to the superior courts of Northern Rhodesia continued in effect after Zambia became independent so as to apply Part II of the Act to the superior courts of Zambia. In my opinion this question must be answered in the negative.

There was clearly a major legal change of status when Zambia became independent and I think it would not be correct or right to say that the superior courts of Zambia are or were, since the independence of Zambia, superior courts of Northern Rhodesia. In my opinion if Part II of the Act could be applied to the courts of Zambia, as to which I would reserve my opinion, it would require legislative action in Kenya to effect the application and I can find no such legislative action which had that effect. For this reason the present application must succeed. Even if I had not come to this decision, and if I felt that Part II of the Act applied to the judgment in question, still I would have allowed the application.

The order for registration was made on July 26, 1966. Notice of it was served on a Mrs. Melville on

August 22, 1966. Mrs Melville was employed by Air France but had no authority to accept service on its behalf. She mislaid the notice and it did not come to light until October 18, 1966. This application was made on November 7, 1966. It is objected that it was made after sixty days from the service of the notice. In my opinion service on Mrs. Melville was not good

service on Air France and so the application was not made outside the limits of the time prescribed. Even if it were I think I could in my discretion entertain the application and in the circumstances I would entertain it.

Turning to the merits, the judgment appears to have been made in a suit which was instituted in 1965. There is evidence that in 1964 Air France closed down its establishment in Zambia and thereafter had no authorised representative in Zambia. The position as to whether in 1965 Air France was still doing business in Zambia is not very clear. There is a letter from a Miss Hurter who says she was employed by an independent company which only represented Air France commercially in the sense that if Miss Hurter took a booking for Air France she would still have to ask another company, Zambia Airways, to make the booking. She said that Air France had a general agent in Zambia called C. A. A. represented by Zambia Airways.

From this it would appear that the sort of transactions which Miss Hurter and her company were transacting did not amount to more than the business of a forwarding agent who forwarded orders for confirmation or for acceptance or rejection. This does not amount in law to the transaction of business by Air France in Zambia through Miss Hurter for purposes of establishing Air France's presence or residence in Zambia through Miss Hurter or her company. The position of C.A.A. and Zambia Airways is more obscure but service was not effected through either of them.

Air France was served by substituted service upon Miss Hurter who at the time refused to accept the service.

This substituted service must be accepted as good and sufficient service as far as proceedings in Zambia are concerned but it was not in my opinion due service for the purpose of enforcing this judgment outside Zambia. *Schibsby v. Westernholz* (1) and *Buchanan v. Rucker* (2).

Section 3 (2) (c) of the Act provides:

"3(2) The registration of any judgment ordered to be registered under this Part shall be set aside if:

- (c) The judgment debtor being the defendant in the proceedings was not duly served with the process of the original court and did not appear notwithstanding that he was ordinarily resident or was carrying on business within the jurisdiction of that court or agreed to submit to the jurisdiction of that court."

Air France did not appear in that court and I hold that Air France was not duly served with the process of the original court within the meaning of s. 3 (2) (c) of the Act which is contained in Part II of the Act.

There is one other matter to which I wish to refer. Registration under Part II is discretionary and subject in all the circumstances of the case to the court considering it just and convenient that the judgment should be enforced in Kenya. This judgment was entered in default of appearance apparently without any sort of formal proof. The suit is said to have been a suit for damages for dilapidations in breach of a contract of tenancy. I think it is virtually certain that it was judgment in a claim for unliquidated damages which should have been assessed after some sort of proof. This is a circumstance which inclines me to hold that the judgment should not have been registered under Part II of the Act and if registered as it was then my inclination would be to set the registration aside.

When in addition it appears that the defendant was never duly served and was at best served by a form of substituted service which if all the circumstances had been known probably should not have been made I consider that apart from

the provisions of s. 3 (2) (c) it would not be just and convenient to allow this judgment to be enforced in Kenya.

The registration is ordered to be set aside. The applicant will have his costs.

Application allowed.

For the applicant:

Kaplan & Stratton, Nairobi

K. B. Keith

For the respondent:

Akram & Esmail, Nairobi

S. M. Akram

Otis Elevator Co, Ltd v Bhajan Singh and others
[1967] 1 EA 78 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	17 November 1966
Case Number:	23/1966
Before:	Sir Charles Newbold P, Duffus Ag VP and Law JA
Sourced by:	LawAfrica
Appeal from:	The High Court of Kenya – Miller, J.

[1] Building Contract – Tender by subcontractor addressed to architect – Whether main contractor rendered liable by acceptance by performance.

[2] Contract – Offer and acceptance – Tender by sub-contractor c/o architect – Whether an offer accepted by performance by main contractor – Whether contract brought into existence.

Editor's Summary

The defendants, a firm of building contractors, were erecting a building which required a lift. The plaintiff tendered for the erection of this lift and addressed the tender to the architects. The defendants replied to the tender, accepting the quotation in the sum of Shs. 85,700/- for the supply and erection of the lift. Because of an increase in customs duty, the plaintiffs had to pay more than anticipated for materials and parts used in the erection of the lift and they sought to recover this additional expense under cl. 3 in the tender which included inter alia the words, “3. This price is based on . . . custom duties . . . in effect on the date of this proposal, and this price is subject to adjustment for the amount of

increased or decreased cost resulting from any cost changes in these items” The defendants denied liability firstly on the ground that no contract had been made between the plaintiffs and the defendants and secondly that if any contract did exist between the plaintiffs and the defendants, the contract did not contain the particular cl. 3 above.

Held –

- (i) on the pleadings, the defendants clearly admitted the contract between them, but even apart from this, the letter written by the defendants in reply to the quotation to the architects amounted to an offer to accept that quotation; which offer was accepted by the plaintiffs by their conduct in performing the works and confirmed by the subsequent payment of the full amount quoted as contract price;
- (ii) the contract was based on the quotation which was sent to the architects and the defendants could not accept only part of that quotation and disregard the other part;
- (iii) cl. 3 applied and the plaintiffs were entitled to recover the additional amount.

Appeal allowed.

Case referred to in judgment:

(1) *Boulton v. Jones* (1857), 27 L.J.Ex. 117.

The following judgments were delivered:

Judgment

Sir Charles Newbold P: This is a perfectly clear case. It is also an example of the dangers of trying to take a short cut. By agreement no evidence was taken in this case and the judge was asked to decide the points raised on the pleadings on the admissions therein, on certain facts admitted consequent upon notice to admit facts and on certain facts agreed at the commencement of the argument. This is normally a very dangerous course for a plaintiff to pursue. Very frequently he finds that he has failed to place a requisite fact before the court or the facts placed before the court are such that they are capable of misinterpretation or misconstruction which would not exist if evidence had been called.

Be that as it may, what are the facts which were before the trial judge and on which he was asked to deliver judgment. They are that the defendants, a firm of building contractors, was erecting a building apparently for the University College, Dar-es-Salaam. Even this is not perfectly clear, but I think it can reasonably be inferred that this building required a lift. The plaintiffs tendered for the erection of this lift and they addressed the tender to the architects. At some stage this tender came into the hands of the defendants who then wrote a letter signed by them on May 9, 1963 to the plaintiffs in these terms:

“We have the pleasure to inform you that as desired by the architects we hereby accept your quotation in the sum of Shs. 85,700/- for the supply and erection of one electric passenger lift to nine storey block in connection with the above.”

It appears that the lift was installed and that by reason of an increase in customs duty the plaintiffs had to pay more than they had anticipated in respect of the various materials and parts used in the erection of this lift. They then sought to recover this additional expense under a clause in the tender documents which reads as follows:

“3. This price is based on local erection labour rates, cost – of – living allowance and other obligatory payments in respect of such labour, foreign exchange rates, ocean freight rates, marine insurance rates, war risk insurance rates, customs duties, clearing charges, dock dues and railage rates, in effect on the date of this proposal, and this price is subject to adjustment for the amount of increased or decreased cost resulting from any cost changes in these items. The adjustment in price resulting from each of the foregoing clauses may be invoiced by us as soon as the amount thereof is ascertainable.”

The price referred in this clause was the price of Shs. 85,700/- which is set out in the tender made by the plaintiffs and addressed to the architects and which came to the hands of the defendants and in respect of which the defendants wrote the letter to which I have referred. Now it is agreed by the parties that as a result of increased customs duty the plaintiffs paid Shs. 15,244/- and it is this sum which the plaintiffs sought to recover. When they sought to recover this amount the defendants denied liability and they wrote a letter dated May 3, 1965, to the advocates for the plaintiffs. I shall not read this letter but the effect of this letter is that the defendants were denying liability first, on the ground that no contract had been made between the plaintiffs and the defendants, it being alleged that any contract for the erection of this lift was made

between the plaintiffs and the architects, and, secondly, that if any contract did exist between the parties, that is, between the plaintiffs and the defendants, the contract was for the erection of the lift at the specified sum of Shs. 85,700/- and the clause which I read did not permit the plaintiffs to recover any additional customs duties which he may have paid. Following the correspondence the plaintiffs filed their plaint and by paras. 3 and 4 of their plaint it is alleged that a contract had been made between the parties by correspondence during 1963 under which the plaintiffs had agreed to erect for the defendants a passenger lift and that contract contained the clause to which I have already referred. The defence in paras. 2 and 3 is as follows:

- “2. The defendants admit para. 3 of the plaint but state that they (the defendants) accepted the quotation made by the plaintiff company to a firm of architects at Dar-es-Salaam for the supply and erection of the electric passenger lift in question in the sum of Shs. 85,700/- which sum the defendants have paid to the plaintiff company.
3. The defendants deny the allegations contained in para. 4 of the plaint and put the plaintiff company to a strict proof thereof.

Now it seems to me that the defence is clear admission of the existence of a contract between the plaintiffs and the defendants but a denial that the contract contained the terms under which the plaintiffs are seeking to recover this amount. Counsel for the respondents urged, with some justification, that the case appears to have been conducted before the trial judge on the basis of no admission of a contract and that one of the issues before the trial judge was whether or not a contract existed between the parties in addition to the other issue as to whether any such contract contained the term in question. It may be that that is what happened. Even if that was so, it does not, I think, dispose of this admission in the defence, which to my mind is in the clearest terms, of the existence of a contract. This is another example of the dangers of this type of short cut procedure. Be that as it may, the trial judge gave judgment after hearing argument on such facts as he had before him. These facts, as I say, were in the pleadings, the admissions following upon notice to admit facts, together, of course, with the documents which were put in by consent. The trial judge gave judgment for the defendants. I confess to some uncertainty as to the precise grounds for this judgment. Having set out the various facts and commenting upon the documents the trial judge at the very end of his judgment states as follows:

“This court holds that there is not enough evidence before it to enable it to construe or find that the defendants are liable for the payment of the increased customs duties claimed by the plaintiff company. The plaintiff company have failed to prove their case.”

I find some difficulty from that passage and from the whole of the judgment in coming to a conclusion as to the precise reasons for the decision of the judge. That passage may mean either that he found that no contract existed, or that a contract did exist but that it did not contain this term, or, from the way in which it was worded, that there was no sufficient evidence for him to come to a conclusion one way or the other. If the latter was the meaning for the trial judge, then I have a good deal of sympathy with him because, as I have said, this type of a short cut procedure is not to be encouraged. However, poor as may be the tools with which the plaintiffs asked the trial court and now ask this court to come to a conclusion, we nevertheless must examine the position in the light of the admitted facts and the documents which were put in by consent.

Now, as I have said, it seems to me a matter beyond doubt that the defendants have admitted the existence of a contract. Counsel for the respondent, however, has urged that having regard to the procedure which was adopted before the

court it is open to him to argue no contract. I do not think that it is, but so that I may deal with the points which he has raised, I will assume that it is open to him to do so. He has urged that the facts disclose an offer by the plaintiffs to the architects, which offer was, according to the plaintiffs, accepted by the letter of May 9. He submitted, as a matter of law, that an offer made to one person cannot be accepted by another person with the result that the acceptance creates a contract. I accept that. I think that it is not possible, save in the most unusual circumstances, for the acceptance by Y of an offer made to X to create a contract between Y and the offeror. He referred to authority in support of that, in particular the words of the judges in the *Boulton v. Jones* case (1). In his circumstances, however, he very properly stated that this letter could also be construed as a counter – offer by the defendants. I think that is the proper way in which it could be regarded and that is in fact the way in which the parties regarded it. It was a counter-offer by the defendants stating in effect this: with reference to the offer which you made to the architects to supply and instal a lift on the terms of that tender we are prepared to enter into a contract with you on those terms for the installation of that lift. I would agree with counsel for the respondent that the letter of May 9 is not an acceptance; it is a counter-offer and that counter-offer was accepted by the performance of the contract. I think beyond question of doubt that is what all the parties involved in this matter understood to be the position and that is what in law I consider was the position. It was perfectly open for the plaintiffs by their conduct after receiving this letter to accept the counter-offer and proceed to instal the lift. The fact that at no time did the main contractors object to this shows quite clearly that that is what the parties understood. What also puts the matter beyond any question of doubt is the fact that at the end of the contract the defendants paid the sum of Shs. 85,700/- and in the admitted facts which are set out at the beginning of the argument the defendants admitted that that payment was made under the contract. So on the first issue, that is, whether or not there was a contract, in my view that issue is disposed by the pleadings; but even if it was not disposed of by the pleadings such facts as were before the court made it quite clear that there was a counter – offer accepted by the parties. I should here, I think, deal with some submissions by counsel for the respondent in relation to the terms of this contract in so far as they were referred in support of the submissions that no contract existed between the plaintiffs and the defendants. He urged, with some justification that cll. 14 and 15 of the last page of the tender, which in fact is the contractual part of the tender, the first part being only a specification, would seem to make it quite clear that the contract was not between the plaintiffs and the defendants. I accept that there is considerable force in that, but, as pointed out by counsel for the appellant, cl. 14 contains the words “unless otherwise specifically agreed” and an agreement, specific or otherwise, may arise just as much from conduct as it may arise in writing. The conduct of the plaintiffs in installing the lift consequent upon the letter of May 9, is, I think, a clear indication of a specific agreement that the plaintiffs and the defendants will treat each other as principals. Counsel for the respondent also referred to various clauses in the specification which suggest that the contract would normally be with the owner. While this is so we must give business efficacy to this contract having found that it existed. These clauses must be read in a liberal manner, in a manner as meaning nothing other than this: that it is the duty of the defendants to ensure that either they, in so far as lies within their power, or the owners provide the necessary facilities to the plaintiffs for the erection of the lift in accordance with the terms which are stated in the contract. In so far as there are clauses in the specification which disclose a liability on the plaintiffs to the owners for the installation and completion of the lift, then it remains for decision when the case arises as to whether such clauses are enforceable by the owner. But the existence of these clauses does

not, I think, show, having regard to all the other facts of the case, that no contract was entered into between the parties.

I now turn to the second part of the submissions, that is, whether if there is a contract, did that contract contain this particular clause? On that I have no doubt whatsoever. As I said at the beginning of my judgment, this is a clear case. When this tender was accepted it was accepted in its entirety, subject to the variations which I have mentioned, and subject to any specific waiver which I have also mentioned, necessary to give business efficacy to the contract. I do not think for a moment that it would have been open to the plaintiffs to instal the lift except in accordance with the specification and in the manner and with the requirements and with the materials set out in that contract. Nor do I think it open to the defendants to say there was a contract, but the contract only required them to pay the specified sum mentioned in their letter and nothing else. Reference to the specified sum in the letter was nothing other than a reference enabling identification of the contract. I am quite sure that if the tender had in terms been addressed to the defendants, the defendants' letter of acceptance would have been precisely the same, because the defendants would have merely have identified the tender in the same way without setting out the various subsidiary clauses which might have affected the tender price one way or the other. I cannot in the circumstances understand how it is open to the defendants to say that cl. 3 is excluded from this contract.

I am quite satisfied from what I have said and for the reasons that I have given that there did exist a contract between the parties and that this contract did contain cl. 3. Now it is admitted by the parties that if that is the position then the plaintiffs expended the sum of Shs. 15,244/- consequent upon the change in customs duties and that they are entitled to their recovery.

For these reasons I would allow the appeal, set aside the judgment of the trial judge and substitute therefore a judgment and decree ordering that the defendants do pay to the plaintiffs the sum of Shs. 15,244/- and, as a consequence, also ordering that the defendants do pay to the plaintiffs the taxed costs of that suit.

Duffus Ag VP: I agree with my Lord the President. There are two questions in this appeal, first, was there a contract between the plaintiff and the defendants and secondly, did that contract contain cl. 3 whereby the defendants agreed to pay for the increased cost of materials due to an increase in customs duty. In my view, on the pleadings the defendants clearly admitted that there was a contract existing between them. However, counsel for the respondent has pointed out that in the arguments before the High Court, and this was not altogether clear, counsel did address on the question as to whether the contract was not between the appellant and the architects. My view is that the defendants must be bound by the pleadings, but that even apart from this on the evidence before the court and on the admissions in the pleadings that, and here I agree with the learned President, the letter written by the defendants in which they referred to the quotation to the architects, amounted to an offer to accept that quotation and that that offer was accepted by the appellants by its conduct in performing the work, and confirmed by the subsequent payment in full of the amount quoted as the contract price. It is therefore clear that there was a contract between the parties. The question then is what was that contract? Again, here I think it is quite clear that the contract was based on the quotation which was sent to the architects and I do not think that the respondents can accept only a part of that quotation and disregard the other part. In my view the entire quotation or tender applies and this is what the parties accepted as the contract. Clause 3 therefore applied and the appellant is entitled to recover the amount which admittedly he paid for customs

duty as a result of a change in these duties. I agree therefore that this appeal be allowed and judgment entered as my Lord the President has ordered.

Law JA: I consider this case to be governed by the pleadings and admissions in the suit which leave no doubt that the parties entered in a contract for the installation by the appellant of a lift at the University College, Dar-es-Salaam. I do not think it was open on the pleadings for the respondent to contend that the contract was between the appellant and the architects having regard to para. 3 of the defence which admits that the contract was between the appellant and respondent. In any event it is my opinion that it was the intention of all concerned that the building contractors should be the offerees, and that is why the architects sent the tender to the contractors for acceptance, and the contractors accepted it, and the appellant to proceed to instal the lift without further comment or question. Some of the conditions of the tender or quotation are not applicable to a contract by a building contractor and should in my view, be disregarded, including cll. 14 and 15 which would only be appropriate if the contract was with the building owner, which it was not. Clause 3, however, did provide for an increase in the contract price in the event of an increase in customs duty. This was clearly a condition which did apply, and it was accepted by the respondents. I agree that this appeal should be allowed and I agree with the order proposed.

President: Order: Appeal allowed with costs, the order of the High Court set aside. Substituted therefore an order giving judgment to the plaintiffs in the sum of Shs. 15,244/- with interest; defendants to pay the plaintiff's taxed costs.

Appeal allowed.

For the appellant:

Archer and Wilcock, Nairobi

P. le Pelley

For the respondent:

J. K. Winayak & Co., Nairobi

J. M. Nazareth, Q.C. and J. K. Winayak

Tuwamoi v Uganda
[1967] 1 EA 84 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	22 December 1966
Case Number:	148/1966
Before:	Sir Charles Newbold P, Duffus Ag VP and Law JA
Sourced by:	LawAfrica
Appeal from:	The High Court of Uganda at Moroto – Saldanha, Ag.J.

[1] *Criminal Law – Murder – Evidence – Dying declaration – Tests as to reliability – Confession both retracted and repudiated – Procedure to be followed by prosecution – Evidence Ordinance, s. 30 (U.).*

[2] *Evidence – Dying declaration – What tests for reliability necessary.*

[3] *Evidence – Statement retracted and repudiated by later statement – Procedure to be followed – Whether corroboration necessary – Evidence Ordinance, s. 30 (U.).*

Editor's Summary

During the night of November 2, 1964, the appellant allegedly came to the home of the deceased, and killed her with his spear. The deceased's daughter, who was awakened by the noise, found her mother dying, and the judge accepted that the deceased made a dying declaration to her daughter implicating the accused. The accused made a statement in the nature of a confession, but next day, on November 4, 1964, made a further statement which was a complete denial of the crime. Only the first statement was tendered by the prosecution in the lower court.

Held –

- (i) the dying declaration should have been tested for reliability as to identification;
- (ii) a trial court should accept with caution a confession which has been retracted or repudiated or both retracted and repudiated and must be fully satisfied that in all the circumstances of the case that the confession is true;
- (iii) if the accused makes more than one statement to the police, the prosecution should tender all statements made by the accused.

Appeal allowed. Conviction set aside and sentence quashed.

Cases referred to in judgment:

- (1) *Pius Jasunga v. R.* (1954), 21 E.A.C.A. 331.
- (2) *Mibinga v. Uganda*, [1965] E.A. 71.
- (3) *Maude v. R.*, [1965] E.A. 193.
- (4) *Okale v. R.*, [1965] E.A. 555.
- (5) *R. v. Mutwiwa* (1935), 2 E.A.C.A. 66.
- (6) *Emperor v. Shambhu and Another*, I.L.R. (1932), 54 All 350.
- (7) *R. v. Keisheimeiza* (1940), 7 E.A.C.A. 67.
- (8) *R. v. Robert Sinoya* (1939), 6 E.A.C.A. 155.
- (9) *R. v. Durgaya*, 3 Bom. L.R. 441.
- (10) *Toyi v. R.*, [1960] E.A. 761.
- (11) *R. v. Kaperere* (1948), 15 E.A.C.A. 56.
- (12) *Miligwa Mwinje v. R.* (1953), 20 E.A.C.A. 255.
- (13) *Kamau v. R.*, [1965] E.A. 501.

- (14) *Pyaralal Melaram Bassan v. R.*, [1961], E.A. 521.
- (15) *R. v. Labasha* (1936), 3 E.A.C.A. 48.
- (16) *R. v. Mutwiwa Maingi* (1935), E.A.C.A. 66.
- (17) *Gathugu v. R.* (1953), 20 E.A.C.A. 294.

C.A.V.

Judgment

Duffus Ag VP, read the following judgment of the court: This is an appeal against a conviction for a murder alleged to have occurred over two years ago. We are informed that the reason for the excessive delay in bringing this matter to trial is due to the fact that this is the appellant's second trial. He was previously tried and convicted but the Court of Appeal ordered a re-trial which was only completed in August this year.

The prosecution case is that the appellant, during the night of November 2, 1964, came to the home of the deceased armed with a spear and there he used his spear and killed the deceased, wounded a man called Lokopirimoi, with whom the deceased was then living, and also speared four head of cattle. The appellant had been married to Nacham, the daughter of the deceased, but they had separated. It appears that Nacham's parents had returned five head of cattle to the appellant as being part of the dowry but there was a dispute as to another five head of cattle and an amount of Shs. 65/- which the appellant alleged to have been outstanding as part of the dowry.

Nacham was the first prosecution witness and claimed that she was awakened by hearing the deceased and Lokopirimoi shouting that Lopech (the appellant) was killing them. She ran out and saw her mother lying on the ground still alive but dying with wounds on her back and stomach and she then saw the appellant in a kraal about ten yards away spearing the cattle. She avers that her mother, who could still speak a little, told her that she had been killed by Lopech and then her mother died. At the trial the judge admitted the statement made to the police by this witness two days after the incident for the purpose of contradicting her sworn evidence. In that statement Nacham had said that she saw a person whom she did not know spearing their cattle and that she did not know this person because, she said "it was too dark I could not see him properly". She did, however, set out the fact that her mother was still alive and had told her that Lopech had speared her. In his judgment the trial judge rejected Nacham's evidence to the effect that she had recognized the appellant but accepted as a fact that the deceased had made a dying declaration to her. When the case came for trial on the second occasion the paramour of the deceased, Lokopirimoi, had disappeared and the only evidence against the appellant apart from the statement made by the deceased as to her cause of death was a statement in the nature of a confession made by the appellant on November 4, 1964. The police took two statements from the appellant. One was this confession of November 4, 1964, made to Corporal Mututa with Corporal Acila acting as his interpreter, and the other statement, a complete denial of the crime, was made the following day, November 5, 1964, to Sergeant Essiagu through Constable Oyoo as the Karamojong interpreter.

In his judgment the trial judge accepted Nacham's evidence as to the dying declaration made by the deceased and he also accepted that the appellant had confessed in a statement made on November 4, 1964, and he found that this statement was a repudiated and not a retracted statement and did not therefore need corroboration.

The two main grounds of appeal are based on the judge's findings on these two matters and on the fact that he relied on this evidence in finding the appellant guilty of murder. We would here set out the relevant portions of the judgment on these matters. In dealing with Nacham's evidence the learned judge said:

"I do not think she recognised the accused as being the man who speared the cattle.

I am satisfied that Nacham is speaking the truth, that she both heard her mother cry out mentioning accused's name and later heard her mother say that Lopech had speared her. It is usual to look for corroboration of the evidence of a dying declaration but there is corroboration as will appear hereafter."

On the question of the statements the judge said:

"I held a trial within a trial in order to decide whether accused made the statement which Corporal Mututa said he did and, if so, whether he made it voluntarily. In the ruling which I delivered at the end of the 'trial within a trial' I said I was satisfied that accused had been properly cautioned, that he had not been beaten, that he had made it voluntarily and that Corporal Mututa had recorded exactly what accused said to him.

At the time of the 'trial within a trial' the statement made by accused to Sergeant Essiagu on November 5 at Kotido was not in evidence.

As I pointed out earlier Mr. Kelshiker has sought to put it in in order to prove that the first statement must have been irregularly recorded and even the police must have known this, hence the recording of the second statement.

But Sergeant Essiagu has said that he was instructed by Assistant Inspector Olum, the O/C. Crime, Kotido, to record it because the first statement was recorded in the language used by the accused. This is very likely a true explanation. I see nothing sinister about the recording of this second statement. The position might have been different if the statement denying the killing had been made before the confession admitting guilt. As it happened the first statement was in accordance with 'The Evidence (Statements to Police Officers) Rules, 1961'. But a police officer not thoroughly conversant with the law could be excused for thinking that the statement ought to be recorded in the language used by the accused.

The statement made by accused to Corporal Mututa is a clear admission of his guilt. The accused goes into detail and describes the circumstances in which he speared Tore and why he did so.

This confession on the part of the accused is a repudiated one and not retracted and therefore needs no corroboration. This confession is sufficient to convict the accused. In addition it provides corroboration of Tore's dying declaration to Nacham."

The learned trial judge concluded his judgment as follows:

"Both assessors are of the opinion that accused is not guilty and should be acquitted. Both appear to have based their opinion upon the fact that Tore was killed at night when it was dark and it would have been difficult to recognise the person who killed her.

In my summing up I had said that the only person who claimed to have seen and recognised the accused was Nacham and that her evidence on this point was clearly unreliable because in her statement to the police she had said that she had not recognised the person who had speared the cattle because it was dark.

I had also said that accused's confession to Corporal Mututa, if they believed that he made it and made it voluntarily, was sufficient proof of his guilt and also provided corroboration the dying declaration to Nacham if they believed Nacham's evidence on this point. But the assessors appear to have ignored completely the evidence of the confession.

For reasons I have stated I myself have no doubt at all about accused's guilt and I find him guilty of murder contrary to s. 183 of the Penal Code and convict him of this offence."

It is clear from this judgment that the trial judge has based his verdict on the dying declaration that the deceased made to Nacham and also on the appellant's first statement to the police which he found to be a repudiated statement not needing corroboration.

We will first deal with the dying declaration. Counsel for the appellant submitted that the learned judge having accepted that the dying declaration was made did not then proceed to examine the dying declaration itself and the circumstances in which it was made in order to determine whether the statement made by the deceased was true, i.e. that the deceased did in fact recognise the appellant as her assailant. Counsel for the appellant referred us to the judgment of this court in the case of *Pius Jasunga v. R.* (1). In this and in numerous other cases this court has stressed the caution to be exercised in accepting statements made by a deceased person. Recent judgments of this court on this point are *Mibinga v. Uganda* (2), *Mande v. R.* (3) and *Okale v. R.* (4).

In this case the attack took place at night and the trial judge has not accepted the evidence of the only eye-witness, Nacham, as she had stated in her statement to the police that she could not recognise the person spearing the cattle because it was too dark. Both the assessors who heard all the evidence advised the judge that the appellant be acquitted as this incident occurred at night and they were not satisfied as to the identity of the appellant. With respect to the learned trial judge, he does not appear to have adequately considered whether or not he should have accepted the identification made by the deceased as being true and this applies whether the evidence was considered as a part of the *res gestae* or to have been a dying declaration admissible under the provisions of s. 30 of the Evidence Ordinance. Nowhere in his judgment has the judge considered this question. He does deal with the assessors' opinions but he apparently rejects their opinions as he found that the confession was voluntary and was sufficient proof of the appellant's guilt and that the assessors appear to have ignored this evidence in giving their opinions.

We will now consider the other evidence relied on by the trial judge in arriving at his verdict of guilty. This was the first statement made by the appellant to the police, the confession. In considering this question we will also consider the distinction which has been made in these courts over the years between "a retracted statement" and "a repudiated statement". The trial judge in his judgment said:

"This confession on the part of the accused is a repudiated one and not retracted and therefore needs no corroboration. This confession is sufficient to convict the accused. In addition it provides corroboration of Tore's dying declaration to Nacham."

The appellant in this case made two statements to the police. One, which amounted to a confession, made on November 4, 1964, and the other a complete denial of the offence on the following day. We note the prosecution only tendered the first statement and left it to the defence to call evidence to prove and produce the second statement. In cases like this when the accused makes more than one statement to the police, one in which he admits the offence and the other in which he denies it, it is our view that the prosecution should tender all the statements made by the accused in order that the court should have all the relevant facts before it when it comes to decide the vital point as to whether or not the contents of any of the statements are true. In this case no injustice was done as the prosecution apparently made the facts known to the defence

and the witnesses available, so that the defence was able to call the necessary evidence on this matter.

We now come to the distinction that has been made over the years between a statement “retracted” and a statement “repudiated”. The basic difference is, of course, that a retracted statement occurs when the accused person admits that he made the statement recorded but now seeks to recant, to take back what he said, generally on the ground that he had been forced or induced to make the statement, in other words that the statement was not a voluntary one. On the other hand a repudiated statement is one which the accused person avers he never made.

We have had some difficulty in tracing how this distinction arose. The first reported decision in East Africa relating to retracted confessions appears to have been in 1935. We refer here to the decision of this court in *R. v. Mutwiwa* (5) in which this court held that it would be unsafe to convict on the retracted confession in that case and it adopted as a correct statement of the law the rule of practice referred to by Sir Grimwood Mears, C.J., in *Emperor v. Shambhu and Another* (6) and the judgment quotes this rule as follows ((1932), I.L.R. 54 All. at p. 358):

“The evidentiary value of a retracted confession is very little and it is a rule of practice, as also a rule of prudence, that it is not safe to act on a retracted confession of an accused person unless it is corroborated in material particulars.”

This rule was more fully explained and modified by later decisions and before referring to the decision in 1936 which first made the distinction between a retracted and a repudiated statement, we would refer to some of these decisions. We would first refer to *R. v. Keisheimeiza* (7) and to the following extract from the judgment of the court delivered by Whitley, C.J.:

“We would refer to the judgment of this court in the case of *R. v. Robert Sinoya* (8) in which the authorities are reviewed and the opinion was expressed that the danger of acting upon a retracted confession in the absence of corroboration must depend to some extent upon the manner in which the retraction is made. We agree that in ordinary cases as a general rule when a confession is definitely and categorically retracted it is unsafe for the court to act upon it without corroboration but if after enquiring into all the material points and surrounding circumstances the court is fully satisfied that the confession cannot but be true there is no reason in law why the court should not act upon it. (*R. v. Durgaya* (9)). The law is concisely summarised in Woodroffe and Ameer ali (9th Edn.) at p. 277, in the following words:

‘It is unsafe for a court to rely on and act on a confession which has been retracted, unless after consideration of the whole evidence in the case the court is in the position to come to the unhesitating conclusion that the confession is true, that is to say, usually unless the confession is corroborated in material particulars by credible independent evidence or unless the character of the confession and the circumstances under which it was taken indicate its truth.’ “

We would also refer to the judgment of this court read by Sir Alastair Forbes, V.-P., in *Toyi v. R.* (10) where it was stated:

“We agree that there is no rule of law or practice which requires corroboration of a retracted confession before it can be acted upon. But we think the learned judge was understating the case in merely saying that ‘it is desirable . . . to have such corroboration’. It is a well-established rule of prudence

that it is dangerous to act upon a retracted confession unless it is corroborated in material particulars or unless the court, after a full consideration of the circumstances, is satisfied of its truth – *R. v. Kaperere Mwaya* (11), *Miligwa Mwinje and Another v. R.* (12). With respect, we think that the learned judge's direction, in so far as it fell short of a warning to the assessors that in the absence of corroboration a retracted confession is to be received with great caution and reserve, amounted to a misdirection. However, we were satisfied that in fact in his judgment the learned judge had accepted the appellant's extra-judicial confession as true only after full consideration of the circumstances, and that there was every justification for such acceptance."

In the recent case of *Kamau v. R.* (13) this court set out the rule as at present applied by this court to a retracted confession. This was an appeal from Kenya (Farrell, J.) but the rule as thus set out would equally well apply to Uganda and Tanzania. We quote ([1965] E.A. at p. 505):

"As we have earlier said, the other material evidence against the appellant was her own cautioned statement, which she retracted at the trial. In relation to this, the learned judge directed the assessors that it is dangerous to rely upon a retracted confession in the absence of corroboration, but that they might do so if fully satisfied that the confession must be true. He further directed them that they might properly treat the evidence of Wambui as corroboration of the cautioned statement.

We think that the learned judge's direction regarding retracted confessions was correct (*Toyi Kalihose v. R.* (10); *Pyaralal Melaram Bassan v. R.* (14)) and that Wambui's evidence, not itself requiring corroboration, was capable of affording corroboration."

The present rule then as applied in East Africa in regard to a retracted confession, is that as a matter of practice or prudence the trial court should direct itself that it is dangerous to act upon a statement which has been retracted in the absence of corroboration in some material particular, but that the court might do so if it is fully satisfied in the circumstances of the case that the confession must be true.

We would then refer to the first case which we can trace which dealt with a repudiated statement as distinct from a retracted confession. This was in 1936 in the case of *R. v. Labasha* (15). In this case the appellant on a charge of murder made a detailed confession of the crime in his statement before the committing magistrate. The trial judge found that the statement had been made freely and voluntarily and that the statement contained nothing but the truth and he convicted the appellant. In the judgment of the court delivered by Sir Sidney Abrahams, C.J. the court said inter alia:

"In the course of our examination of this case the question arose whether the statement of the appellant amounted in the circumstances to a retracted confession. The question is of some importance because it has been ruled by this court in *R. v. Mutwiwa Maingi* (16), following the case of *Emperor v. Mutwiwa Maingi* (16), following the case of *Emperor v. Shambhu and Another* (6), that a retracted confession must be corroborated before a conviction can be founded on it. Denial of a confession embodied in the statutory statement in the committing court has seldom occurred in the courts in these territories so far as we know, and in all probability will seldom occur, but it is of course possible that it may, and it is desirable to know whether such a denial amounts to a retracted confession, and, if not, how it should be regarded.

We can find no authority for holding that a denial that a confession was ever made amounts to a retraction of that confession. To retract a confession is to declare to be false a confession which is admitted to have been made. We can also find no authority which requires a court to treat a confession denied as if it were a confession retracted.

In Taylor on Evidence (11th Edn.), at p. 584, the following passage appears:

‘Indeed all reflecting men are now generally agreed that deliberate and voluntary confessions of guilt, if clearly proved, are among the most effectual proofs in the law, their value depending on the sound presumption that a rational being will not make admissions prejudicial to his interest and safety unless when urged by the promptings of truth and conscience’.

We see therefore no justification for discounting the value of a confession believed to have been made because the accused denies having made it, and we are of the opinion that a court may convict upon such a confession if, taking circumstances of the case into consideration, there seems no reason to believe that the confession is not true.”

There are two matters of special significance in this judgment. The first point is that when this judgment was delivered the law as to a retracted statement was still that as set out in the *Mutwiwa* case (16), that is, that a retracted statement should be corroborated by other material evidence before a conviction could safely be founded on it. This judgment was delivered in 1936 before later judgments of this court made it clear that a court can found a conviction on such a statement even if there is no corroboration, provided that the court is fully satisfied in all the circumstances of the case that the confession must be true. We doubt very much whether this court would have made the distinction between a retracted and a repudiated confession if the rule of practice had been then so widely stated.

The other point which we would stress is that in the *Labasha* judgment (15) this court whilst holding that the rule requiring corroboration did not apply, did however also set out the standard of proof which would be required in a repudiated statement; that is, the court laid down that a trial court may convict upon such a confession even if subsequently repudiated, if after taking all the “circumstances of the case into consideration there seems no reason to believe that the confession is not true”. The general effect of this condition would appear to be that the weight to be placed on the evidence of a confession is the same whether it be subsequently retracted or repudiated; that is, that the court might found a conviction on such a statement if it is satisfied in all the circumstances of the case that the confession must be true.

The position however, with regard to a repudiated confession has not always been very clear. Thus in the case of *Gathugu v. R.* (17) this court in its judgment said ((1953) 20 E.A.C.A. at p. 296):

“It is perhaps worth while to emphasize the distinction in principle between a statement or confession which is retracted and one which is repudiated. In the former case the court of trial looks for corroboration as a matter of practice if not of law to assist it in determining which of the two stories told by the accused is likely to be the truth. In the case of repudiation once the court is satisfied that the accused did in fact make the statement, it is reasonable inference to draw in the absence of contrary indications that it has been denied because of its truth.”

On reconsideration of the position we find it difficult to accept that there is any real distinction in principle between a repudiated and a retracted confession.

This decision appears to narrow down considerably the rule of practice laid down in 1940 in the *Keisheimeiza* case (7) and also the standard of proof required in a repudiated statement as set out in 1936 in *R. v. Labasha* (15).

We would attempt to simplify the position. First the onus of proof in any criminal case is on the prosecution to establish the guilt of an accused person. A conviction can be founded on a confession of guilt by an accused person. The prosecution must first prove that this confession has been properly and legally made. The main essential for the validity of a confession is that it is voluntary, but the other legal requirements of each territory must also be established. Thus in Uganda if the confession is made to a police officer then it must have been made to an officer of the rank of corporal or upwards and also in accordance with the Evidence (Statement to Police Officers) Rules, 1961. If the court is satisfied that the statement is properly admissible and so admits it, then when the court is arriving at its judgment it will consider all the evidence before it and all the circumstances of the case, and in doing so will consider the weight to be placed on any confession that has been admitted. In assessing a confession the main consideration at this stage will be, is it true? And if the confession is the only evidence against an accused then the court must decide whether the accused has correctly related what happened and whether the statement establishes his guilt with that degree of certainty required in a criminal case. This applies to all confessions whether they have been retracted or repudiated or admitted, but when an accused person denies or retracts his statements at the trial then this is a part of the circumstances of the case which the court must consider in deciding whether the confession is true.

The legislatures in these countries have recognized the very real danger that exists of confessions being improperly obtained or indeed of being deliberately falsified and have laid down the standard required and the various safeguards applicable. The courts have also been alive to this danger and have by numerous decisions over the years stressed the caution to be exercised by trial courts, and it is from these decisions that the present rule of practice or prudence has evolved. But this rule does no more than stress the care with which a court should act in dealing with a confession.

We would summarise the position thus – a trial court should accept any confession which has been retracted or repudiated or both retracted and repudiated with caution, and must before founding a conviction on such a confession be fully satisfied in all the circumstances of the case that the confession is true. The same standard of proof is required in all cases and usually a court will only act on the confession if corroborated in some material particular by independent evidence accepted by the court. But corroboration is not necessary in law and the court may act on a confession alone if it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true.

We would now consider the facts of this case. The first point is that this confession appears to have been both retracted and repudiated. Retracted because the appellant said that he was beaten and forced to thumbprint the statement and also because the defence alleged, and this was admitted by Corporal Acila, that he told the appellant that it would be better that he told the truth. Repudiated because he denies having admitted that he killed the deceased. Then there is the fact that the two statements are so entirely different in content, and yet were made on succeeding days, and also the fact that Corporal Mututa who took the first statement could not speak the appellant's language and did not understand what he was saying. He therefore had to depend entirely on the interpretation made by Corporal Acila, a person who could not read or write. Corporal Mututa thought that the interpreter was speaking to the appellant in the Karamojong language and so recorded this in the statement

but in fact the interpreter said it was in the Ele language. The appellant alleged that the interpreter, Acila, was his enemy as he was a member of the Jie tribe who were not on good terms with the appellant's tribe, the Dodoth. There is also the fact that Corporal Mututa was the investigating officer. The second statement taken on the following day by Sergeant Essiagu with a different interpreter and taken this time in the Karamojong language gave a full account of the appellant's relationship with the deceased and her daughter and of his movements at the relevant time. The accuracy and admissibility of this statement was not challenged. It is at least strange that the appellant should have so quickly changed his mind and while confessing his crime on one day should, on the following day so completely and fully deny the charge. Another factor that is to be borne in mind is that Corporal Mututa had to depend entirely on the evidence of Corporal Acila, an illiterate man whom the appellant alleged was biased against him and that Corporal Mututa only recorded what Acila told him. This confession therefore depended entirely on the truthfulness of Corporal Acila.

This was a case that needed very careful consideration and it does not appear to us that the learned trial judge fully directed himself either on the question of the reliability of the deceased's dying declaration having regard to the circumstances in which her identification of the appellant was made or as to the truthfulness and accuracy of the confession. There is also the fact that both the assessors advised him to acquit the appellant. After full consideration we are of the view that it would be unsafe to allow this conviction to stand and we therefore allow this appeal and set aside the conviction and quash the sentence.

Appeal allowed. Conviction and sentence quashed.

For the appellant:

Dalal and Singh, Kampala

S. H. Dalal

For the respondent:

Attorney-General, Uganda

A. M. Khan

J K Chatrath and another v Shah Cedar Mart

[1967] 1 EA 93 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	26 January 1967
Case Number:	14/1966
Before:	Sir Charles Newbold P, Duffus and Law JJA
Sourced by:	LawAfrica
Appeal from:	The High Court of Kenya – Miles, J.

[1] Distress – Excessive amount – Whether distress for excessive amount unlawful Site tax wrongly included – Distress for Rent Act, s. 3 (1) (K.).

[2] Estoppel – Landlord and tenant – “Tenant” estopped from denying tenancy – Evidence Act, 1963, ss. 120, 121 (K.).

[3] Estoppel – Estoppel against statute – Whether Transfer of Property Act (K.) prevents tenancy being created by estoppel by arrangement between parties.

[4] Landlord and Tenant – Tenancy by estoppel – Evidence Act, s. 120 and s. 121 (K.).

[5] Landlord and Tenant – Distress – Whether lawful – Appointment of receiver – Registration of Titles Act (Cap. 281), s. 46 (K.) – Distress for Rent Act (Cap. 293), s. 3 (1) (K.).

[6] Landlord and Tenant – Tenant holding over – Liability for double rent – Distress for Rent Act, s. 14 (K.).

[7] Mortgage – Powers of “receiver” invalidly appointed under a charge – Subsequent tenancy by estoppel – Whether “receiver” can distrain for rent.

Editor’s Summary

The respondents carried on business on premises of which the first appellant claimed to be the duly appointed receiver under a charge and the landlord. The first appellant authorised the second appellant, a bailiff, to carry out distress on the premises on October 11, 1962, in respect of rent due for September and October 1962 and site tax for 1962 of Shs. 5,283/20. The lower court found that the first appellant’s appointment as receiver on behalf of the chargee of the premises was unlawful and that therefore no relationship of landlord and tenant existed between the first appellant and the respondent. The pleadings admitted an agreement between the parties in terms of which the respondents were to be tenants from month to month of the first appellant and rent of Shs. 1,500/- per month was payable by the respondents to the chargee; in evidence the respondents admitted that they looked on the first appellant as the person entitled to receive the rent on behalf of the chargee. There was no dispute over the fact that the respondents were in occupation of the premises or that they owed one month’s rent at the time of distress; but there was an issue as to whether or not the respondents had held over, which was the subject of a counter-claim for double rent by the first appellant.

Held –

- (i) the respondents had entered into a tenancy agreement with the first appellant and the chargee; the relationship of landlord and tenant existed between the first appellant and the respondents;
- (ii) the respondents were estopped from denying the tenancy by reason of s. 120 of the Evidence Act;
- (iii) the fact that the amount in respect of which the distress was carried out wrongly included an amount for site tax did not render the distress illegal or excessive;

- (iv) therefore, the respondent's claim for damages for unlawful distress must be dismissed;
- (v) on the facts, the respondents had held over and were therefore liable for double rent under s. 14 of the Distress for Rent Act.

Appeal upheld.

Cases referred to in judgment:

- (1) *Regent Oil Co., Ltd. v. Gregory*, [1965] 3 W.L.R. 730.
- (2) *Tancred v. Leyland* (1851), 117 E.R. 1036; [1843-60] All E.R. Rep. 304.
- (3) *Glynn v. Thomas* (1856), 156 E.R. 1085.
- (4) *Phillips v. Whitsed* (1860), 121 E.R. 301.
- (5) *Clarke v. Grant*, [1949] 1 All E.R. 768.

C.A.V.

The following judgments were read:

Judgment

Duffus JA: The respondents, a firm of timber merchants, carried on business in the name of Shah Cedar Mart, on premises in the industrial area, Nairobi. They brought this action against the two appellants claiming damages in respect of an alleged illegal distress for rent on these premises. The first appellant claimed to be the duly appointed receiver for the chargee of these premises and to be the landlord of the respondents and it is admitted that he authorized the second appellant, a bailiff, to carry out the distress complained of. The first appellant counterclaimed for double the rent due for December, 1962, by virtue of the Distress for Rent Act on the ground that the respondents, after giving notice to leave at the end of November, 1962, stayed over in these premises until January 1, 1963.

After a lengthy hearing the learned trial judge found that there had been an illegal distress and he gave judgment against both appellants jointly and severally for damages for the illegal distress, and also for trespass to these premises at the time of the distress. He dismissed the counterclaim.

The facts in this case are complicated and difficult to ascertain. It is however agreed that Zaverchand Shah one of the four partners in the respondent firm was the registered proprietor of the premises in question and that these premises were subject, inter alia, to three charges to Mr. G. K. Desai. The charges were all executed in 1957 and then an instrument of variation was made in 1960, which purported to give the chargee, Mr. Desai, a statutory power of sale. It is admitted that Mr. Shah was at the relevant period in 1962 hopelessly in arrears in his payments of principal and interest. It is also agreed that the respondents were in occupation of and were carrying on their business on these premises. It is the appellants' case that the chargee, Mr. Desai, appointed the first appellant as the receiver of these premises in February, 1962, and that following this appointment, the first appellant, as receiver, rented these premises to the respondents and that the distress was carried out as a result of arrears of rent due under this tenancy. It is agreed that the respondents were in occupation of these premises before their tenancy started. The distress on October 11, 1962, is admitted, and the trial judge found that there was no

evidence to show that the distress was levied other than in a normal manner.

The main issue in this case is simply whether the distress was lawful or illegal; and to decide this the court has to determine whether at the time of the distress the relationship of landlord and tenant existed between the first appellant and the respondents and, if so, what, if any, rent was due at the time of the distress.

The learned trial judge held that the appointment of the first appellant as receiver was invalid and accordingly he had no right or title to enter into the tenancy agreement. In his judgment he said:

“I hold accordingly that the appointment of the first defendant as receiver was invalid. It follows from this that the first defendant had no right or title to enter into a tenancy agreement with the plaintiffs. From this it again follows that the relationship of landlord and tenant did not exist between the plaintiffs and the first defendant at the time when the distress was levied, and it was therefore illegal.”

As a result of this finding the trial judge made his award of damages against both appellants.

Counsel for the appellants relied on three alternative grounds to support the existence of the relationship of landlord and tenant as between the first appellant and the respondents.

He submitted first that the chargee Mr. Desai did possess the statutory power to appoint a receiver under the provisions of s. 46 of the Registration of Titles Act (Cap. 281) and that the first appellant's appointment as receiver was therefore a valid one. Counsel also sought to justify this appointment by virtue of s. 100A (1) of the Transfer of Property Act. He also submitted that if the appointment of the receiver was not valid, then the chargee, Mr. Desai, had entered into possession of the mortgaged property through the receiver, the first appellant, acting as his agent, and accordingly the first appellant had acted as his agent in entering into the tenancy agreement with the respondents. The third alternative was a submission that in any event the respondents were estopped both by their pleadings and conduct from denying that the relationship of landlord and tenant existed between the first appellant and themselves.

I would first consider here the question of estoppel. The appellants relied on the provisions of s. 121 of the Evidence Act, 1963, the relevant portion of which states:

“No tenant of immovable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had at the beginning of the tenancy a title to such immovable property.”

From the pleadings and from the evidence called for the respondents it is, in my view, clear that the respondents admit that they were in possession of these premises by virtue of a agreement entered into between themselves, the first appellant and the chargee Mr. Desai, by which it was agreed that the respondents rented these premises from the first appellant. I would here refer to the amended plaint, in particular to para. 7 which states:

“(7) In consideration of allowing the plaintiff which at all material times was in possession of the premises to continue to remain in possession of the premises despite default as aforesaid of payment by the chargor to the chargee a verbal agreement was concluded some time in March, 1962, between the chargor for and on behalf of the plaintiff the first defendant and the chargee on the following terms and conditions:

- (i) the plaintiff would be a tenant from month to month of the first defendant.
- (ii) rent in the sum of Shs. 1,500/- per month commencing from March, 1962, was payable by the plaintiff to the chargee.

(iii) such rent was payable in arrears.”

Then followed other pleadings in which the respondents averred that they paid rent to the chargee in accordance with this agreement. In his defence the first appellant also avers at para. 6 that the respondents were at all material times his tenants. There was a dispute between the parties as to the amount of rent payable. The evidence of the chargor, Mr. Zaverchand Shah, one of the partners of the respondent firm, confirms the fact that the negotiations for the tenancy agreement were conducted between himself and the first appellant. In evidence he had this to say:

“We came to a conclusion about our staying in the premises. At the end I was present with Mr. Chatrath and Desai. We reached a conclusion eventually that I should give Shs. 1,500/- every month, to rent those premises because otherwise I was to vacate them. By ‘I’ I mean Shah Cedar Mart, the plaintiff company.”

and then later he said this:

“I recognized that Chatrath was entitled to vacant possession and that rent was due to him on the instruction of Desai. *Letter 8*. I looked on Chatrath as the person entitled to receive the rent. I had paid Shs. 1,500/- every month to Desai as per Chatrath’s instructions.”

and then later Mr. Shah admits that the September rent had not been paid and was in arrears on the date the distress was made, i.e. October 11, 1962.

On the pleadings and on the evidence it is perfectly clear that the respondents admit that at the time the distress was effected they occupied these premises as the first appellant’s tenants, and that they did in fact owe one month’s rent in arrears at the time of the distress. It is also admitted that the chargor, Zaverchand Shah, was very much in default both as regards to the payment of principal and interest on the various charges to Mr. Desai and that Mr. Desai could have taken steps to enforce the security and to have the respondents put out of possession and that it was in consideration of the chargee foregoing his rights and allowing the respondents to remain in possession of these premises, that the chargor for himself and on behalf of the respondents, the chargee Mr. Desai, and the first appellant agreed that the respondents should rent these premises from the first appellant as from March 1, 1962, at a fixed monthly rental. In his judgment the judge upheld the submission of counsel for the respondents to the effect that estoppel could not lie here as there could not be an estoppel against a statute. I quote from his judgment on this point:

“I will assume for the purpose of considering the point of estoppel that the appointment of a receiver was invalid under this section. Does this constitute an estoppel against a statute? In my opinion, it does. Mr. Gautama contends that the plaintiffs entered into a tenancy with the defendant personally and his precise legal status is immaterial. In my view, this contention is not correct. The first defendant had no power to enter into a tenancy with the plaintiffs, except by virtue of his appointment as receiver, and it was upon this basis that the tenancy was negotiated. To hold, in these circumstances, that a tenancy was created by estoppel would be to ride a coach and horses through the provisions of the Transfer of Property Act, relating to the appointment of receivers. Had the plaintiffs attorned tenants direct to the chargee that would have been a clear estoppel. I see *Regent Oil Co., Ltd. v. Gregory* (1). This however is not the case here. I hold accordingly that the plea of estoppel fails.”

I would here again summarise the position between the parties at the time that the tenancy agreement was entered into. The premises were owned by one

of the partners, Zaverchand Shah, who was heavily indebted to the chargee, Mr. Desai, under three legal charges on the property. The respondents occupied and carried on their business on these premises. The terms and conditions of their occupation have not been clearly established here but the case proceeded on the basis that they had no right to continue in occupation as against the chargee, and it is agreed that the chargee could have taken action to enforce his charges. It was in these circumstances that this tenancy agreement was entered into between Zaverchand Shah the owner of the premises for himself and admittedly as agent for the respondents, Mr. Desai, and the first appellant who was clearly also acting on behalf of Mr. Desai.

The terms of that agreement are in dispute, but what is not in dispute was the fact that there was an agreement and that as a result of that agreement:

- (1) The chargee did not proceed to enforce the undoubted rights which existed in him as a chargee, and that
- (2) The respondents were allowed to remain in the premises under the agreement by which they became the tenants of the first appellant, acting as the receiver and agent of the chargee.

In these circumstances I cannot, with great respect, see how this could possibly be said to be an estoppel against the statute. There can be no doubt that it was within the capacity of all the parties to agree that the first appellant should act as an agent or as a receiver for the chargee even if he was not a statutory receiver duly appointed under the provisions of the Act.

It was undoubtedly to the benefit of the respondent firm to become tenants of the first appellant and thus prevent the chargee exercising the undoubted rights which he had to enforce his charges, and the chargee on the other hand forewent these rights.

The doctrine that there can be no estoppel against a statute simply means that an estoppel cannot render valid something that the law makes invalid; so that if a statute declares a transaction to be invalid or expressly declares that something should not be done then the doctrine of estoppel cannot be used to override the specific directions of the law.

With respect to the learned trial judge I cannot see how the arrangement arrived at between the parties resulting in the tenancy agreement could be said to have been prohibited by the Transfer of Property Act or to offend against the provisions of this or any other enactment. I will assume that the appointment of a receiver under s. 69f of that Act does not apply to these charges and further that there was no other statutory provision for the appointment of a receiver, but I can find no provision prohibiting the type of agreement arrived between the parties in this case or declaring any such arrangement to be invalid.

Generally speaking the law allows persons, not under any legal disability, a very wide discretion as to the terms of any contract or agreement they may desire to enter into. In this case both the chargee Desai, the chargor and the owner of the property Zaverchand Shah, and the occupier of the premises, the respondents, had considerable interests to protect, thus the chargee could not collect his principal and interest, the chargor could not pay, and as a member of the respondent firm, he along with the other members of that firm clearly wanted to retain possession of the premises in which they conducted their business. In circumstances such as these I can find no reason why these parties should not have entered into the tenancy agreement which was for the benefit of all the parties.

I am therefore of the view that the tenancy agreement was a legal and binding agreement and that whether or not the respondents are by virtue of the provisions of s. 121 of the Evidence Act now estopped from denying the title of their

landlord they are clearly estopped from denying the tenancy by reason of s. 120 of that Act. I am therefore satisfied on the evidence and pleadings that, at the time of the distress for rent, the relationship of landlord and tenant did exist between the respondents and the first appellant. It is not therefore necessary for me to consider the question as to whether the first appellant's appointment as a receiver was a valid exercise of a statutory power.

It is an admitted fact that the respondents did owe at least one month's rent before the distress was levied, but before considering the amount of rent due I would deal with the law on the question of a distress being levied for an excessive amount.

The right of distress in Kenya is given by the Distress for Rent Act (Cap. 293), s. 3 (1) whereof provides:

"3(1) Subject to the provisions of this Act, every person having any rent or rent service in arrear and due upon any grant, lease, demise or contract whatsoever shall have the same remedy by distress for the recovery of such rent or rent service as is given by the common law of England in the like case."

The position in England is that a landlord is entitled to exercise his right of distress if any rent is in arrears and the distress does not become illegal merely because it is carried out for more rent than is due. By virtue of s. 3 of the Distress for Rent Act. the remedy for distress in Kenya is that given by the common law in England. I refer here to the decisions in *Tancred v. Leyland* (2) and *Glynn v. Thomas* (3). In delivering the judgment of the court in the latter case Coleridge, J., said, inter alia ((1856), 156 E.R. at p. 1087):

"For the plaintiff in error the case mainly relied on was *Tancred v. Leyland* (2) in error; and that case decided that the merely taking goods in distress on a claim of more rent being in arrear than was in fact in arrear, and selling them on such claim, was not actionable; the first, because the distrainor for rent is not bound by the amount for which he claims to distrain, and though he takes, alleging that he does so for an amount exceeding the real arrears, he may sell afterwards only for that which is really due; the second, because from a mere allegation that the distrainor sold for the alleged arrears and costs, it is not to be inferred that he sold more than was necessary to raise the amount of the arrears actually due,"

and further at p. 1088:

"Now as some rent was due, the taking was lawful; and as the taking was lawful, so was the detention until the sum really due, with enough to cover the lawful charges, was tendered.

In this case there is a dispute as to the amount of rent due when the distress was levied, but at any rate it is admitted that Shs. 1,500/- was due for the September rent when the distress was levied on October 11, 1962.

According to the notice of distress dated October 11, 1962 (in evidence: see p. 119 of the record) the distress was levied in respect of rent amounting to Shs. 9,283/20 but according to the instructions given to levy the Shs. 9,283/20 was made up of two amounts being rent for September and October, 1962 Shs. 4,000/-, and unimproved site tax for 1962 Shs. 5,283/20. It is agreed that these instructions correctly show the position and that the distress was carried out both in respect of arrears of rent and also for the 1962 site tax. There can also be no doubt that in this case that the site tax was wrongly included in the distress for rent and that any distress carried out for this purpose would be illegal and actionable. The position here, however, is that the first appellant

was in fact justified in carrying out the distress to recover arrears of rent and the question is what is the position when he also wrongly included another amount not recoverable under that distress?

I would here again refer to the decision in another English case, *Phillips v. Whitsed* (4) and to the following short extract from the judgment of Cockburn, C.J., which, in my view, correctly sets out the law in this matter:

“There is no doubt that if a person having a right to distrain makes, on distraining, some statement as to the character of the distress which, if the only ground in fact for the distress, would render it illegal, he may yet plead afterwards by way of avowry setting out the real and true ground on which he had a legal right to distrain.”

The first appellant was therefore justified in carrying out the distress for the arrears of rent due and the fact that he also wrongly included the amount for site tax would not, in my view, affect his liability in this case. The evidence shows that the respondents did not at any time tender to the bailiff the amount of rent which they said was then due. By agreement one machine was given into the possession of the second appellant as a guarantee and no other goods were distrained upon. It appears from the correspondence between the parties and between their solicitors that at one stage a cheque was sent purporting to represent the rent due for September, 1962, but this cheque was returned and eventually the amount was paid into court. The evidence shows that at no time was a legal tender made of the rent and the costs of the distress. In these circumstances it appears to me that the distress was a legal one properly carried out and having regard to the agreed possession of only one machine, that the distress cannot be said to be excessive. The respondents have failed to show any reason why they should recover damages for an illegal or wrongful distress. I would therefore allow the appeal and order that the claim be dismissed.

There remains the difficult question of deciding what was the actual amount of rent agreed on between these parties. There are three versions. First, the respondents' case that a rental of Shs. 1,500/- p.m. had been agreed on, secondly, the first appellant's case that a revised rental of Shs. 2,000/- p.m. had been agreed on with effect from September 1, 1962, and thirdly the rental based on the learned trial judge's findings of Shs. 3,000/- p.m.

It is clear that the trial judge had great difficulty in arriving at the truth in this case and he has my entire sympathy in his attempts to solve the entangled and confused problem which the parties succeeded in creating out of what should have been a simple issue. In his judgment the learned trial judge on this question said:

“So far as the first agreement in March, 1962, is concerned, I think there is force in Mr. Gautama's contention that it is unlikely that the receiver would have agreed to a rent of no more than Shs. 1,500/- since the outgoings in respect of the premises amounted to Shs. 1,000/- per month. Mr. Shroff has stressed that as soon as the allegation of Shs. 3,000/- rent was made by the first defendant in his letter of August 28, 1962, Mr. Shah replied putting forward his version of the agreement, but I consider it hardly likely that the letter of August 28, 1962, was a sheer fabrication. This argument cuts both ways. It is perhaps surprising that there is no reference in the previous correspondence to any such arrangement although this rent had not been paid over a period of six months. However, I consider that the probabilities are in favour of the first defendant.”

The trial judge then went on in his judgment to find that there had been no concluded agreement for the payment of Shs. 2,000/- p.m. I am of the view

that the judge was correct in his findings and that the position is that the original rental agreed on was Shs. 3,000/- p.m. and that the subsequent reduction to Shs. 2,000/- was never finalized, but the first appellant cannot be awarded more than he seeks, and that is a rental both in respect of the claim and counterclaim of Shs. 2,000/- p.m.

I would here consider the first appellant's counterclaim. He seeks to recover double the rent for December, 1962, on the ground that the respondents stayed over for that month after giving notice to quit which expired at the end of November, 1962. He abandons his further claim in respect of Shs. 3,365/- for Crown rent.

It is agreed that the respondents gave notice to quit by November 30, 1962, in their letter dated October 5, 1962. It is also agreed that they did not in fact leave until January 1, 1963, and the first appellant is claiming double rent for the month of December by virtue of s. 14 of the Distress for Rent Act (Cap. 293).

The respondents claim that the first appellant waived the notice of October 5, 1962. This was issue No. 11 as framed by the learned judge but he did not find it necessary to decide this issue in his judgment. He dismissed the counter-claim. This tenancy is a lease within the meaning of s. 111 of the Transfer of Property Act and by virtue of sub-s. (h) could be determined on the expiration of a notice to quit duly given by one party to the other. The legality of the notice is not questioned. It was given on October 5, to expire on November 30, 1962. The respondents claim a waiver of the notice but the law is that once a valid notice to quit has been given, the tenancy automatically ends at the expiration of such notice although the parties may, by agreement, create a new tenancy at the expiration of the old and this is the true position when a so-called waiver of a legal and valid notice to quit occurs. [I would in this respect refer to the decision of the Court of Appeal in England in the case of *Clarke v. Grant* (5) and to the following extract from the judgment of Lord Goddard, C.J., which, in my view, sets out the law as applicable here ([1949] 1 All E.R. 769):

"If a landlord seeks to recover possession of property on the ground that breach of covenant has entitled him to a forfeiture, it has always been held that acceptance of rent after notice waives the forfeiture, the reason being that in the case of a forfeiture the landlord has the option of saying whether or not he will treat the breach of covenant as a forfeiture. The lease is voidable, not void. and if the landlord accepts rent after notice of a forfeiture it has always been held that he thereby acknowledges or recognizes that the lease is continuing. With regard to the payment of rent after a notice to quit, however, that result has never followed. If a proper notice to quit has been given in respect of a periodic tenancy, such as a yearly tenancy, the effect of the notice is to bring the tenancy to an end just as effectually as if there has been a term which has expired. Therefore, the tenancy having been brought to an end by a notice to quit, a payment of rent after the termination of the tenancy would only operate in favour of the tenant if it could be shown that the parties intended that there should be a new tenancy."

I am of the view that there is sufficient evidence on the record before us including the various exhibits to show clearly that no new tenancy agreement was ever arrived at between the parties after the tenancy expired by virtue of the notice to quit on November 30, 1962, and I am of the view this court should now determine as a fact that there has been no waiver of the notice given on October 5, 1962, and that no new agreement was entered into between the parties for a new tenancy after the tenancy expired by virtue of the notice to quit on November 30, 1962. I have fully considered the evidence on the record on this question

and I do not intend to set this out in detail except to say that it is clearly shown and admitted by the respondents that the negotiations to create a new tenancy never came to finality and that at no stage was any new agreement arrived at between the parties.

I am therefore satisfied that the respondents held over for the month of December and are accordingly liable for the payment of double the rent under the provisions of s. 14 of the Distress for Rent Act.

There remains the question as to the payment into court. It appears, following upon the consent order of Edmonds, J., on December 7, 1962, that Shs. 6,400/- was paid into court. This represents Shs. 6,000/- for rent for September, October and November and Shs. 400/- in respect of the costs of the distress. The first appellant would be entitled to this amount of Shs. 6,000/- for rent for the months of September, October and November and the second appellant to Shs. 400/- in respect of the cost of the distress. The machinery levied on was released as a result of this consent order. We understand from counsel at the Bar that Shs. 4,500/- was paid to the first appellant and Shs. 1,900/- paid out to the respondents.

It follows from the judgment that this Shs. 1,900/- should now be repaid by the respondents and that from this amount Shs. 1,500/- be paid to the first appellant and Shs. 400/- to the second appellant. This is not taking into account the Shs. 1,500/- paid in and then subsequently paid out to the respondents in respect of December's rent. This amount would be covered by the judgment for Shs. 4,000/- on the counterclaim and no further order would be therefore needed in respect of this.

I would therefore allow this appeal both on the claim and on the counterclaim and I would order that the claim against both the appellants be dismissed and that judgment be entered on the counterclaim for the first appellant against the respondents for Shs. 4,000/- and that the appellants should have the costs of the trial in the High Court on the higher scale and further the costs of the interim injunction. I would give the appellants the costs of this appeal and also certify for two counsel.

I would further order that the Shs. 1,900/- paid out to the respondent from the amount paid into court be forthwith paid by him as to Shs. 1,500/- to the first appellant and as to Shs. 400/- to the second appellant.

The facts as to the payments of the various amounts into and out of court are not clearly set out in the record and there is a possibility of some error in my understanding of the position. I would therefore give leave for either party to apply to the court to amend our order in so far as it affects these payments.

Sir Charles Newbold P: I agree with the judgment of Duffus, J.A., and there will be an order in the terms proposed by him.

Law JA: I have had the advantage of reading in draft the judgment prepared by Duffus, J.A. I agree with his conclusions and with the orders proposed by him. In particular I am of opinion that even if the first appellant's purported appointment by the chargee as receiver of the suit property was invalid, the learned trial judge erred in holding, as he did, that it followed that the first appellant had no right or title to enter into a tenancy agreement with the respondent firm. The arrangement that the first appellant should lease the property to the respondent firm was concurred in by the chargee and the chargor – who, incidentally, is also a partner in the respondent firm. It has always been the law, as I understand it, that a mortgagee cannot make a lease before fore closure which will bind the mortgagor, except under a statutory or express power, unless the mortgagor concurs in the grant. It is clear from the pleadings that this is precisely what happened in this case. The chargor and chargee both

concurred in the granting of a tenancy of the charged property by the first appellant, as agent for the chargee, to the respondent company. There was full mutuality of consent between all the parties; no question of fraud, mistake or misrepresentation arises; and I can see no reason why the parties should not be held to the terms of their freely negotiated contract. As to the precise nature of those terms, I agree with the conclusions arrived at by Duffus, J.A., and, like him, I would allow this appeal.

Appeal allowed. Claim dismissed against both appellants. Judgment for the first appellant on his counterclaim against the respondents. Costs above and below to the appellants. Consequential order for payment out, with leave to apply.

For the appellants:

J. M. Nazareth, Q.C. and Satish Gautama, Nairobi

For the respondents:

J. A. Mackie-Robertson, Q.C. and Hoshang Shroff, Nairobi

Tenywa v Uganda
[1967] 1 EA 102 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	3 February 1967
Case Number:	675/1966
Before:	Sir Udo Udoma CJ
Sourced by:	LawAfrica

[1] *Criminal Law – Procedure – Criminal Procedure Code (Cap. 107) s. 20 (1) (U) – Meaning of “police officer” – Power to stop and search – Busoga District Administration policeman.*

[2] *Criminal Law – Possession of stolen property – Nature of onus on accused under the Penal Code (Cap. 106), s. 299 (U).*

[3] *Police – Powers of Busoga District Administration policeman – No power to stop and search – Not “police officer” under Criminal Procedure Code, s. 2 and s. 20 (1) (U).*

Editor’s Summary

The appellant was stopped and questioned by a detective sergeant, an employee of the Busoga District Administration, as to his possession of a bicycle. The appellant stated that he had bought the bicycle from an Asian in Kamuli but he could not produce an invoice covering the purchase and when taken to the said Asian at Kamuli the Asian denied having sold the appellant the bicycle. The appellant was taken to the Central Police Station and the police, after investigation, received a report that the number on the

bicycle frame had been forged. The appellant was duly prosecuted and convicted under s. 299 of the Penal Code and, at the trial, the report on the forged frame number was admitted as evidence.

Held –

- (1) the Busoga District Administration Police cannot exercise the powers conferred on the Central Government Police under s. 20 (1) of the Criminal Procedure Code;
- (2) the evidence contained in the report that the frame number of the bicycle had been forged was hearsay and inadmissible;

(3) the appellant had given a reasonable explanation as to his possession of the bicycle.

Appeal upheld. Conviction and sentence set aside.

No cases referred to in judgment.

Judgment

Sir Udo Udoma CJ: The appellant, Madhuli Tenywa, was convicted by the chief magistrate, Busoga Magistrate's Court, of being in possession of property reasonably suspected of having been stolen or unlawfully obtained contrary to s. 299 of the Penal Code. He was sentenced to twelve months' imprisonment. The appeal is against conviction and sentence.

The grounds of appeal are:

- "1. That the decision of the chief magistrate is wrong in law because a Busoga District Administration Police cannot exercise the powers conferred on the Central Government Police under s. 20 (1) of the Criminal Procedure Code;
2. That inadmissible evidence was wrongly admitted, namely, the report as to the registration number on the frame of the bicycle alleged to have been obtained from Kampala; and
3. The chief magistrate misdirected himself in law in the undermentioned passage of his judgment, namely that 's. 299 of the Penal Code puts the onus of proving that the article found on him was his, on accused'."

On July 16, 1966, a Detective Sergeant, Silvesteri Zirabamuzale, an employee of the Busoga District Administration, saw the appellant at 2 p.m. with a Raleigh bicycle. He questioned the appellant as to how he had come by the bicycle. The appellant told him that the bicycle was his and he had bought it from an Asian in Kamuli. The District Administration Policeman, Silvesteri Zirabamuzale, demanded from the appellant the invoice covering the purchase of the bicycle as proof that he had in fact bought it from Kamuli.

As the appellant could not produce the invoice demanded Silvesteri Zirabamuzale at his request was taken to the Asian at Kamuli, who although admitting that the appellant was employed by him as his turnboy, denied having sold the bicycle to him. On a further enquiry as a result of information supplied by the appellant, one Kafuko also denied having sold the bicycle to the appellant.

Silvesteri Zirabamuzale thereupon took the appellant with the bicycle to the Central Police Station and there reported the matter. He handed over the appellant and the bicycle to the Central Government Police for prosecution. that was on June 17, 1966.

The case was then taken over by Constable Consitanti Wepakulu, a Central Government Police Officer No. 5390. On taking over the case, Detective Constable Consitanti Wepakulu examined the frame of the bicycle and found the number to be 3184. He became suspicious as the number on the bicycle frame appeared to have been forged. Consitanti Wepakulu forwarded the bicycle to the Kampala Central Police Station for examination. He later received a report to the effect that the proper and correct number of the bicycle should be BU/31842; the effect of the report, being that the number on the frame of the bicycle had been altered.

In his defence, the appellant maintained that the bicycle was his. He admitted that he was seen with

the bicycle by Silvesteri Zirabamuzale; and that when he was asked for a receipt, he explained to him that he had had the bicycle for the

past two years, and that the receipt which had been given to him when he bought the bicycle was lost.

The learned chief magistrate, after having thoroughly summarised the evidence, held that on a charge under s. 299 the onus of proving that the property is his is on the appellant; that the appellant did not say in his evidence how he had acquired the bicycle; that there was evidence that the frame number of the bicycle had been forged, and that since the appellant had not told him how he had obtained the bicycle, he was satisfied that the bicycle was not the property of the appellant. He therefore convicted him and sentenced him to a term of imprisonment as already stated.

It is quite obvious that the conviction of and the sentences imposed on the appellant cannot be sustained in law and on the facts.

A charge laid under s. 299 of the Code in respect of property suspected of having been stolen or unlawfully obtained must be the result of the exercise of the powers vested in police officers by s. 20 (1) of the Criminal Procedure Code, the provisions of which are in the following terms: –

“20(1) Any Police Officer may stop, search or detain any vessel, boat, aircraft or vehicle in or upon which there shall be reason to suspect that anything stolen or unlawfully obtained may be found and also any person who may be reasonably suspected of having in his possession or conveying in any manner anything stolen or unlawfully obtained, and may seize such thing.”

In terms of the provisions of s. 20 (1) of the Criminal Procedure Code, the power to stop, search and detain any vessel or person reasonably suspected of having in his possession stolen property is vested only in police officers. And a police officer is defined in s. 2 of the Criminal Procedure Code as “including any member of a police force established under the provisions of the Police Ordinance”. And in s. 2 of the Police Act (Cap. 312) “police force means any police force established under the provisions of this Act or the Constitution. Police officer means any attested member of a police force.”

It should be noted that the police in the contemplation of s. 20 (1) of the Criminal Procedure Code is a police officer as defined under the Criminal Procedure Code; and he is defined as “including any member of a police force established under the provisions of the Police Ordinance”. The District Administration Police Force, if that is the proper expression for it, is not established under the Police Ordinance and therefore would not come within the meaning of the provisions of s. 20 (1) of the Criminal Procedure Code. Which means in effect that Silvesteri Zirabamuzale, being a policeman employed by the Busoga Administration, cannot exercise the powers conferred on police officers under s. 20 (1) of the Criminal Procedure Code. He therefore had no authority to have stopped and searched the appellant and to have interrogated him as to the bicycle.

It is plain that when Silvesteri Zirabamuzale stopped and searched and interrogated the appellant he was acting outside the scope of his duty and power. The charge of being in possession of property suspected of having been stolen or unlawfully obtained is therefore bad in law ab initio. The learned trial magistrate was wrong in law in convicting the appellant under s. 299 of the Penal Code because he failed to direct his mind to this important point of law as to whether or not the Busoga District Administration Police comes within the terms of police officer envisaged in s. 20 (1) of the Criminal Procedure Code.

Counsel for the respondent was right in not seeking to support the conviction and sentence imposed by the magistrate in this case.

Furthermore, the learned trial magistrate was wrong in law to have admitted in evidence the report alleged to have been obtained from Kampala, which suggested that the original number of the bicycle had been altered. That piece of evidence was hearsay and should not have been admitted by the learned trial magistrate unless the expert who had examined the bicycle had testified before the court and been cross-examined on the point as to how he had arrived at his conclusion. In the instant case, the examiner of the bicycle was not called as a witness, and there was no opportunity for him to be cross-examined by the appellant. The result of such error must of necessity occasion a miscarriage of justice in that the evidence undoubtedly influenced the learned trial magistrate in his conclusion that the bicycle must have been stolen or unlawfully obtained.

The learned trial chief magistrate was also wrong in law in holding that the onus of establishing that the bicycle was the appellant's was on the appellant. That is not the law. What the law requires in a charge under s. 299 of the Penal Code is that the appellant should give an account as to how he had come by the bicycle to the satisfaction of the trial magistrate. Generally therefore in the absence of proof by the prosecution that the article is the property of someone else, a reasonable explanation as to how the accused person had come by the property would be sufficient ground upon which to discharge him.

On the evidence as a whole, there is no doubt that the appellant had given a reasonable explanation as to how he had come to be in possession of the bicycle. He explained to the learned trial magistrate that the bicycle was his and that he had bought it and had been using it for the past two years. That evidence was neither contradicted nor challenged; and, in my view, ought to have been accepted by the learned trial magistrate as reasonable in the circumstances, there being no other claimant to the bicycle.

For these reasons, this appeal succeeds and it is allowed. The conviction of the appellant is set aside and the sentence of twelve months' imprisonment imposed on him is quashed. The appellant is found not guilty. He is acquitted and discharged. It is ordered that the bicycle be returned to him forthwith.

Order accordingly.

The appellant did not appear and was not represented.

For the respondent:

Attorney-General, Uganda

M. A. Khan (State Attorney, Uganda)

Uganda v Nyegenye
[1967] 1 EA 106 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	3 January 1966
Case Number:	629/1966
Before:	Sir Udo Udoma CJ
Sourced by:	LawAfrica

[1] Criminal Law – Tax – Failure to pay created offence by Local Administrations (Amendment) (No. 2) Act 1965 (U) – Failure to pay prior to Act not offence.

[2] Statute – Retrospective operation – Local Administrations (Amendment) (No. 2) Act 1965 (U) – Whether retrospective in operation.

Editor's Summary

The accused was convicted of failure to pay his tax during the period 1962-1966. This offence was created by s. 74a of the Local Administration (Amendment) (No. 2) Act 1965 which came into force on July 30, 1965. The accused pleaded guilty and the magistrate imposed a fine of Shs. 100/- or three months' imprisonment in default. In addition the accused was ordered to pay tax of Shs. 250/- for the period 1962/1966.

Held – As the Local Administrations (Amendment) (No. 2) Act 1965 was not intended to be retrospective, its provisions would not apply to arrears of tax due from 1962/64.

Conviction and sentence set aside.

No cases referred to in judgment.

Judgment

Sir Udo Udoma CJ: In this case the accused, Muluka Nyegenye, was charged with failing to pay his tax during the periods 1962 to 1966. He was convicted on his own plea of guilty by the magistrate grade III in the magistrate's court of Bukedi holden at Bulumbi, and fined Shs. 100/- or three months' imprisonment in default. In addition he was ordered to pay the tax amounting to the sum of Shs. 250/- for the period 1962/1966.

On the application of the acting chief Magistrate, Mbale, and the Director of Public Prosecutions not seeking to be heard or to support the order of the magistrate grade III, the conviction and fine imposed are set aside. The accused is discharged because the conviction and fine were illegal for the following reasons:

1. Failure to pay tax prior to July 30, 1965 was not an offence. It was created an offence under s. 74a of the Local Administrations (Amendment) (No. 2) Act of 1965. The Act came into force on July 30, 1965.
2. Prior to that date, any tax due and remaining unpaid was recoverable only by a civil suit as a debt instituted by the Local Administration concerned under the provisions of s. 74 (1) of the Local Administrations Act (Cap. 25); and under s. 74 (2) where the court was satisfied that the defaulter refused or wilfully neglected to pay his tax, it was competent for the court in which the action was instituted and tried to order the defaulter to pay not only the tax and the costs of the action but also a penalty not exceeding half the amount of the tax due and unpaid.
3. Section 74 (1) and (2) of the Local Administrations Act (Cap. 25) was on July 29, 1965, repealed. It is now replaced by two new sections, namely s. 74 and s. 74a of the Local Administrations (Amendment) (No. 2) Act 1965. Under s. 74 of the Act, however, it is still open for any Administration

concerned to sue by a civil suit for the recovery of any tax in default of payment. In addition under s. 74a (1) of the Act a refusal, neglect or failure to pay tax is now an offence by the authority of which, and without prejudice to the liability of the defendant to pay his tax, a defaulter may be ordered to pay a fine not exceeding half the amount due as tax or a fine of Shs. 100/- whichever is the less, or in default of the payment of such fine he may be sentenced to a term of imprisonment not exceeding one month.

4. It is clear therefore that since July 30, 1965 failure to pay tax is an offence by virtue of the provisions of s. 74a of the Local Administrations (Amendment) (No. 2) Act 1965.
5. The position therefore is that in respect of the failure to pay his tax for 1965 and 1966 the accused had committed an offence for which he could properly be convicted. But as the Local Administrations (Amendment) (No. 2) Act 1965 was not intended to be retrospective in effect, its provisions would not apply to the arrears of tax due from 1962 to 1964. Such tax could still be recovered by a civil claim instituted in a court of competent jurisdiction within the provisions of s. 74 of the Local Administrations (Amendment) (No. 2) Act 1965.
6. It was therefore wrong in law for the magistrate to have convicted the accused of failure to have paid his tax from 1962 to 1966.
7. The charge itself is bad in law for duplicity, for each failure of the accused to pay his tax in each year is a separate and distinct offence.

In the circumstances, the proper order to make, I think, is that the conviction and sentence imposed on the accused be set aside and the accused be discharged, but without prejudice to what other proper and legal steps may be taken to recover whatever tax is due from the accused during the period 1962 to 1964 and thereafter for the period 1965 to 1966. The procedure required in both cases would appear to be different. It is further ordered that if the fine imposed by the magistrate grade III had been paid the same be refunded forthwith to the accused.

Order accordingly.

Neither party was represented.

Kaur and others v City Auction Mart Ltd
[1967] 1 EA 108 (HCU)

Division:	High Court Of Uganda At Kampala
Date of judgment:	5 September 1966
Case Number:	35/1966
Before:	Jones J
Sourced by:	LawAfrica

[1] *Land – Land registration – Practice in proceedings in court under Registration of Titles Ordinance, s. 197 (U.) – Suit must comply with requirements of Civil Procedure Rules – Civil Courts Ordinance, s. 2*

(U.).

[2] *Practice – Formalities – Notice of motion must be signed by a judge and sealed before issue – Civil Procedure Rules, O. 5, r. 1 (3) (U.).*

[3] *Practice – Notice of motion – Must be signed and sealed – Civil Procedure Rules, O. 5, r. 1 (3) (U.).*

Editor's Summary

By notice of motion application was made to lift a caveat lodged against a plot in Kampala, protecting a leasehold interest of the respondent. A preliminary objection by the respondent was that the notice of motion (which was part of a "suit" within the meaning of s. 2 of the Uganda Civil Courts Ordinance) should have been signed by a judge and sealed with the seal of the Court under O. 5, r. 1 (3) of the Civil Procedure Rules.

Held – the notice of motion was a nullity.

Application dismissed.

Cases referred to in judgment:

(1) *Re Pritchard (deceased)*, [1963] 1 All E.R. 873.

Judgment

Jones J: This was a notice of motion asking the respondent to show cause why the following order be not made:

"That the caveat lodged by the respondent on August 12, 1966 under instrument No. 165820 by Messrs. Patel and Dave on behalf of the respondent by virtue of Tenancy Agreement dated August 4, 1966 prohibiting registration of any person as transferee of proprietor of land or any instrument affecting the said land should not be removed on the ground that the said caveat has been lodged without any reasonable cause."

The property which is the subject of the caveat is Plot 31 Salisbury Road, Kampala and the leasehold interest therein has been registered in Leasehold Register Volume 258, Folio 18. It formed part of the estate of the late Kehan Singh Kalsi.

Messrs. Singh & Treon acted for the estate, and in that capacity, collected rents, and were authorised to execute leases. Acting on that authority, they rented 31 Salisbury Road, Kampala, to a Mr. Bhavsar from May 1, 1965 to April 30, 1966 both inclusive at a rent of Shs. 1,200/- per month. On April 4, 1966 the tenancy was extended for two years from May 1, 1966 to May 31, 1968 at a rental of Shs. 1,300/- per month.

The executors of the estate of Kehar Singh Kalsi contracted to sell Plot 31 to Sayani, Sayani and Sayani all of P.O. Box 1164 Kampala. A memorandum of sale was prepared by Patel and Patel, advocates of Kampala, on July 29, 1966. The sale was subject to the property being unencumbered.

Documents of transfer have been prepared and a sum of Shs. 100,000/- has been deposited towards the payment of the purchase price. The sale cannot be completed, as the respondent lodged a caveat (No. 165820), against the property with the Registrar of Titles on August 12, 1966.

This notice of motion was filed to lift that caveat; otherwise the deal between the executors and Sayani, Sayani and Sayani would fall through with consequential loss to the applicants.

Their advocate contended that the leases were invalid as they:

- (1) contravened the provisions of s. 21 (3) (c) of the Public Lands Act (Article 201) and s. 108 of the Registration of Titles Ordinance;
- (2) the advocates had no authority to grant leases on behalf of the estate in any event.

Although counsel for the applicant in argument from the bar, attacked the validity of the lease made to Bhavsar the ground of this application was that Bhavsar had lodged the caveat without reasonable cause. That is an entirely different matter. What better cause could a man have for lodging a caveat than the possession of what he considered was a protectable interest in the property about to be sold?

Be that as it may, counsel for the respondent took up a preliminary point of law which, if valid, disposed of the matter.

He considered that as s. 197 of the Registration of Titles Ordinance had not been complied with, in that the requirements of O. 5, r. 1 (3) of the Civil Procedure Rules had not been carried out, the notice of motion could not be entertained by this court.

Section 197 of the Registration of Titles Ordinance reads: –

“197. Subject to the provisions of the next succeeding section and to any rules which may be made by the Chief Justice under any of the powers conferred on him, the same rules of procedure and practice shall apply in proceedings before any court under this Act as are in force for the time being in respect of ordinary proceedings before such court; and there shall be the same rights of appeal in respect of proceedings under this Act as exist for the time being in respect of ordinary proceedings.”

Counsel for the respondent argued that this meant that the “same rules of procedure and practice shall apply in proceedings before any court under this act as are in force for the time being in respect of ordinary proceedings, before such court”, i.e. the rules appertaining to suits, as a notice of motion under O. 48, r. 1, is a proceeding within the meaning of s. 2 of the Civil Courts Ordinance, where a suit is defined as: –

“Suit means all civil proceedings commenced in any manner prescribed.”

The procedure governing suits is laid down under O.5 and O.5, r. 1 (1), as read with O.5, r. 1 (3), which read:

- “1(1) When a suit has been duly instituted a summons may be issued to the defendant –
- (3) Every summons shall be signed by the judge or such officer as he appoints, and shall be sealed with the seal of the court.”

The practice in these courts has been to use and treat the notice of motion as the summons and in the instant case at the bottom of the Notice of Motion is to be found:

“This summons have been taken out by J. S. Shah, Esq., Advocate, P.O. Box 1604, Kampala, counsel for the applicant.

To 1. J. S. Shah, Esq. advocate, Kampala.

2. City Auction Mart Ltd., Kampala.”

If counsel for the respondent’s contention is correct (and Shah could only pray in aid, to counteract his argument, ss. 101 and 103 of the Civil Procedure Ordinance which only affects matters not specifically provided for, and not going to the root of the whole proceedings) this notice of motion has a fundamental defect which is incurable and nullifies the whole proceedings.

This summons was not signed by a judge and apart from an endorsement on a minute slip on a chamber summons to the following effect: –

“The Honourable Mr. Justice Bennett in the absence of Vacation Judge Submitted for: Perusal and directions please.

My Lord. Application made under Court Vacation Rules (L.N. 130/56) Dy. C. Regr. Please let me know the date convenient to your Lordship.

On 29.8.66 at 9 a.m.

Ag. Deputy Registrar.

C.G.B. 25.8.66.”

apart from that endorsement, whatever it may mean, there is no certificate of urgency under the vacation rules or any intelligible direction to the Acting Deputy Chief Registrar.

If it can be construed as a direction within the meaning of O. 5, r. 1 to issue a summons, I cannot say that the provisions of O.5, r. 1 (3) have been complied with. The “summons” has not been signed or sealed. There is some mark or heiroglyphic on the summons which could have been done by anyone. A signature means signature and not initials. This is an official document purporting to be issued from the High Court initiating proceedings and not a departmental minute. The squiggle on the summons is not sufficient and in no way complies with the provisions of O. 5, r. 1 (3).

The law lays down that a document, such as a summons, must bear the seal of this court, for obvious reasons, such as to show that the fees have been paid and that it is issued under proper authority and out of the proper office.

Counsel for the respondent referred to *Re Pritchard (deceased)* (1).

“An originating summons under the Inheritance (Family Provision) Act, 1938, was sealed in and issued out of the Pontypridd District Registry instead of the Central Office as required by R.S.C., O. 54, r. 4b. The defendants entered appearances and did not take objection to the issue of the summons. The validity of the summons was subsequently raised by the district registrar; at that date the period within which proceedings under the Act of 1938 could be begun had expired. By R.S.C., O. 70, r. 1, non-compliance with any rule of court did not render any proceedings void unless the court or judge so directed. There was no mention of an originating summons in the Supreme Court of Judicature (Consolidation) Act, 1925, which, by s. 225, defined an action as a civil proceeding ‘commenced by writ or in such other manner as may be prescribed by rules of court’. R.S.C., O. 54, r. 4b, provided that an originating summons ‘shall be sealed in the Central Office . . . and when so sealed shall be deemed to be issued’.

It was held that there had not been any commencement of proceedings, for the originating summons had not been issued out of the Central Office as required by R.S.C., O. 54, r. 4b, which was in mandatory terms, and the originating summons was a nullity; there was not a mere irregularity but a

fundamental defect, which the defendants could not waive, to which R.S.C., O. 70, r. 1, did not apply, and for which no rule of court provided a remedy (see p. 884, letter H, p. 882, letter I, and p. 885, letter C, post.)”

In my view these proceedings have failed to comply with a fundamental statutory requirement, and are therefore a nullity.

If I had to deal with this notice of motion on its merits I do not consider I could have dealt with it on the affidavits. The deponents would have had to be summoned for examination, amounting in effect to a full-blown action.

The notice of motion is dismissed with costs for the reasons I have expressed above.

Motion dismissed.

For the applicant:

J. S. Shah, Kampala

For the respondent:

Patel and Dave, Kampala

R. S. Dave

Marijani v Uganda [1967] 1 EA 111 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	3 February 1967
Case Number:	598/1966
Before:	Sir Udo Udoma CJ
Sourced by:	LawAfrica

[1] *Criminal Law – Charges – Facts relating to the incident sufficient to constitute two counts under one section of Penal Code – Counts to be in the alternative.*

[2] *Sentence – More than one sentence of imprisonment imposed – Trial court to decide whether concurrent or consecutive.*

Editor’s Summary

On June 29, 1966, a policeman was sent to the Jinja market to check whether hawkers were licensed to trade. Without checking whether a crowd of fifteen hawkers in Spire Road, Jinja, had licences the policeman ordered them to take their wares into the market. Some of them moved off with their wares. The policeman caught the hand of one of them with a view to arresting him. The appellant, two others

accused with him, and some others then attacked the policeman causing him injuries. The appellant and his two co-accused were convicted under s. 230 (*b*) of the Uganda Penal Code on two counts: (i) assaulting a police officer in the execution of his duties; (ii) obstructing a police officer in the execution of his duty; and under s. 102 (*c*) of the Uganda Penal Code, on a third count of rescuing a person from lawful custody. Each accused including appellant was sentenced to eighteen months' imprisonment in respect of each count (it was not stated if these sentences were to be consecutive or concurrent) and the two co-accused, being young persons of sixteen and seventeen years, were ordered to be sent to a reformatory school for a period of three years.

Held –

- (i) appellant (and the two co-accused) were not guilty of offences under count (ii) because the policeman was not, at the time, doing the duty he was detailed to do, which was merely to look for hawkers without licences; and that count should have been considered as an alternative to count (i);

- (ii) nor under the third count because on the facts no one had been actually arrested or kept in lawful custody.

Appeal allowed in part.

No cases referred to in judgment.

Judgment

Sir Udo Udoma CJ: The appellant, Benansio Marijani, was tried and convicted together with two other persons, James Wanji Kenyi and Amule Hasani, by the magistrate grade I, Magistrate's court, Busoga on a charge containing three counts, the first of which was assaulting a police officer in the execution of his duty contrary to s. 230 (b) of the Penal Code, the second of obstructing a police officer in the due execution of his duty contrary to s. 230 (b) of the Penal Code, and the third of rescuing a person from lawful custody contrary to s. 102 (c) of the Penal Code.

The three of them were each sentenced to eighteen months' imprisonment on each count; and the second and third accused persons, who have not appealed against their conviction and sentence, were ordered to be sent to the Reformatory School as the learned trial magistrate found them to be young persons of 16 years and 17 years of age respectively.

The appellant, who was the first accused at the trial, now appeals against his conviction and sentence on the grounds that the decision is bad in law; that it is not supported by the evidence; and that the sentence is excessive.

The facts of the case are quite simple. The complainant, Cardinal Nyeko, a Police Constable No. 4597 attached to the Police Station, Jinja, went in mufti to the Jinja Market on special duty to look for unlicensed hawkers. That was on June 29, 1966. On entering Spire Road in Jinja, he saw about fifteen hawkers, including the appellant, and the second and third accused who have not appealed, hawking their wares. He instructed them to take their wares into the market instead of hawking about with them. He then produced his identity card for their inspection to establish his identity that he was in truth a policeman on duty.

The third accused then said to Cardinal Nyeko that if he prevented them from hawking their wares he would have to demand from him the money with which to feed himself for that day. The second accused repeated the same remarks. All of a sudden the crowd of over fifteen hawkers then surrounded P.C. Cardinal Nyeko, who thereupon repeated his instructions that the hawkers should take their wares into the market and that if they failed to do so he would have them arrested.

In response to Cardinal Nyeko's warning, some of the hawkers took their wares into the market. But the second accused refused to obey the order and warning and instead threatened to beat P.C. Cardinal Nyeko. Thereupon Cardinal Nyeko caught one of those, who had refused to move into the market, by the hand with a view, according to him, to arresting him. As a result the rest of the crowd, including the appellant and the second and third accused, attacked P.C. Cardinal Nyeko.

The appellant hit him on the forehead. The second accused boxed him on the lip and cheek and the third accused hit him with a stick on the back of his head. P.C. Cardinal Nyeko fell down.

Abubaker Thani, a hotel owner in Jinja, who saw P.C. Cardinal Nyeko being beaten by a crowd of

some fifteen people, including the appellant and the second and third accused, went to his rescue when he saw that P.C. Cardinal Nyeko was lying on the ground while still being attacked by his assailants.

On arrival at the scene, Abubakar Thani observed that P.C. Cardinal Nyeko was bleeding from his head and chin. He blew his whistle calling for help. The appellant and his group ran away. Abubakar Thani then carried P.C. Cardinal Nyeko in a semi-conscious state, unassisted by anyone as there was no response to the sound of his whistle, to his hotel and rendered him first aid.

Thereafter both P.C. Cardinal Nyeko and Abubakar Thani went together to the Police Station and reported the incident. As a result the appellant and the second and third accused were arrested and charged as already stated.

The injuries sustained by P.C. Cardinal Nyeko as described by the doctor, who examined him, consisted of bruises on the left shoulder and on the forehead and the upper lip. There were contusions on the right side of the head and on the back of the neck. The injuries were classified as harm.

The appellant and the second and third accused denied having had anything to do with the beating of P.C. Cardinal Nyeko. The appellant said he only heard at 5 p.m. that day that a policeman had been beaten by a crowd of people. The second and third accused told the court that they were inside the market that day and had nothing to do with the beating of any policeman.

Needless to observe that the learned trial magistrate, quite rightly, rejected the defence of the appellant and of his co-accused as on the evidence the appellant and the second and third accused were clearly identified both by P.C. Cardinal Nyeko and Abubakar Thani, who said he knew them for a long time. The learned trial magistrate convicted the appellant and the second and third accused as already mentioned on the three counts of the charge.

The question is: Did the evidence before the court support the decision of the learned trial magistrate as to entitle him to have found the appellant and his co-accused guilty on all the three counts? Was the learned trial magistrate right in law in convicting the appellant and his co-accused on the second and third counts of the charge in particular?

When these questions were put to the State Attorney, who appeared for the respondent, he rightly, in my view, told the court that he could not support the conviction of the appellant and his co-accused on the second and third counts of the charge, and that, in any case, on the facts the offence disclosed is that of assault; and that the learned trial magistrate was not justified in convicting the appellant and the second and third accused on the second and third counts of the charge, because, in any event, on the facts the second count should have been treated as an alternative to count 1 of the charge, the facts being the same, and the counts having been laid under the same section of the Penal Code.

It seems to me that the learned trial magistrate did not seem to have appreciated the position that the evidence accepted by him and the facts disclosed by the evidence could only support the first count of the charge, which was assaulting a police officer in the execution of his duty contrary to s. 230 (b) of the Penal Code.

It may be that in a proper case from the same evidence the conduct of the appellant might be sufficiently stretched to amount to obstruction as well as an assault. But as the charge was laid under the same section of the Penal Code, it was the duty of the learned trial magistrate to have considered the second count of the charge as an alternative to the first count, in which the appellant was charged with assaulting a Police Officer in the course of the execution of his duty. Even so, on the evidence of Cardinal Nyeko himself, what was the duty he was in Jinja to execute?

On his own evidence he was detailed to look for hawkers without licences and not to order hawkers

not to sell in the street, nor to order hawkers to move their wares into the market. In his evidence he did not at any time say that the hawkers

he had ordered to move their wares into the market were unlicensed. There was no evidence before the court that he at any time demanded the production of their licences and that any of the fifteen persons involved there had refused to do so.

In what way then could it be said that he was obstructed in the due execution of his duty? On his own showing Cardinal Nyeko was not doing the duty he was detailed to do so there could be no question of his having been obstructed in the execution of his duty. The learned trial magistrate was therefore wrong in law to have convicted the appellant and the second and third accused persons of obstructing P.C. Cardinal Nyeko in the course of the execution of his duty.

On the third count again, on the evidence of Cardinal Nyeko himself, he was attacked immediately he caught the hand of one of the fifteen hawkers with a view to arresting him. Which in effect means that he had not in fact arrested the person concerned and detained him, but at the very most was about to do so when the crowd descended upon him.

The question must be for the commission of what offence was he about to arrest the person concerned? Surely it was not because he had no licence since he never demanded any of the fifteen hawkers to produce their licences.

In my view, looking at the evidence as a whole, what has been established is that no arrest was in fact ever effected by Cardinal Nyeko, and that nobody even the person whom Cardinal Nyeko purported to have attempted to arrest was anywhere detained or kept in custody. That being so, there was no evidence before the court to support the charge of rescuing contrary to s. 102 (c) of the Penal Code, the relevant provisions of which are:

“102 (c) Any person, who by force rescues or attempts to rescue from lawful custody any other person – is in any other case guilty of a misdemeanour.”

To constitute the offence of rescue under s. 102 (c) of the Penal Code, therefore, the person rescued must have been arrested and kept in lawful custody. There was no such evidence before the court.

The learned trial magistrate was therefore wrong to have convicted the appellant and the second and third accused of rescuing a person (unnamed) from lawful custody contrary to s. 102 (c) of the Penal Code. The learned trial magistrate would appear not to have directed his mind at all to the evidence and to the section of the Penal Code under which the appellant and the second and third accused were charged.

The appeal of the appellant on the second and third counts is allowed. The conviction of and the sentence imposed upon the appellant on the said second and third counts are accordingly quashed. He is discharged and acquitted.

There is abundance of evidence to support the conviction of the appellant and his co-accused on the first count of the charge, namely assaulting a Police Officer in the due execution of his duty contrary to s. 230 (b) of the Penal Code, although, as indicated, the Police Officer concerned appeared to have been doing something at the time outside the instructions given to him. But I think it would be right to consider what he was doing as part of the duty for which he was sent to Jinja market. In any case, the evidence that P.C. Cardinal Nyeko was severely assaulted is overwhelming. The appeal on the first count is therefore dismissed and the conviction and sentences are confirmed. The order of this court therefore is that the appellant do serve the sentence of eighteen months imposed upon him by the learned trial magistrate in respect of the first count only, in which event, the appeal against sentence in respect to the

first count is dismissed, as in my view, the magistrate was too lenient, having regard to the evidence of the assault administered on Cardinal Nyeko.

Although the second and third accused did not appeal against their conviction or sentence, I think that they should also benefit from this judgment. I shall treat the matter as if in fact they had appealed. Accordingly the conviction of and the sentences imposed upon both of them in respect to the second and third counts of the charge are also quashed. The two accused, that is, James Wanjiri Kenyi and Amule Hansani, stand convicted on the first count of the charge only, namely, assaulting a Police Officer in the execution of his duty contrary to s. 230 (b) of the Penal Code.

The order of the learned trial magistrate that they should be detained in the reformatory school still stands. But the detention will now be for eighteen months only, the learned trial magistrate having found that the second and third accused were young persons of sixteen and seventeen years of age respectively.

Before concluding this judgment, I think I should comment on the order of the learned trial magistrate as regards sentences. The learned trial magistrate, having found all the accused guilty on the first, second and third counts, made the following order:

“Sentence

Accused one, two, three each to go to prison for eighteen months on each count concerned. Accused two and three in lieu thereof to go to reformatory school for a period of three years.”

At a glance, it is quite clear that the order sentencing all the accused to prison for eighteen months on each of the three counts is bad in law, because the learned trial magistrate failed to indicate whether the sentences were consecutive or concurrent. This is a very important point as, on the evidence, if the magistrate was right in convicting all the accused on the first and second counts in law, since they were based on the same facts, the sentence which the magistrate could competently have passed on the accused should have been concurrent, if the counts were not treated as alternative.

It is unfortunate that this particular magistrate still indulges in this form of sentencing convicted prisoners, despite the fact that in his previous judgments similar errors had been commented upon by this court. It is to be hoped that from now on, this practice would cease. It is the duty of every magistrate in sentencing a convicted person to a term of imprisonment on a number of counts to indicate whether the sentences imposed are concurrent or consecutive.

The court below to carry out the order of this court as expressed in this judgment.

Appeal allowed in part.

The appellant did not appear and was not represented.

For the respondent:

Attorney-General, Uganda

M. A. Khan (State Attorney, Uganda)

Shah v Mbogo and another
[1967] 1 EA 116 (HCK)

Division: In the High Court of Kenya at Nairobi

Date of judgment: 25 November 1966

Case Number: 1087/1965

Before: Harris J

Sourced by: LawAfrica

[1] Insurance – Motor insurance – Notice under s. 10 (2) (a) Insurance (Motor Vehicles Third Party Risks) Act (K.) of proceedings by injured party – What form and service required.

[2] Insurance – Motor insurance – Whether and when insurer entitled to have ex parte judgment against insured set aside for lack of notice to insurer.

[3] Practice – Ex parte judgment – Setting aside – Principles on which court acts.

[4] Practice – Person not party to proceedings – When entitled to apply to set aside judgment – Insurer and insured.

Editor's Summary

This was an application by notice of motion by an insurance company to set aside an ex parte judgment obtained by the plaintiff against the defendants, who were the company's insureds, for damages for personal injuries, which judgment was enforceable against the company under the Insurance (Motor Vehicles Third Party Risks) Act.

The application was on the ground that no adequate notice of the proceedings in which the judgment was obtained had been given to the company by the plaintiff. There had been correspondence between the plaintiff's advocates and the company's advocates before action filed; and after it was filed a notice was left at the company's office by a clerk of the plaintiff's advocates. Details of the correspondence and of the notice and its service appear in the judgment. The summons was served by advertisement.

Held –

- (i) the company, under the terms of its policy, had the right to bring this application on behalf of and in the name of its insured; but
- (ii) the company was in fact well aware of the plaintiff's claim; and
- (iii) the terms of the notice were adequate to meet the requirements of s. 10 (2) (a) of the Insurance (Motor Vehicles Third Party Risks) Act, and the notice was effectively served; therefore
- (iv) applying the principle that the court's discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should be refused.

Application dismissed.

Cases referred to in judgment:

- (1) *Windsor v. Chalcraft*, [1939] 1 K.B. 279.

Judgment

Harris J: This is a motion brought by the Pioneer General Assurance Society Ltd. on notice to the plaintiff for orders (1) that the ex parte judgment and decree passed in this suit on July 8, 1966, by which a sum of damages with interest and costs was awarded to the plaintiff against the defendants jointly and severally, be set aside, and (2) that the plaintiff be

ordered to serve a copy of the summons in the suit upon the Society or its advocates, and that thereafter the Society be allowed to enter an appearance and file a defence in the name of the defendants within such time as the court may fix. The motion purports to be brought under the provisions of rr. 10 and 24 of O. 9 of the Civil Procedure (Revised) Rules, 1948, and s. 97 of the Civil Procedure Act. Rule 24, however, is available only to a defendant, which the Society is not, and I shall therefore treat the application as having been made under r. 10 of the Order and s. 97 of the Act only.

The motion is grounded on an affidavit of one, Ahamed Hadi Nimji, a director and a claims manager of the Society, which carries on insurance business in Kenya and elsewhere. In his affidavit he states, at para. 6, that by a letter dated July 26, 1966, from the advocates for the plaintiff, which was received by his office on the following day, he learned for the first time that an action had been filed by the plaintiff against the defendants and a judgment pronounced in the plaintiff's favour.

Paragraph 7 of his affidavit is as follows:

"7. I, being the Claims Manager of the Insurance Company, receive all claims or papers in relation thereto including the court summons and other notices issued by the Court. I never received summons or other notification of any kind whatsoever either from the defendants or from the plaintiff or his advocates to the effect that an action was filed in this case and nor did I receive any other information about the institution of this suit. I have inquired from the members of my staff, whom I verily believe, and they have informed me that they too never received any intimation of any kind about the filing of above suit."

Paragraph 9 of his affidavit states that the judgment obtained by the plaintiff is enforceable against the Society under s. 10 (2) of the Insurance (Motor Vehicles Third Party Risks) Act (Cap. 405).

At the hearing of the motion an affidavit of a clerk named Abdul Karim Jiwani, who is employed by the Society, and an affidavit of a clerk named Himatlal Naran who is employed by Messrs. Khanna and Company, the advocates for the plaintiff in the proceedings, were also read, and both these deponents were cross-examined on their affidavits.

The matter arises out of an accident which occurred on January 10, 1965, when a motor vehicle, registered number KCA 941, said to be the property of the first defendant and to have been driven at the time by the second defendant as an authorised driver and to have been insured by the Society, knocked down the plaintiff, causing him injuries. The first step in the proceedings leading to the judgment and decree now sought to be set aside appears to have been the sending by the plaintiff to the Society of a letter dated February 1, 1965, notifying the Society of the accident and of his injuries, giving the registration number of the car and the name of the driver, stating that the car's insurance policy bore the name of the Society and giving the number of the policy. The letter concluded by saying:

"In the circumstances I reserve my right to any form of claim under the insurance policy on your Company covering all my expenses of Aga Khan Hospital till the full recovery of my left limb."

This letter was acknowledged by the Society, which immediately wrote to the first defendant requesting him to call at the Society's office, and a statement from him as to the circumstances of the accident was at some stage recorded in writing by the Society. On March 19, 1965, the advocate then acting for the plaintiff wrote to the Society, setting out short particulars of the accident and of the

plaintiff's injuries, and calling upon the Society to admit liability, a copy of the letter being sent to the first defendant as the person covered by the Society's policy. This communication was acknowledged by the Society on March 22, in a letter saying:

"We regret very much that our investigations have not been completed as yet, and we shall revert to the matter, in due course."

On April 8 the Society requested, without prejudice, that the plaintiff should furnish it with a copy of the medical report on his injuries, which was done under cover of a letter from the plaintiff's advocates dated May 26, in which they told the Society that, in view of the latter's delay, proceedings would be filed within ten days if the plaintiff's claim was not admitted. To this the Society replied on May 31, inquiring as to whether the plaintiff would afford it an opportunity of having him medically examined by its own doctor. To this also the plaintiff agreed, and he was examined by a surgeon named Aziz Khan, after which the Society, in a letter from its advocates, Messrs. J. K. Winayak & Co., dated July, 2, undertook to furnish the plaintiff with a copy of the surgeon's report as soon as the report was received. This undertaking was not honoured, and on August 5, Messrs. Khanna and Company, who by then had been appointed advocates for the plaintiff, wrote to Messrs. J. K. Winayak and Company seeking the name and address of both the driver and the owner of the vehicle, and inquiring as to whether Messrs. Winayak would "accept service of the summons on behalf of these gentlemen." Messrs. Winayak thereupon wrote to the Society on August 6, followed by a reminder on August 20, as a result of which they replied to Messrs. Khanna on September 1 giving the name and address of the owner of the car, and adding: "We have no instruction to accept the summons."

On October 5, 1965, Himatlal Naran, the law clerk employed by Messrs. Khanna and Company, called at the Society's claims department in Nairobi and spoke to Abdul Karim Jiwani, the filing clerk in that department already referred to. In view of the passage of time and the fact that the events of October 5 probably did not strike the participants as very important, it is not surprising that there should be some element of uncertainty as to what took place on that occasion. Jiwani in evidence said that Naran had called in the morning of October 5, and had stated that he wanted to serve on him what he understood Naran to describe as a "court process," but that he (Jiwani) had refused to accept the document, saying that he had no authority to accept "any court process or summons or anything" and suggesting that, if Naran were to call later in the day, he would see the claims manager who, according to Jiwani, was "the only authorised person in the claims department to accept court processes or summonses." Subsequently in his evidence Jiwani said that on July 27, 1966, that is, nearly ten months later, the claims manager started inquiring as to whether the Society had received any correspondence in this case or any notice from an advocate, to which Jiwani replied, "No". Then, a week later, Jiwani recalled the events of October 5, whereupon he told the claims manager that "maybe a certain gentleman had called in the office to serve a court process, but when I told him to call in the afternoon he did not turn up." Jiwani also said in evidence that the claims manager never comes to the office in the mornings.

Naran, in evidence, said that it was in the afternoon of October 5, that he called at the Society's premises, the purpose of his visit being to effect service of what he called a "third party notice" and that he there saw an African clerk at the counter to whom he tendered the notice and who took it to an Asian clerk in the same office and then returned, saying that the notice would be accepted by Jiwani. Naran said that he was then taken to Jiwani's room in the same building and that, on his tendering the notice to Jiwani at his counter, the latter read through it, left the counter and telephoned to somebody, and, on returning to

the counter, said that the person to accept service was not available and that Naran should call again the following day at noon. Naran added that, on hearing this, he told Jiwani that there was no necessity for him to call again and that Jiwani could himself accept service by signing a duplicate of the notice, but this Jiwani declined to do, whereupon Naran placed the original notice on Jiwani's table and departed. Naran is a law clerk of some twelve years' standing and experienced in the service of documents, and after his visit to the Society's office he endorsed, in his own handwriting, on a copy of the notice a memorandum reading as follows:

"October 5, 1965. Attending office of M/s. Pioneer General Assurance Society Ltd., seeing Mr. Jiwani when he telephoned someone and thereafter told me to come on October 6, 1965 at 12 p.m. as the person who is to accept service is not available at present. A notice was left with him (Jiwani) who refused to sign."

As between two witnesses I accept Naran's evidence as being the more reliable.

The plaintiff was filed on November 5, 1965, and on March 25, 1966, the plaintiff obtained from this court leave to serve the summons on the defendants by affixing a copy thereof on the court notice board at Nairobi and publishing once, in the "East African Standard" newspaper, an appropriate notice addressed to the defendants. Service was duly effected in the manner directed, but neither defendant entered an appearance within the time limited, whereupon the plaintiff caused the suit to be set down for hearing ex parte. The action came on for hearing before this court on June 17, 1966, in the absence of the defendants, when, after hearing evidence from the plaintiff and from a medical practitioner called by him, the court reserved its decision, and judgment was given for the plaintiff on July 8, in the sum of Shs. 40,875/- with interest and costs.

The Society now seeks the relief stated, but before considering the matter further it is necessary to deal with a preliminary objection raised by the plaintiff to the effect that the application as framed is incompetent. The grounds of this objection are, shortly, that the application should have been brought, either in the name of the defendants and with their leave, or by way of an application for leave to intervene, with both the plaintiff and the defendants being made parties, as set out in the first paragraph of the Annual Practice, 1966, Vol. 1, p. 174. In my opinion this objection cannot succeed. The notice of motion states that the application will be made by counsel for the Society "for and on behalf of and in the name of the applicants/defendants" for inter alia an order that the plaintiff be directed to serve the Society or its advocates "for and on behalf of the applicants/defendants", and thereafter that the Society be allowed to enter an appearance and file a defence "in the name of the defendants" within such time as the court may deem fit. Furthermore, the policy of insurance, under which the first defendant is said to have been covered, contains, in condition number 5, an express provision that the Society shall be entitled to take over and conduct in the name of the insured "the defence or settlement of any claim or to prosecute in his name for its own benefit any claim for indemnity or damages or otherwise", and that the insured shall give all such information and assistance as the Society may require. Although these words do not specifically mention the right of the Society to take proceedings by way of appeal there can be no doubt that they are intended to comprise such a right, and I think that likewise they must include the right to bring and prosecute an application such as the present.

Turning now to the substantial issue in the case, the basis of the relief sought is that, as a result of the plaintiff having been enabled to obtain judgment on an ex parte hearing, the Society, as the insurer of the first defendant, has been adversely affected by becoming liable to pay to the plaintiff the amount awarded to him. The materiality of the question of the service of the notice, with which I

have dealt in some detail, arises primarily from the provisions of s. 10 (2) (a) of the Insurance (Motor Vehicles Third Party Risks) Act, exempting an insurer from the obligation imposed by sub-s. (1) in respect of any judgment unless, either before or within fourteen days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings. The Act does not require that the notice to the insurer shall have been given specifically by the plaintiff, nor that it shall have been expressed in any particular form of words or served in any particular manner. The terms of the notice employed in the present case are as follows:

“In the High Court of Kenya at Nairobi.

Civil Case No. 1087 of 1965.

Pranjivan Velji Shan Plaintiff

versus

1. *Mwangi Seo Mbogo*

P.O. Box 143, Nairobi

2. *Mburia s/o Mugo*

P.O. Box 22, Kerugoya

Defendants

Notice of Institution of a Suit Under Third Party Risks Ordinance, 12 of 1945.

Take Notice that a suit is being instituted for the recovery of damages, interest and costs for personal injuries suffered by the plaintiff, as a result of an accident which occurred on January 10, 1965 at about 3.30 p.m. when vehicle No. KCA 941 belonging to the first defendant and driven by the second defendant as an authorized driver and insured by you knocked down the plaintiff who was walking along Desai Road to Champa Road who sustained inter alia shock, compound fracture of his tibia and fibula on the left side, bruises over the right leg, haematoma over the left cheek bone, dislocation of the metacarpo phalangeal joint of the left ring finger (*sic*), cut in front of the left ear.

Dated at Nairobi this 5th day of October, 1965.

for *Khanna and Company*,

sgd. R. N. Khanna

Advocates for the Plaintiff.”

In my opinion these terms are adequate to meet with the requirements of s. 10 (2) (a), and the steps taken by the plaintiff’s advocates to effect service would have been sufficient to comply with the provisions of O. 5, r. 13, and O. 47, r. 2, of the Civil Procedure (Revised) Rules, 1948, had the notice been one to be served by virtue of these rules. Apart from the provisions of those rules, it is clear that an insurer cannot be permitted to enlarge the effective protection afforded to him by the Act by so arranging his affairs that, at the head office of his business in Nairobi, there is only one person empowered to accept service of documents and such person attends at the office only in the afternoons. I am satisfied that notice, in the terms which I have set out, was given to the Society on October 5, 1965, and that, at least on the evidence before me, the the Society could not now, were it to seek to do so, rely successfully upon the provisions of s. 10 (1) (a) for the purpose of avoiding liability.

The Society, in support of the present application, relied strongly upon the decision of the Court of Appeal in England in *Windsor v. Chalcraft* (1) where the court, by a majority, reversing the order of Du Parcq, J. (as he then was),

set aside, at the instance of an insurer, a judgment in favour of a plaintiff for damages arising out of the death of a person in a road accident, which was obtained against the insured in default of appearance. In that case, however, the defendant failed either to notify the insurer of the accident or to give notice of the plaintiff's claim, as he was required to do by the terms of the policy, whereas in the present case, as the claims manager admits in para. 3 of this affidavit, the first defendant, that is, the insured, informed the Society about the accident. Again, on the merits, it was said that in case that, although the claim was brought by the plaintiff for the benefit of himself and the mother of the deceased, pursuant to Lord Campbell's Act, and for the benefit of the deceased's estate, pursuant to the Law Reform (Miscellaneous Provisions) Act, 1934, the damages awarded, amounting to more than £2,500, were greater in amount than could have been recovered in a contested action under either of those statutes.

But the principal distinction between *Windsor's* case (1) and the present is that here the plaintiff appears to have done everything possible before filing his action, either personally or through his advocates, first, to reach a settlement without resort to litigation, and then, in view of the Society's apparent refusal to give proper attention to the matter, to warn the Society that an action was being filed; while the Society, for its part, consistently and, it would seem, deliberately declined to take heed of the intimation so given to it.

The plaintiff's advocates, probably appreciating the desirability of ensuring that the Society should be a defendant in the proceedings in order to avoid the question that has now arisen, displayed considerable patience in the conduct of of the correspondence, culminating with their letters of August 1 and 17, 1965, enquiring as to whether the Society's advocates would accept service of proceedings against the two defendants. It would seem from the footnote to Messrs. Winayak's letter of August 20, that, as advocates for the Society, they also were contending with the dilatoriness or evasiveness of their client, and, although the Society's reply to Messrs. Winayak has not been put in evidence, the reasonable inference to draw from Messrs. Winayak's communication of September 1, is that the Society had expressly declined to authorize Messrs. Winayak to accept service. Following the taking up by the Society of this attitude, the only step left to the plaintiff to take prior to filing the action was to give a formal notice to the Society, which notice was given and, as I have already held, must be deemed to have been effectively served.

No explanation has been offered as the reason for the Society's course of conduct. Possibly, it may have been the implementation of a general policy of declining to assist in the prosecution of claims against itself; or, perhaps, it was inspired by the thought that a claimant should be encouraged to proceed with his claim *ex parte* so that the Society could gauge its strength and then, relying upon having the decree set aside, contest the claim in the light of the knowledge thus obtained; or, again, there may have been some doubt in the mind of the Society as to whether it was inescapably liable under the terms of the policy. Whatever was the reason, the present position is that, directly as a result of the tactics adopted by the Society with every appearance of deliberateness, a judgment by default has been obtained by the plaintiff against the defendants which will involve the Society in financial loss. I do not consider that, in these circumstances, the decision in *Windsor v. Chalcraft* (1) is authority for granting the relief sought.

The matter, however, does not rest there for, apart from the special position arising under the road traffic legislation, the Society relies upon the general principle that, if a *prima facie* case is made out, the court will readily set aside a judgment obtained *ex parte* so that the matter may be determined on its merits. Based on this principle, the Society's complaint is that it received no notice of the plaintiff's intention to file proceedings, no notice of the proceedings having

been actually filed, and no hearing notice for the day of the trial; and that the judgment, therefore, should not be allowed to stand. Among the items of correspondence annexed to the affidavit of the claims manager, to which reference has been made, is a letter from the Society's advocates, dated July 2, 1965, that is, before the action was filed, in which they state:

"According to our instructions the true facts are that our client was travelling in his car driven by his driver in the direction of Fort Hall Road along Desai Road and a break-down which was towing another vehicle and had intended to turn into a side road or lane had stopped to give way to our client's vehicle. Your client without looking in the direction in which our client was travelling jumped over the rope which was tied to the break-down vehicle and the break-down and came in the path of our client's vehicle. Accordingly the driver of the insured of our clients had no opportunity whatsoever of avoiding collision of his vehicle with your client."

Apart from the fact that the writer of that letter appeared to be treating, not only the Society, but also the owner of the car as his client, it is clear from the earlier part of that letter that, at that time, the Society was well aware of the details of the accident, the nature of the plaintiff's claim, and the identity of the defendants. Furthermore, the plaintiff's intention to file his action, together with all relevant details, was again given to the Society by the notice dated October 5, 1965, to which I have already referred. I am unable to see, then, on what basis it could be suggested that the Society, which is now seeking to place itself in the shoes of the defendants, should not be fixed with knowledge of the filing of the action by reason of the publication, in the "East African Standard" newspaper of April 6, 1966, of a notice addressed to the defendants by name, together with the posting of a copy of the plaint on the court notice board at Nairobi, pursuant to the order of this court dated March 25, 1965, by way of substituted service of the proceedings on the defendants.

Since, then, it has been shown that, long prior to the date of the hearing, the Society was in fact aware of the nature of the plaintiff's claim, of the opinion both of its own medical adviser and of the plaintiff's medical adviser as to the plaintiff's injuries, and of the first defendant's version of how the accident occurred, but had refused nevertheless to authorize its advocates to accept service of the proceedings, as a result of which it had subsequently been served, in a manner amply sufficient to satisfy the Civil Procedure (Revised) Rules, 1948, with a formal notice to the effect contemplated by s. 10 (2) (a) of the Insurance (Motor Vehicles Third Party Risks) Act, following which notice of the filing of the suit had been duly published in the press and elsewhere, I am not persuaded that, in these circumstances, the Society is entitled now to come to this court and have the judgment set aside on the ground that it did not have notice of the proceedings.

A fortiori it is difficult to see how the Society, not having either accepted service of the proceedings and entered an appearance or taken any step to be added as a party, can secure the same result on the ground of not having received notice of the hearing for, even if it had been served and had attended, it is doubtful that, not having appeared or been joined, it would have been entitled to be heard.

One other small matter, although it forms no part of the grounds of my decision, may, perhaps, be mentioned. The accident occurred on January 10, 1965, and the inquiry to the Society's advocates as to whether they would accept service was made on August 5 of that year. Had service been accepted the delay consequent upon the necessity for effecting substituted service could have been avoided and the suit could very probably have been disposed of at an earlier date. If the present motion were to be granted, leading to service of the summons on the Society, entry of appearance, and the filing of pleadings, the fresh hearing would almost certainly not take place for some considerable time, and there

could be no

certainly that the plaintiff's witnesses would necessarily be available or, if available, would be as clear in their recollection of the material events as at the time of the earlier hearing. This is a matter for which no allowance could properly be made at the fresh hearing in relation to the discharging by the plaintiff of the onus of proof resting on him as such plaintiff.

I have carefully considered, in relation to the present application, the principles governing the exercise of the court's discretion to set aside a judgment obtained *ex parte*. This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. In my opinion, applying those principles to the facts before me and taking everything into account, the Society has not made out a sufficient case on the merits to justify the setting aside of the perfectly regular order of July 8, 1966, and accordingly the motion must be refused. The Society will pay the plaintiff's costs, to be taxed on the higher scale.

Application refused.

For the defendant:

J. K. Winayak & Co., Nairobi

K. Bechgaard, Q.C., and Winayak

For the plaintiff:

Khanna & Co., Nairobi

R. N. Khanna

Bhanji v McBride
[1967] 1 EA 123 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	24 January 1967
Case Number:	1103/1965
Before:	Rudd J
Sourced by:	LawAfrica

(As Administrator of H. H. The Aga Khan Platinum Jubilee Hospital, Nairobi)

[1] Negligence – Hospital – Patient slipping on floor – Whether such lack of reasonable care as to render hospital liable.

Editor's Summary

The plaintiff, who was a patient in the Aga Khan Platinum Jubilee Hospital, Nairobi, recovering from an

attack of malaria, slipped and fell in the corridor outside the shower compartments and sustained a fracture of the right wrist resulting in some permanent damage. The court assessed the damages at £700. The plaintiff sued the hospital authorities, alleging that he slipped because the floor of the corridor outside the shower compartment was wet. There was some conflict as to whether the floor of the corridor was wet and if so, whether the water came from the adjoining bathroom or from the shower used by the plaintiff.

Held –

- (i) the hospital was not bound to ensure that the floor of this corridor leading from the bathroom and just outside some shower compartments was always bone dry;
- (ii) the hospital staff had not acted with such unreasonable lack of care towards the plaintiff as to render the hospital or its administrator liable.

Action dismissed.

No cases referred to in judgment.

Judgment

Rudd J: On March 14, 1964, the plaintiff was admitted to the Aga Khan Platinum Jubilee Hospital, Nairobi, complaining of fever, backache and vomiting for two days previously. He was treated for malaria and on March 15 his condition was afebrile and as from March 16, he was fully ambulant. On the afternoon of March 20, 1964 he slipped and fell in the passage outside the shower compartments and suffered a fracture of the right wrist with considerable dorsal displacement of the lower radial fragment. This united but there was considerable restriction of movement necessitating an operation which was duly performed and caused some improvement. Nevertheless there is still a restriction on movement and loss of power. There is occasional pain or aching and muscle atrophy. He cannot write as well as he used to, cannot lift heavy weights, cannot use tools as he used to. For workman's compensation purposes his present disability is about 20 per cent. and this would be permanent.

In the box as far as gesticulation went I noticed that the wrist was fairly flexible and there was easy pronation and supination within the limits attempted in normal gesticulation. He is, however, not a workman. He supervises his father's business. He used to work on the family vehicles in the family's private garage. He used to do repair work in the garage but cannot, he says, do that now. He used to drive heavy lorries to trading centres selling beer, soft drinks and the like. He has had to give up much of these things and says that his father has reduced his salary and that his brother now does the work he used to do.

This is a family business and there is scope and opportunity to magnify the present disability and its effects. I am sure that he could write quite well if he really made sustained efforts. He is not really dependent on his skills as a workman and I am not fully satisfied that his loss of salary was necessarily as great as he says it was. Nevertheless there was pain and suffering, some permanent disability and he cannot do as much as he could before the accident. These are not negligible but not quite as serious in his case as in the case of a man who was merely a workman or mechanic simpliciter. Ordinarily I would say that general damages would not exceed more than £500 to £600 if there had been no second operation. Taking into account the second operation I assess them at £700. There still remains the question of liability.

On the question of liability the plaintiff's case is that he went for a bath or shower and finding the bathroom occupied he had a shower. As he left the shower compartment he slipped and putting out his hand to save himself the wrist got broken.

He says he slipped because the floor of the corridor outside the shower compartment was wet. This corridor leads to the bathroom door and he says the water came from that door.

There is no independent corroborating evidence from the nature of the case. The floor was a terrazzo floor and this is the only proper floor according to the best modern opinions for such a corridor in a hospital.

I think it is much more likely that the water came from his shower. This would happen if the plastic curtain was left hanging outside the raised bottom sill of the shower compartment. It should not happen if the curtain was hanging inside this sill.

The water could, however, come from the bathroom if there was a great deal of splashing from the bath. The floor of the bathroom is designed with drains and slopes to drain away any normal amount of

water or even a somewhat abnormal amount of water splashing out from the bath. I am not satisfied that the water in the passage, if there was water in the passage, came from the bathroom.

I think it more likely that it came from the shower. There is however some question as to whether there was any water in the corridor and on the floor. The sister in charge says when she saw it, say 10 to 20 minutes after the accident, it was dry and the plaintiff's soap and shoes were still there and on the floor. The difficulty about her evidence is that it would suggest that the plaintiff had his soap in his hand, that it slipped out of the hand and that he trod and slipped on it. This does not seem to me to be a very likely sequence of events.

I do not know and do not feel able to find firmly what were the precise facts of the case. I think there probably was some moisture on the floor but I do not think that that should be considered very exceptional in the circumstances or that the hospital was bound to ensure that the floor of this corridor leading from the bathroom and just outside some shower compartments was always bone dry. In the nature of things and with ambulant patients using the showers I would expect some water to be on the corridor floor occasionally. This is not a case of a hospital servant flooding the floor or of such a servant applying a slippery polish to the floor and leaving it there without warning. Nothing of that sort has been proved to my satisfaction and in my view the hospital staff has not been proved to have acted with such unreasonable lack of care towards the plaintiff as to render the hospital or its administrator liable in damages to the plaintiff for the unfortunate injuries which he suffered as a result of his slip or fall.

In my view that is an unfortunate accident which could happen in any bathroom or outside any shower compartments such as the one the plaintiff was using. I am satisfied that the construction and design was not dangerous and was in accordance with the best modern opinion. I am not satisfied that any lack of reasonable care has been proved against the hospital staff. For these reasons I dismiss the action with costs.

Action dismissed.

For the plaintiff:

Archer and Wilcock, Nairobi

P. le Pelley

For the defendant:

Macdougall and Wollen, Nairobi

R. N. Sampson

Umari Bin Abudu (*Estate of*) v Commissioner of Lands
[1967] 1 EA 126 (HCK)

Division: High Court of Kenya at Mombasa

Date of judgment: 25 October 1966

Case Number: 15/1964

Before: Harris J

Sourced by: LawAfrica

[1] *Evidence – Land Registration Court – Procedure to be followed for taking evidence in – Land Titles Act, s. 6 and s. 8 (K.) – Evidence Act 1963, s. 146 (K.).*

[2] *Land – Land titles – Procedure to be followed by Land Registration Court – Evidence must be given in the Land Registration Court – Land Titles Act, s. 6, s. 8 (1) and s. 15 (1) (K.).*

[3] *Practice – Land Registration Court – Procedure as to evidence – Burden of proof in – Land Titles Act, s. 6 and s. 8 (K.).*

Editor’s Summary

The appellant’s predecessor in title had in 1909 presented a claim under the Land Title Ordinance of 1908, but, as the Land Registration Court set up under the Ordinance did not sit in the area in question between 1908 – 1957, there was no adjudication on the original claim. The Recorder of Titles twelve months after having questioned squatters on the land delivered a judgment in 1964 allowing part only of the renewed claim and this appeal was against that judgment. The appellant complained that the Recorder had not conducted the proceedings before him in accordance with the Acts, and also that the Recorder had applied too high a standard of proof, having regard to the failure by the authorities over a period of many years to provide a forum in which the claim could be heard. The third point raised by the appellant was that the Recorder gave his judgment without affording the appellant an opportunity to obtain legal advice.

Held –

- (i) the Land Registration Court is a “court” within the meaning of the Evidence Act 1963; and therefore evidence given before it should be taken in the manner prescribed by s. 146 of that Act;
- (ii) the judgment was vitiated by failure to take evidence in the manner required by law and must be set aside;
- (iii) (obiter) the criterion of proof under the Act remained the balance of probabilities though, in some cases, it might well be that the absence of certain evidence could be reasonably accounted for by the mere passage of time;
- (iv) the Recorder’s failure to accede to the request of the appellant’s advocate for a new hearing before delivering his judgment, which did not take place for more than twelve months afterwards, was unreasonable and he failed properly to exercise the discretion vested in him.

Appeal allowed.

Cases referred to in judgment:

(1) *Jeevanjee and Co. v. The Crown* (1915-16) 6 E.A.L.R. 86.

(2) *Sheikh Omah Dahman el Amudy and Another v. Government of Kenya, Mombasa* C.A. No. 13 of 1958 (unreported).

Judgment

Harris J (read by **Wicks J**): This is an appeal by one Shariff Mohamed bin Abdulla, as administrator of the estate of Umari

bin Abudu bin Saidi, from the judgment of the Recorder of Titles delivered on October 22, 1964, at Mambui in the Coast Province, allowing in part only a claim under the Land Titles Act (Cap. 282) put forward by the appellant's predecessor in title to certain lands in that Province, and directing the issue to the appellant of a certificate of title to ownership in respect of plot No. 578 being portion of the lands claimed.

The circumstances of the case are somewhat remarkable. On November 30, 1908, there was enacted as an Ordinance the measure now known as the Land Titles Act with the stated purposes of making provision for the removal of doubts that had arisen in regard to titles to land and of establishing the Land Registration Court. The Ordinance was applied only to certain areas, including the district of Malindi in which the lands, the subject of this appeal, are situate, and by s. 15 it was declared that all persons being or claiming to be proprietors of, or having or claiming to have any interest whatever in, immovable property in any district or place whereto the Ordinance had been applied should, before the expiration of twelve clear months from the date of such application, make a claim in respect of that interest to the proper officer, by whom in turn the claim would be passed to the Recorder of Titles. The Ordinance provided that the Recorder should be the presiding judge of the Land Registration Court and conferred upon him jurisdiction to determine all such claims on notice to the persons concerned, each applicant whose claim was successful to be issued with a certificate of title.

It appears that as far back as the year 1909, very shortly after the commencement of the Ordinance, the present claim was presented, and it is agreed that the appellant is the successor in title to the original claimant and as such is entitled to pursue the claim. It was conceded by the respondent that, except for a short sitting about the year 1920, the Land Registration Court had apparently not sat to hear cases from the Malindi district at any time between the years 1908 and 1957. It is stated in the judgment under appeal that the present claim, which is numbered 1238/2514, is not the original claim submitted but a copy, the original claim having been destroyed with many others by fire in the office of the District Office at Malindi a number of years ago, and it would seem that the copy was made from information contained in a register of claims prepared when the claims were first submitted in the year 1909 and since held in the office of the Liwali at Malindi.

The grounds of appeal principally relied upon in this court were as follows:

- (1) that the Recorder did not conduct the proceedings before him in accordance with the provisions of the Act;
- (2) that in view of the lapse of time since the date of the original application the Recorder should not have required the appellant to prove his claim with strictness; and
- (3) that the Recorder should have allowed the appellant an adjournment to enable him to obtain legal advice.

In support of the first ground of appeal counsel for the appellant referred to the fact that, from a passage in the judgment appealed from, it would appear that the Recorder had apparently taken evidence from witnesses informally and not in the presence of the appellant. The passage referred to is as follows:

"The land which has been claimed is shown on Air Photographs No. 077 and 091 and is approximately 1,000 acres. The boundaries to the land were demarcated on November 22 and December 5, 1962. These boundaries were shown by Shdrak Charo who said that he was employed by Shariff Mohamed and was paid Shs. 35/- per month to look after a banana shamba belonging to Shariff Mohamed on the Sabaki River. Shdrak Charo has two

shambas nearby which he states he pays Shs. 50/- p.a. to Shariff Mohamed. Shdrak Charo says that he had no knowledge of the boundaries of the claim until the previous week when he was shown by Omari Jefwa. There are many squatters upon the land and although it has been stated that these squatters used to pay rent, this has not been substantiated, and in fact a number of squatters who have been questioned deny that they have ever paid rent for the land which they occupy.”

The proceedings leading up to the judgment appear from the record. On March 20, 1962, the appellant gave evidence in support of his claim before the Recorder sitting in the Land Registration Court at Mambrui. Subsequently, by a letter dated November 20, 1962, the Recorder required him to demarcate the boundaries of the land claimed and to report on completion at the Recorder’s office at Mambrui during the period from November 5 to November 20, 1962, whereupon a time would be arranged for inspection of those boundaries. On November 20, that is, the last day of the period specified, the appellant wrote to the Recorder stating that, owing to indisposition, he was unable to attend to demarcate the boundaries but that one of his employees named Omar Jefwa would be present with twenty labourers to clear the boundaries. By a notice dated August 8, 1963 the Recorder informed the appellant that September 4, 1963 had been fixed for the sitting of the Land Registration Court at Mambrui for the appellant to attend and prove his claim, in default of which the cause might be heard and determined in his absence, and the appellant was asked to bring with him any documents upon which he intended to rely together with “letters of administration or summary certificates for the above-mentioned estates”.

On September 2, 1963, the appellant wrote to the Recorder requesting him to postpone the hearing until September 16 to enable the appellant to contact a lawyer in Mombasa, explaining that he had been unable to do so earlier owing to the illness of his child. This letter was followed by one from the appellant’s advocate to the Recorder, dated September 13, 1963, written on the assumption that the hearing had not concluded and requesting that they be informed of the new hearing date so that they might attend. To this last letter the Recorder replied on September 30 stating that the appellant’s letter of September 2 had not been received until after September 4 and that the hearing had been held in his absence and adjourned for judgment. Judgment was ultimately delivered more than twelve months later on October 22, 1964.

The note of the proceedings, signed by the Recorder, does not show any person as having attended on September 4, and states that the matter was adjourned for judgment. I understood counsel for the respondent not to challenge the assertion of counsel for the appellant that the Recorder had apparently taken evidence between the time of the hearing in 1962 and September 1963 by travelling around the countryside interviewing people in the absence of the appellant, an assertion which receives some measure of verification from the statement in the judgment that a number of squatters on the land had been questioned.

In support of his contention that the Recorder did not conduct the proceedings before him in accordance with the Act, counsel for the appellant submitted that the Land Registration Court is strictly a court and must sit as such and act judicially and that evidence should be given before it only upon oath and be subject, if desired, to cross-examination. Counsel for the respondent contended that the Act gave the Recorder a complete discretion which must be so exercised as not to cause a miscarriage of justice but he was not prepared expressly to say that it must be exercised judicially. In considering this matter it is necessary to look at the statutory provisions setting up the court and providing for its procedure.

Section 6 of the Act declares that:

“There shall be a court of special jurisdiction, subordinate to the High Court, to be styled the Land Registration Court, whereof the Recorder of Titles shall be the presiding judge, and the Recorder of Titles shall have jurisdiction in all claims made under this Act relating to immovable property situated in the district, area or place to which this Act has been applied, with powers to determine any questions that may need determination in connexion with such claims and the Recorder of Titles shall have all the powers of a judge in respect of procedure in the said Land Registration Court, including the summoning of and administering oaths to witnesses, assessors, land valuers, appraisers and other persons whose advice, assistance or evidence seem to him to be necessary, the production of instruments and records and the due and proper administration of justice and order in the said court.”

Section 9 provides that the court shall be held in such places as the Recorder shall determine and s. 7 confers a right of appeal to the High Court from every final judgment of the Recorder, with a right of further appeal from the High Court to the Court of Appeal. No qualifications are now prescribed for appointment to the post of Recorder though under the Ordinance as originally enacted the Recorder was required to be a barrister or solicitor of not less than five years’ standing.

Section 8 of the Act is in the following terms:

“8(1) It shall not be necessary for the Recorder of Titles to take down in writing the evidence given in the Land Registration Court of any witness verbatim, unless requested to do so by the claimant or by a person opposing a claim:

Provided that the essence of such evidence shall be noted by him.

- (2) It shall not be necessary for the Recorder of Titles to put in writing any judgment delivered by him, except in a short and concise form showing his reasons for arriving at such judgment.
- (3) The record of all evidence, whether oral or documentary, taken by the Recorder of Titles at the investigation of the claims shall, subject to the provisions of sub-s. (5) of this section, be made up in a separate file, and the finding or judgment thereon, and reasons therefor, and all orders of the Recorder of Titles in relation thereto, shall be duly entered on the said record.
- (4) The record so made up shall at all reasonable times, upon a written application on that behalf, be open to the inspection of any person interested in such claim or his agent duly authorized thereto in writing, with liberty to demand and receive copies thereof or extracts therefrom upon payment of the fees which may be prescribed.
- (5) The Recorder of Titles may, when he thinks fit, consolidate the claims of one or more persons, and the same shall then form the subject of one and the same investigation; and the record of all evidence whether oral or documentary taken by the Recorder of Titles at such investigation shall be filed with any one of the statements of the claims so consolidated as aforesaid, and the finding or judgment on each of such claims, and reasons therefor, and all orders of the Recorder of Titles in relation thereto, shall be duly entered on the said record.”

In *Jeevanjee and Co. v. The Crown* (1), Hamilton, C.J., in the High Court of East Africa, in considering the position of the Recorder in regard to the procedure to be followed by him, said ((1915-16), 6 E.A.L.R., at p. 88):

“Proceedings in the Land Titles Court are in many respects different from proceedings for the recovery of land in other courts of the Protectorate . . . There is nothing in the Land Titles Ordinance, 1908, which lays down what procedure should be followed, and it is eminently reasonable that having regard to the nature of the work of that court the procedure should be elastic and not too closely fettered by rule.”

He then refers to the provisions of s. 6 and continues:

“The Recorder is thus left with a free hand, and though I do not wish it to be thought that this court desires in any way to interfere with that freedom, it is still open to this court, and is, I conceive, its duty, to examine into any particular case that comes before it, to see whether the procedure that has been adopted in that case is not contrary to any general principle for eliciting the truth where there are conflicting claims to land, and whether such procedure has, in fact, led to what is or may be an erroneous decision, particularly when, as in this case, it is alleged that a claimant has been deprived of his rights owing to the procedure adopted.”

In my opinion, however wide may be the Recorder’s discretion as to procedure, the Land Registration Court is a “court” within the meaning both of the Evidence Act, 1963, and of the Indian Evidence Act, 1872, as formerly applied to Kenya, with the result that evidence given before it should be taken in the manner prescribed by s. 146 of the Act of 1963 and formerly by s. 138 of the Act of 1872 and the witnesses giving such evidence should be required to do so under oath or affirmation or otherwise as provided by the Oaths and Statutory Declarations Act (Cap. 15). Support for this conclusion is to be found in s. 8 (1) of the Land Titles Act which appears to require that, whatever be the degree of formality to be attached to the proceedings, the evidence to be adduced must be given “in the Land Registration Court”.

In the present case there is nothing before me to show that the Recorder, in taking the evidence of the squatters whom he apparently questioned, made any attempt to comply with the requirements of s. 8 of the Land Titles Act, or that the questioning of the squatters amounted to the taking of evidence in accordance with the principles embodied in the statutory provisions to which I have referred. His judgment is expressly based upon amongst other things, statements imputed to the squatters taken in such a way as to render them extra-judicial and not admissible as evidence in a court of law. In my opinion all this so vitiated the decision that the judgment cannot stand and must be set aside.

This finding is sufficient to dispose of the principal issue raised on the appeal, but I understand both counsel to say that, for the guidance of the Recorder in future cases, they would wish the court to consider the proposition, which was raised as an alternative ground of appeal, to the effect that, in rejecting the appellant’s claim, the Recorder had applied too high a standard of proof, having regard to the circumstances created by the failure over a period of many years by the authorities to provide a forum in which the claim could be dealt with, and to the fact that, by s. 17 (1) of the Act, all land to which the Act applies is deemed to belong to the State if no certificate of ownership has been granted to any other owner. Although it would not be appropriate for me to attempt to lay down in advance any criterion by which specific claims under the Land Titles Act should be dealt with, it may perhaps be permissible to make certain observations relevant to the present case.

Counsel for the respondent agreed that the original application was filed within the period allowed by s. 15 (1) of the Act and that the only reason which could be suggested as to why the matter was not disposed of shortly afterwards appeared to be the lack of the necessary judicial machinery. This has almost certainly rendered more difficult the appellant's task of adducing evidence of the state of affairs at the time of the application and, if the issue were merely one between the appellant and the Government, it might have a bearing on the merits of the case. Indeed Edmonds, J., in a somewhat similar case of *Sheikh Omar Dahman el Amudy and Another v. Government of Kenya* (2), expressly held that, in the circumstances, the Recorder in that case had required too high a standard of proof. The position here, however, is not so simple, for it would appear that portion of the land claimed by the appellant, namely, plot No. 577 containing 66.5 acres, is already the subject of a certificate of ownership, dated May 5, 1966, granted under the Act to two persons named Saleh Bin Abdullah Bin Hyder and Ali Bin Suldan Bin Ali as proprietors in common in fee, while two further portions are the subject of appeals by other persons now pending before this court.

It would seem that the difficulty placed in the way of the appellant by the failure to establish the requisite judicial machinery may, to some extent at least, be avoided or tempered by the application of the provision of the Evidence Act as to the burden of proof. In *Jeevanjee's* case (1) Hamilton, C.J., appears to have held that the ordinary rules of evidence were applicable to proceedings before the Recorder whether brought by or against the Crown, and he referred specifically to s. 110 of the Evidence Act, 1872, of India. The provisions of that section are now to be found in s. 116 of the Evidence Act, 1963, which provides that "when the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner", and it may well be that the appellant, if he can establish long-continued possession of the lands by himself or his predecessors, will find his claim reinforced by the lapse of time since the date of the original application. It should perhaps be added that the form used for the original application required that it be verified by an express declaration by the original application, and it has not been suggested that this requirement was not complied with, with the result that the original application itself constitutes evidence of a claim of right extending back for nearly sixty years.

Apart from these observations I am not prepared without further argument to say that the difficulties which are undoubtedly placed in the way of claimants under the Act by the long continued absence of a forum for the prosecution of their claims would justify the adoption by the court of a lower standard of proof of such claims. The criterion, it seems to me, must remain that of the balance of probabilities, though it may well be in some cases that the absence of certain evidence, which the court would otherwise expect to be produced, can be reasonably accounted for by the mere passage of time.

A third ground of appeal was that the Recorder, before reaching his decision, should have afforded the appellant the opportunity he sought to obtain the legal advice which he had been unable to secure earlier owing to the illness of his child. No doubt the appellant's request had not been received on September 4 when the case was called and judgment reserved, but it was received on the following day and was followed up by a letter from the appellant's advocates of September 13 so that the bona fides of the request were not in doubt. The Recorder's reply to the advocates merely reiterated that the request had not been received until after September 4, that the hearing had been held in the appellant's absence, and that the case had been adjourned for judgment. An indication as to how this situation might have been dealt with may be gathered from s. 18 of the Act which, in sub-s. (2), allows the Recorder to proceed in the absence of a claimant only

if no good and sufficient cause for such absence is shown, and in sub-s. (3) provides that where a claimant, after judgment has been given in his absence, appears within a reasonable time and satisfies the Recorder that his absence was due to sickness, accident or some other cause over which he had no control, the Recorder must open up the judgment. In my view the Recorder, in declining to accede to the request of the appellant's advocates before delivering his judgment, which did not take place for more than twelve months afterwards, acted unreasonably and failed properly to exercise the discretion vested in him. On this ground also I would allow the appeal.

At the hearing counsel for the appellant intimated that he did not seek to uphold so much of the order of the court below as directed the issue to him of a certificate of title to ownership of plot No. 578 and sought, instead, that the whole order of the Recorder be set aside and the entire matter remitted to the Land Registration Court for re-hearing subject to the limitation that that court cannot, in this matter, interfere with the effectiveness of the certificate of ownership, dated May 5, 1966, and granted to two other persons in respect of plot No. 577, to which I have already referred. There will be an order accordingly and, at the request of both counsel, I direct that, if the matters at issue in civil appeals Nos. 16 and 17 of 1964 now pending before this court should also be remitted to the Land Registration Court for re-hearing, the Recorder shall be at liberty to hear all three matters together. The appellant will have his costs of this appeal.

Order set aside. Case remitted for re-hearing accordingly.

For the appellant:

Bryson, Inamdar & Bowyer, Mombasa

J. E. L. Bryson

For the respondent:

Attorney-General, Kenya

D. P. Nagpal (State Counsel, Kenya)

Virani v Dharamsi
[1967] 1 EA 132 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	9 February 1967
Case Number:	48/1966
Before:	Sir Charles Newbold P, Sir Clement de Lestang VP and Duffus JA
Sourced by:	LawAfrica
Appeal from:	The High Court of Tanzania – Biron, J.

[1] Workmen's Compensation – Out of and in course of employment – Section 5 (1) and s. 5 (2) of Workmen's Compensation Ordinance (Cap. 263) (T.).

Editor's Summary

The deceased workman was employed as a clerk by the appellant and part of his duty was to go to a particular godown and collect coffee beans. In the course of such duty, the deceased and another person, who was not an employee of the respondent, had a quarrel as a result of which the deceased died. The court found that the quarrel resulted from acts done by the deceased for the purposes of and in connection with his employer's business. The judge, on appeal from the resident magistrate, stated that an accident arose "out of and in the course of employment" if it resulted from an act which the employee was employed to do, even if the employee adopted a wrong method of doing the act or did it in a wrong manner. The employee in this case was employed to go and collect beans which was precisely what he was doing, and in the course of his so doing,

an argument arose and from this argument the employee received injuries from which he died. The judge therefore upheld the decision of the resident magistrate awarding compensation to the dependants of the deceased. The employer appealed to the Court of Appeal.

Held – in these circumstances the workman was clearly enabled to recover compensation under s. 5, whether under s. 5 (1) alone or under s. 5 (1) as construed with s. 5 (2).

Appeal dismissed.

Cases referred to in judgment:

- (1) *Noble v. Southern Railway Co.*, [1940] A.C. 583.
- (2) *Lee v. Breckman and Co.* (1928), 21 B.W.C.C. 32, C.A.
- (3) *Holden v. Premier Water-Proof and Rubber Co.* (1930), 23 B.W.C.C. 460, C.A.

Judgment

Sir Charles Newbold P: This is an appeal from the decision of a judge of the High Court of Tanzania upholding the decision of a resident magistrate awarding compensation to the dependants of a deceased workman in circumstances which I shall shortly detail.

Counsel for the appellant has urged that there has been no finding that the deceased met his injury from an accident arising out of and in the course of his employment; that the resident magistrate and the judge of the High Court, Biron, J., have applied the wrong test by thinking that all that is necessary to enable the dependants to succeed in their claim is for them to prove that the injury had occurred to the deceased during the period of his employment; that in any event both the resident magistrate and Biron, J., had arrived at their conclusions on the basis that the injury had been received as the result of an act “done by the workman for the purposes of and in connection with his employer’s trade or business” under s. 5 (2) of the Workmen’s Compensation Ordinance (Cap. 263), whereas what should have been considered is whether the case came within s. 5 (1) and whether the accident arose “out of and in the course of the employment”; and finally that, the employment of the deceased had been that of a clerk, which did not subject him to any particular risk of assault and it is only if the employment subjects the workman to any particular risk of assault that any injury received from an assault can be said to “arise out of and in the course of the employment”. I hope that I have set out fully the main points raised by counsel.

I may say here at once that during the many years in which the Workmen’s Compensation Act of the United Kingdom has been subject to judicial scrutiny there has occurred a very considerable number of cases in which those in any way concerned with this particular sphere of the law would be satisfied that many a distinction has been drawn without a difference. Further, due to the particular history of the amendments to the United Kingdom Act decisions taken at certain periods would have little reference to the Ordinance of Tanganyika because those decisions would be related to the then existing legislation of the United Kingdom, which legislation is different from that incorporated into the law of Tanganyika. Having said that, I think it is necessary also to say that it is the law of Tanganyika and not that of the United Kingdom which we have to apply.

Turning to the points urged by counsel, the first thing to be considered is whether there has been any

finding by either court as to the circumstances in which this accident occurred. It is true that the resident magistrate in the course of his judgment referred on a number of occasions to proviso 5 (1) (*b*) and it is

also true that in this respect the judgment might well be somewhat clearer. However, the very last paragraph of his judgment reads as follows:

“There was an accident which resulted in the death of the workman and this death is within the meaning of s. 5 (2) of the Workmen’s Compensation Ordinance (Cap. 263). It also arose in course of the employment of the respondent, and the respondent is liable to pay compensation under s. 5 (1) of the Ordinance. Objections are dismissed”.

Taking this in conjunction with the judgment as a whole I confess that in my view there is a clear finding that the injury arose “out of and in the course of the employment” by reason of the application of s. 5 (2). I take the earlier references of the resident magistrate to proviso (b) as nothing other than a statement that on the facts had it been held that the injury of the workman was attributable to his serious and wilful misconduct the resident magistrate would nevertheless have been prepared to exercise his discretion under the proviso to the proviso and award compensation. When it came up to the judge there is a most definite finding to the effect that the quarrel, as a result of which the deceased met his injuries, arose, to use for a moment a neutral term, as a result of the nature of the work that he was doing and directly related to that work. Biron, J., at p. 36 said this:

“Although the learned magistrate does not appear to have made an express finding to that effect, it is abundantly clear, and I have no hesitation at all in so finding on the evidence, that the quarrel was over the coffee each of the participants had come to collect.”

In referring to “coffee” Biron, J., clearly intended to refer to beans. Later on Biron, J., said this in his judgment:

“Although the learned magistrate quoted the sub-section 5 (2) which was in accordance with the submission made by the senior labour officer who appeared at the hearing. I am by no means persuaded that the learned magistrate relied on this subsection alone, as he expressly referred to and set out s. 5 (1) (b) of the Ordinance.”

I think that what Biron, J., decided in his judgment was that the resident magistrate was correct in coming to the conclusion that the accident, by reason of s. 5 (2), arose out of and in the course of the employment and that in any event if there had been what could be described as serious and wilful misconduct on the part of the deceased, Biron, J., himself would have been prepared to apply the discretion given by the proviso to proviso (b) of s. 5 (1). This, I think, appears from the passage at the bottom of p. 39 where he said:

“Even if the deceased did assault Kassim, and it is by no means clear from the evidence that he did, such, in the words of s. 5 (1) (b), ‘serious and wilful misconduct’ on his part does not necessarily disentitle his dependants to compensation, as, as especially provided for in the section, the court has a discretion to award the dependants of the deceased workman full compensation. And I have no hesitation in holding that this is a case where such discretion should be exercised in the dependants’ favour.”

The facts very briefly are as follows. The deceased was employed as a clerk by the respondent and it is accepted that part of his duty was to go to a particular godown and collect beans. In the course of such duty the deceased and another person, who was not an employee of the respondent, had a quarrel as a result of which the deceased died. The evidence is not very clear as to the precise nature of the quarrel and as to precisely what occurred. It is however clear that the quarrel arose out of the very work which the deceased was required to

do and was in fact doing, and I have already pointed out the finding of Biron, J., on that matter. The position is, therefore, that even though the deceased may be regarded as blameworthy in quarrelling with the person who inflicted the injuries from which he died, nevertheless this quarrel certainly resulted from acts done by the deceased “for the purposes of and in connection with his employer’s trade or business.”

Having stated these facts it is now necessary to consider the law of Tanganyika on this matter. Section 5 (1) of the Workmen’s Compensation Ordinance (Cap. 263) provides that “if personal injury by accident arising out of and in the course of the employment” is caused to a workman then the employer is liable to pay compensation. To that subsection there is a proviso (b) in which it is provided that if the injury is attributable to the serious and wilful misconduct of the employee no compensation in respect of the injury shall be paid. I may pause here for a moment and point out that the existence of the proviso in that way shows quite clearly that even if the injury is attributable to the serious and wilful misconduct of the workman nevertheless it may still arise out of and in the course of the employment because were that not so there would be no necessity for the proviso. To continue, there is a proviso to proviso (b) and this further proviso grants to the court a discretion to award compensation even though the injury is attributable to the serious and wilful misconduct of the workman. There follows sub-s. (2) which provides that in certain cases, that is, where death or serious incapacity resulted and the “act was done by the workman for the purposes of and in connection with his employer’s trade or business” the injury “shall be deemed to arise out of and in the course of his employment” notwithstanding that when the accident happened the workman was acting in contravention of statutory or other regulations or that he was acting against or without instructions from his employer. Now it cannot be doubted that the object of sub-s. (2) is to bring within the ambit of sub-s. (1) certain injuries which, had it not been for sub-s. (2), would not be said to arise out of and in the course of employment. Thus if the circumstances are such that the court does not consider that the injury comes within sub-s. (1) because the court does not consider that the accident arose out of and in the course of employment nevertheless the court may then consider whether the circumstances fall within sub-s. (2); and if they do then the case is immediately thrown back into sub-s. (1) with the result that the injuries are deemed to have been occasioned in circumstances which entitle the workman to compensation, subject, of course, to the provisoes. In order, however, to determine whether the case falls within sub-s. (2) what has to be determined is not whether the accident arose out of and in the course of employment, as if it did then the case would have fallen in sub-s. (1), but whether the act was done “for the purposes of and in connection with the employer’s trade or business” and also, of course, whether the accident had resulted in death or permanent incapacity. This seems to me to be precisely what the resident magistrate held. He said this accident resulted in the death of the workman in circumstances falling within s. 5 (2) of the Workmen’s Compensation Ordinance, and then he continued, it also arose in the course of the employment of the respondent, and the respondent is liable to pay compensation under s. 5 (1) of the Ordinance. As I say, if the two requirements of sub-s. (2) are found to exist, that is, that the accident resulted in death or serious incapacity and that the act was done for the purposes of and in connection with the employer’s business then the case will automatically be within sub-s. (1). It was urged by counsel for the appellant that not only were the two requirements to which I have referred necessary but also that the sub-section only applies where the workman has done an act which is contrary to statutory or employer regulations or instructions. He submitted that there must exist such regulations or instructions and in support of that he has referred to the case of

Noble v. Southern Railway Co. (1) and in particular to the opinion of Lord Maugham. There are opinions which do seem to suggest that the equivalent subsection in the United Kingdom only applies where there exist such regulations. For myself, I can see no such requirement in the Tanganyika section. I read sub-s. (2) as requiring only the two factors to which I have referred and that when the subsection uses the word 'notwithstanding' followed by these references all that the subsection means is that if these two factors exist then the workman comes within the subsection even if the act of the workman is done in violation of statutory or employer regulations or orders and not that there must exist these regulations or orders before the subsection comes into play. To hold the contrary would result in the extraordinary position that a workman injured in circumstances in which he was acting for the purposes of and in connection with his employer's trade or business would only be entitled to obtain compensation if there existed statutory or employer regulations which he had violated. This strikes me as a completely incorrect manner of construing legislation enacted to provide benefits to workmen injured in the course of their employment. In any event I might point out that one can perfectly easily imply in the circumstances of any employment a rule to the effect that the employee is not to enter into rows or commit assaults.

I see nothing in any of the cases to which we have been referred which in any way whatsoever causes me doubt that the decision of the resident magistrate was correct and, equally, the decision of Biron, J., in dismissing the appeal was correct, with the exception of one particular case, that is *Lee v. Breckman and Co.* (2). In that case it was held that a porter, whose duty it was to load furniture and who had got into a brawl resulting directly from his act of loading the furniture and had thereby received permanent injury, was not entitled to receive any compensation under the equivalent section of the local s. 5 (1). The first thing that I might point out about that decision is that nowhere is any reference made in the judgments to the United Kingdom section which is the equivalent of our s. 5 (2). This by itself results in a very clear distinction between the ratio decidendi in that case and the law which we have to apply in this case. In any event I have the greatest doubt whether, with all respect to learned judges, the decision in that case is correct. It is not in line with a number of other United Kingdom decisions. Reference was also made to the case of *Holden v. Premier Water-Proof and Rubber Co.* (3). That was the case in which an employee received injury from the act of a madman and it was held that that injury did not arise out of and in the course of employment. There was no suggestion that the accident which gave rise to the injury resulted from an act done for the purpose of and in connection with his employer's trade or business. In fact in the circumstances of that case the injury which was received had no relation whatsoever to the employment. It was the act of a madman who had vented his insane designs upon another wholly irrespective of what that other man was doing and where he was and any circumstances relating to his employment. It seems to me clear that such an injury could not be said to come within the provisions of s. 5 as a whole and thus entitle the defendant to compensation, unless, of course, the nature of the employment exposed the workman to the risk of injury by madmen.

In conclusion it seems to me that this is the position. An accident arises out of and in the course of employment if it results from an act which the employee is employed to do even if the employee is adopting a wrong method of doing the act or is doing it in a wrong manner. Here the employee was employed to go and collect these beans, which is precisely what he was doing. In the course of doing so an argument arose in relation to the act that he was doing and from this argument the employee received injuries from which he died. These circumstances

are such that, in my view, the workman is clearly enabled to recover compensation under s. 5, whether it be under sub-s. (1) alone or under that subsection construed with sub-s. (2) as the resident magistrate held in this case. For these reasons I would dismiss this appeal.

Sir Clement De Lestang VP: I entirely agree with the judgment of my Lord, the President. He has dealt with all the legal arguments so fully that I cannot usefully add anything. I agree with the order proposed.

Duffus JA: I agree with my Lord, the President. In my view the resident magistrate in his judgment made sufficient findings of fact, although admittedly these are not clearly set out, to support his decision. He held in effect that the accident resulting in the workman's death was an accident within the meaning of sub-s. (2) of s. 5 of the Workmen's Compensation Ordinance and further he held that the onus of proving that the accident was caused by the serious and wilful misconduct of the workman under the provisions of s. 5 (1) (b) was on the employer. I am of the view that he then found that the employer had not discharged this onus and proved that the accident was so caused and accordingly he held the respondent liable to pay compensation under s. 5 (1). I agree therefore that the learned judge of the High Court correctly dismissed this appeal.

Appeal dismissed.

For the appellant:

Sayani, Balsara & Velji, Dar-es-Salaam

J. S. Balsara

For the respondent:

Fraser Murray, Roden & Co., Dar-es-Salaam

R. S. Grimble

Ongodia and Erima v Uganda [1967] 1 EA 137 (CAC)

Division:	Court-Martial Appeal Court at Kampala
Date of judgment:	24 February 1967
Case Number:	1 and 2/1966
Before:	Bennett and Sheridan JJ and Russell Ag J
Sourced by:	LawAfrica
Appeal from:	A General Court-Martial held at Kampala on August 8, 1966.

[1] *Criminal Law – Court-Martial – Whether conspiracy proved where other conspirators are a person or persons unknown – Penal Code, s. 375 (b) (U.).*

[2] *Criminal Law – Conspiracy – Whether conspiracy proved where other conspirators are a person or*

persons unknown – Penal Code, s. 375 (b) (U.).

[3] Military Law – False Alarm – Meaning of “improperly occasioned false alarm” – Offence relating to security – Armed Forces Act 1964, s. 16 (6) (U.).

[4] Military Law – Conspiracy – Whether conspiracy proved where other conspirators are a person or persons unknown – Armed Forces Act, 1964, s. 77 1 (a) (U.).

Editor’s Summary

The two accused captains in the Uganda Army appealed to the Court-Martial Appeal Court against the findings of a General Court-Martial at Kampala under s. 90 of the Armed Forces Act (Cap. 295) (U.). Both appellants had been convicted on two charges:

- (1) That on February 24, 1966, at Entebbe they had conspired together and with other persons unknown to effect an unlawful purpose, namely to set up a road block near Baitabibiri and arrest the then Prime

Minister Dr. A. M. Obote – contrary to s. 375 (6) of the Penal Code and s. 77 (1) (a) of the Armed Forces Act 1964.

- (2) That they had jointly on February 24, 1966, at Entebbe, improperly occasioned false alarm by saying to two other officers, namely Anguram and Guweddeko “We are at war, war has broken out” or similar words contrary to s. 16 (g) of the Armed Forces Act 1964.

The material facts as believed were as follows: On February 24, 1966, the two appellants arrived at the Officers’ Mess at Entebbe at about 2 p.m. The first appellant Ongodia, in the presence of the second appellant Erima, informed Anguram and Guweddeko in the Mess that war had broken out, that the Army Headquarters at Mbuya had been surrounded and they had managed to escape – Ongodia asked Anguram if he had confidence in his platoon and on receiving an affirmative reply, Ongodia asked Anguram to take his platoon to Baitabibiri on the Kampala/Entebbe Road and set up a road block with the object of arresting the then Prime Minister Dr. Obote. Ongodia added that other troops were advancing from Kampala and they would be arriving at any moment. Erima remained silent throughout the conversation but nodded his head from time to time. It was not established at what precise moment of the conversation he nodded his head.

The Judge Advocate in his direction stated that if the evidence of Anguram and Guweddeko was believed the trial court would be justified in finding each appellant guilty on both charges.

Held –

(On the 1st charge)

- (i) evidence was sufficient to justify the inference that the first appellant Ongodia conspired with a person or persons unknown to arrange for the road block to arrest the Prime Minister and the finding on the first charge was confirmed;
- (ii) evidence was insufficient to establish that the second appellant was acting in concert with the first appellant and a finding of not guilty was substituted.

(On the 2nd charge)

both appellants were not guilty. “Improperly occasions false alarms” means “to cause or to be the occasion of false alarms” and the prosecution had failed to prove that

- (a) an alarm was in fact occasioned; and
- (b) at least one man of reasonable firmness was alarmed.

First appellant might have been guilty of an attempt to commit this offence but as he was not charged in the alternative with any attempt the court had no power to substitute such a finding.

Order accordingly.

Cases referred to in judgment:

- (1) *R. v. Gokaldas Kanji Karia and Another* (1949), 16 E.A.C.A. 116.

Judgment

The following judgment of the court was read by **Bennett J**: This is an appeal under s. 90 of the Armed

Forces Act, Cap. 295, against the findings of a General Court-Martial.

At the Court-Martial four charges were brought against the two appellants and they were convicted on the first two charges, which read:

First charge: Both accused jointly

Conspiracy contrary to s. 375 (6) of the Penal Code and s. 77 (1) (a) of the Armed Forces Act 1964

in that they

at Entebbe on February 24, 1966, conspired together and with other persons unknown to effect an unlawful purpose, namely to set up a road block near Baitabibiri and arrest the then Prime Minister, Dr. A. M. Obote.

Second charge: Both accused jointly

Offences relating to security contrary to s. 16 (g) of the Armed Forces Act 1964

in that they

at Entebbe on February 24, 1966, improperly occasioned false alarm by saying to Second Lieutenant Sam Anguram and Lieutenant Guweddeko "We are at war, war has broken out" or similar words.

At the material time each appellant held the rank of Captain in the Uganda Army. The evidence upon which the prosecution relied to establish the guilt of the two appellants may be summarised thus: On February 24 the two appellants arrived at the Officers' Mess at Entebbe in the first appellant's car at about 2 p.m. The only officers in the Mess at the time of their arrival were Second Lieutenant Anguram and Lieutenant Guweddeko, a pilot in the Uganda Air Force. On arriving at the Mess the first appellant, Ongodia, said to Anguram and Guweddeko that war had broken out, that Army Headquarters at Mbuya had been surrounded, and that they had managed to escape, or words to that effect. Ongodia then asked Anguram if he had confidence in his platoon and on receiving an affirmative reply, he asked Anguram to take his platoon to Baitabibiri on the Kampala/Entebbe road and set up a road block with the object of arresting the then Prime Minister, Dr. Obote. Ongodia said that other troops were advancing from Kampala, and that they would be arriving at any moment

The only persons present during this conversation apart from the two appellants were Anguram and Guweddeko. Both these witnesses testified that the second appellant, Erima, was silent throughout the conversation, but Guweddeko said that Erima was looking at Ongodia and that he nodded his head from time to time while Ongodia was speaking. Anguram made no mention of the fact that Erima had nodded.

After the conversation with Anguram and Guweddeko the two appellants lunched in the Mess, and then drove back to Kampala. It appeared that on the morning of February 24 the appellants had been present at a meeting at Makindye Lodge between the then President, Sir Edward Mutesa, and Brigadier Opolot. It also emerged in evidence that on that morning Brigadier Opolot had been relieved of his command of the Uganda Army, that Colonel Amin had been appointed in his stead, and that troops who were presumably loyal to Colonel Amin had taken over the Army Headquarters at Mbuya without a shot being fired.

The two appellants gave evidence in which they admitted that they had gone to Entebbe on February 24 to look for Ongodia's wife, she having gone to Entebbe earlier that day to escape from an ugly situation at Mbuya. They testified that having failed to find Ongodia's wife, they went to the Officers' Mess where they found Anguram and Guweddeko. They denied that Ongodia had said in the Mess "We are at war", or "War has broken out", or words to that

effect. They also denied that Ongodia had asked Anguram to take his platoon and set up a road block on the Kampala/Entebbe road. They admitted that there was a conversation between Ongodia and the two Lieutenants in the Mess, but said that it was confined to informing the two Lieutenants that life in Kampala was normal, that Brigadier Opolot was to be transferred to the Ministry of Defence as Adviser to the Prime Minister, and that Colonel Amin was to be Commander of the Army in his stead.

An attack was made on the credibility of Anguram and Guweddeko, the two principal prosecution witnesses at the trial. It is plain that the Court-Martial could not have convicted the two appellants had they not accepted the evidence of Anguram and Guweddeko as being substantially true. We do not consider that the finding of the Court-Martial as to the credibility of these two witnesses is open to attack in this court. Indeed, counsel for the first appellant conceded that s. 90 of the Armed Forces Act conferred a right of appeal on a point of law only.

The conviction on the first charge has been attacked on the ground that it is said that there was no evidence to prove a conspiracy between the two appellants, or between either of the appellants and other persons unknown.

It is contended that since Erima took no part in the conversation in the Mess but merely nodded his head, there was insufficient evidence to prove that the appellants were acting in concert or that there was any agreement between them and that since a man cannot be convicted of conspiring with himself, both appellants were entitled to an acquittal on the conspiracy charge. It is also contended that there was no evidence of any conspiracy between either of the appellants and third parties, so that the prosecution having failed to prove a conspiracy between the two appellants, the appellants were entitled to an acquittal on the first charge.

The learned Judge Advocate gave a very full direction in his summing up as to the law relating to conspiracy which had not been attacked on the hearing of this appeal. It is, however, contended that he misdirected the Court-Martial when he said in his summing up:

“I think that is all I need say about the evidence of the two principal witnesses called by the prosecution. You will appreciate that the whole basis of this case rests in effect on what was said, or not said, by Ongodia in the Mess at Entebbe. It is for you to make up your minds as to whether or not Anguram and Guweddeko have told you the truth. If you come to the conclusion that they were telling the truth, notwithstanding anything put to them in cross-examination, then you will be justified in coming to the conclusion in your findings that the accused Ongodia at least is guilty on both charges, whatever doubts you may entertain in respect of Erima. If, on the other hand, you come to the conclusion that Anguram and Guweddeko have not told you the truth (and the prosecution, as I say, rests almost entirely on these two witnesses) you have no alternative but to acquit both the accused of the offences charged. Equally, if there is any reasonable doubt as to where the truth lies in relation to the evidence given by these two witnesses, then you must acquit the accused.”

It is contended that there were discrepancies between the evidence of Guweddeko and Anguram which were not referred to by the Judge Advocate, and that he was, in effect, inviting the court to ignore the evidence other than the evidence of these two witnesses. As far as we can see the only material discrepancy between the evidence of Anguram and Guweddeko concerns the nodding attributed to Erima by Guweddeko. Anguram did not mention in his evidence that Erima had nodded while Ongodia was speaking to Anguram. We do not regard the failure of one witness to deal in his evidence with a fact testified

to by another as a true discrepancy. Moreover, we do not consider that the passage complained of in the summing up contains an invitation to the court to ignore the evidence other than that of Anguram and Guweddeko. In our judgment, the only misdirection in the passage complained of is the learned Judge Advocate's observation that the court would be justified in convicting Ongodia on both charges if it believed the evidence of Anguram and Guweddeko. For reasons which we will state hereafter, we consider that the court should have been directed that it would be justified in convicting Ongodia on the first charge only, and that there was no sufficient evidence against either of the appellants to support a conviction on the second charge.

In our judgment, there was sufficient evidence to justify an inference that Ongodia had conspired with a person or persons unknown to arrange for a road block to be placed on the Kampala/Entebbe road with the object of arresting the Prime Minister. Both Anguram and Guweddeko testified that Ongodia had said to Anguram that reinforcements were on the way. How could Ongodia have known about reinforcements unless he was a party to some scheme to send them to Entebbe? Plainly, Ongodia must have been collaborating with those who were to send reinforcements. Ongodia's words seem to us to contain an implied invitation to Anguram to join a conspiracy which was already in existence and an implied promise that if he assisted by setting up a road block, he would be joined by other forces which were on the way.

It is true that there was a discrepancy between the evidence of Anguram and Guweddeko as to where the reinforcements were to come from. Guweddeko testified that Ongodia had said that other men would be arriving from Kampala whereas Anguram testified in cross-examination that Ongodia had said that reinforcements were coming, but that he did not know where they were coming from. However, we do not regard the discrepancy as being sufficiently material to justify the rejection of the evidence of these two witnesses, since both were agreed that Ongodia did mention the impending arrival of reinforcements.

In our judgment, there was sufficient evidence to justify a finding that the first appellant had conspired with others to waylay and arrest the Prime Minister on the Kampala/Entebbe road despite the absence of any direct evidence of an agreement. As was said in the judgment of the Court of Appeal in *R. v. Gokaldas Kanji Karia and Another* (1):

"Certainly there was no direct evidence of an agreement but how rarely is conspiracy proved by such evidence. As Mr. Southworth pertinently observed conspirators do not normally meet together and execute a deed setting out the details of their common unlawful purpose. It is a commonplace to say that an agreement to conspire may be deduced from any acts which raise the presumption of a common plan."

There was no evidence that the arrest of the Prime Minister would have been lawful had it taken place. It was not suggested by the appellants' counsel either at the Court-Martial or before us that there would have been any justification in law for the arrest. In these circumstances we consider that there was sufficient evidence to support the conviction of the first appellant on the first charge.

As regards the second appellant, however grave may be the suspicion that he was acting in concert with Ongodia, we do not consider that there was evidence from which it could properly be inferred that he was a party to the conspiracy. Throughout the conversation in the Mess, Erima remained silent. There was no evidence to indicate that he assented to what was being said by Ongodia apart from the evidence of Guweddeko that he nodded his head from time to time. Unfortunately it does not emerge from Guweddeko's evidence at what junctures Erima nodded his head. He may well have nodded his head when Ongodia said

that Army Headquarters had been surrounded and that war had broken out, while remaining motionless when Ongodia asked Anguram to send his platoon to set up a road block on the Entebbe road. In our judgment the fact that Erima may have nodded his head from time to time while Ongodia was speaking is altogether too equivocal to amount to proof that he agreed to everything that Ongodia was saying. In our judgment there was insufficient evidence to support the conviction of the second appellant on the first charge.

We now turn to the second charge.

We agree with counsel for the appellants' contention that the words "improperly occasions false alarms" in s. 16 (g) of the Armed Forces Act are not to be construed as if they read "improperly utters words calculated to occasion false alarms". We consider that the word "occasions" must be construed according to its ordinary meaning, which is "to cause or to be the occasion of". We consider that in order to succeed on a charge under s. 16 (g) it is incumbent on the prosecution to prove among other matters, that an alarm was in fact occasioned and that at least one man of reasonable firmness was alarmed. In the instant case there was no evidence that anyone was alarmed by the words "We are at war", "War has broken out", alleged to have been uttered by Ongodia in the Officers' Mess.

Both Anguram and Guweddeko said that when they heard Ongodia's account of events in Kampala they were surprised. They did not say they were alarmed. Moreover, their subsequent conduct did not suggest that they were alarmed. All they did was to attempt, unsuccessfully, to telephone Army Headquarters. They did not attempt to warn the Prime Minister of the danger that he was in, or make any report to the police at Entebbe. They did not alert their platoons. They remained in the Mess and it was only in the evening when Captain Ebitu visited the Mess that Anguram reported the incident to him.

In our judgment the evidence does not establish that an alarm, false or otherwise, was occasioned. It may well be that the evidence was sufficient to prove an attempt on the part of the first appellant to occasion a false alarm. Such an attempt would be an offence against s. 16 (g) and s. 54 (6) of the Armed Forces Act. However, the first appellant was not charged with attempt, and our powers on appeal are circumscribed by s. 92 (4) of the Act. That subsection does not enable this court to substitute a conviction for "attempt" unless the attempt has been charged as alternative to the substantive offence, or unless the case falls within s. 56 of the Act. There was no such alternative charge in the instant case, nor does s. 56 apply. For these reasons we consider the convictions of the two appellants on the second charge cannot be allowed to stand.

As regards the first charge, we dismiss the appeal of the first appellant, and direct that a finding of not guilty be recorded in respect of the second appellant. We direct that a finding of not guilty be recorded in respect of both appellants on the second charge.

Since the second appellant has been acquitted on both charges, the sentence of three years' imprisonment imposed on him and dismissal from the Army with disgrace, will cease to have force and effect, having regard to s. 92 (2) of the Armed Forces Act. Under sub-s. (3) of s. 92 of the Act we refer the proceedings in respect of the first appellant, who was sentenced to four years' imprisonment and dismissal with disgrace, to the Defence Council for such action as it may deem necessary.

Order accordingly.

For the appellants:

Kazzorra & Co., Kampala

P. J. Wilkinson, Q.C., and Kazzorra

For the respondent:

A. R. Kapila and B. L. Rao

Re Private Boarding House Ltd
[1967] 1 EA 143 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	19 July 1966
Case Number:	26/1966
Before:	Duff J
Sourced by:	LawAfrica

[1] Company – Alteration of Memorandum of Association – Application to court to confirm – Whether Registrar of Companies must be served with and can appear and be heard on – Companies Ordinance (Cap. 212), s. 7 (T.).

[2] Company – Registrar of Companies – Must be served with and can appear and be heard on any application affecting his records – Application to confirm alteration of memorandum of association – Companies Ordinance (Cap. 212), s. 7 (T.).

[3] Practice – Company – Applications affecting records of Registrar of Companies – Registrar must be served with notice of and can appear and be heard on any such application.

Editor's Summary

The petitioning company, in the course of petitioning for an order confirming the alteration of its memorandum of association, had applied ex parte for an order dispensing with advertisement of the petition and notices. On that application the judge dispensed with advertisement, provided a copy of the petition was served (inter alia) on the Registrar of Companies. But when the Registrar appeared at the hearing, the advocate for the company objected and claimed that the Registrar had no right of audience.

Held –

- (i) the Registrar of Companies should be served with notice of, and has a right to appear and be heard on, applications to confirm alterations of objects, and like proceedings in which his records are involved;
- (ii) the Registrar of Companies in such cases, when served with notice, should in turn give notice to the applicant and to the court as to whether or not he intends to appear.

Objection overruled.

Cases referred to in judgment:

(1) *Re Hearts of Oak Life and General Assurance Co. Ltd. and Reduced*, [1920] 1 Ch. 544.

(2) *In the matter of the African Commercial Corporation Ltd.*, Tanganyika High Court Miscellaneous Civil Cause No. 28 of 1954 (unreported).

Judgment

Duff J: In this application the petitioners sought confirmation for the alteration of the provisions of the Memorandum of Association, the objects of the company being extended, and provision was asked for dispensing with the advertisement of the petition and the notices thereunder. When the matter came before Otto, J., he dispensed with publication of the petition provided that copies were served on the Registrar of Companies, and the Diamond Jubilee Investment Trust Limited, the latter company being a secured creditor. The application was made ex parte, but after service of the copies of petition as directed by the court, the Registrar-General appeared, counsel for the petitioners objecting to his appearing and claimed that he had no right of audience.

In support of his contention, counsel for the petitioning company cited the decision in *Re Hearts of Oak Life and General Assurance Co. Ltd.*

and Reduced (1). In that case the General Assurance Company applied to the court for confirmation of the alteration of the provisions of its Memorandum with respect to the objects of the company and the Hearts of Oak Benefit Society opposed the application on the ground that the interests of the Society would be injuriously affected if the company were to have its objects extended. It was held that the Society could not be heard as it was not a person to whom notice ought to be given, the society not being debenture holders and “any person or class of persons whose interests will, in the opinion of the court, be affected by the alteration.” It was also stated that the alteration was entirely a domestic matter and only persons having an interest in the company could be considered, the court not being concerned with rival traders or trade disputes.

It was agreed by counsel for the petitioning company that in all company applications the Registrar of Companies should be represented, but that this did not extend to applications brought under s. 7 of the Companies Ordinance (Cap. 212). In support of this argument I was referred to s. 7 (6) of the Ordinance, which reads as follows:

“7(6) A certified copy of the order confirming the alteration, together with a printed copy of the memorandum as altered, shall, within fifteen days from the date of the order, be delivered by the company to the registrar, and he shall register the copy so delivered and shall certify the registration under his hand, and the certificate shall be conclusive evidence that all the requirements of this Ordinance with respect to the alteration and the confirmation thereof have been complied with, and thenceforth the memorandum as so altered shall be the memorandum of the company.”

From this counsel infers that the Registrar need only be served with the copy of the order confirming the alterations together with a printed copy of the memorandum as altered and that there is no need to serve him with a copy of the petition, he not being entitled to appear. The Registrar-General, could not agree that a specific distinction could be made between s. 7 and other sections of the Ordinance.

Little authority is available on whether or not the Registrar-General has a right to appear, but one local case – *In the matter of the African Commercial Corporation Limited and In the matter of the Companies Ordinance* (Cap. 212) (2) – is in point. The case was concerned with an application under s. 43 of the Ordinance, an extension of time being asked for within which a return of allotment of shares was to be delivered to the Registrar. Objection was taken to the counsel appearing on behalf of the Registrar of Companies, and Cox, C.J., said:

“... the court may extend the time ‘if satisfied that the omission to deliver the document was accidental or due to inadvertence, or that it is just and equitable to grant relief’, and how can the court really decide such a question without hearing both sides, or at any rate without both sides having the right to be heard? I say both sides because, although the Registrar of Companies is not, as it were, a party to these proceedings, he is, nevertheless, vitally interested in all proceedings such as these: firstly because the records he is required by law to keep cannot be correct if the law is not complied with, and secondly he may initiate proceedings for penalties in proper cases. In my opinion, therefore, in any matter under the Companies Ordinance in which the Registrar of Companies records are involved the Registrar is entitled to be heard if he so wishes and in proper cases should be heard – if only as *amicus curiae*.”

The learned Chief Justice appeared to consider that the Registrar was entitled to appear if he so desired, he also saying that he was entitled to be heard if only

as amicus curiae, and this addendum appears to be at variance with what he has opined earlier. I take it, however, that the learned Chief Justice meant that the Registrar should be heard if he so wished and that a court can be assisted greatly by the Registrar of Companies in determining whether the order should be made confirming the alterations, a view I share and with which I respectfully agree. Counsel for the Registrar-General has mentioned that a practice has arisen where copies of applications under the Ordinance are not served on him in his capacity as Registrar of Companies, and whilst I appreciate that advocates may wish to avoid the possible expense of the fees of the attendance of the Registrar-General or counsel on his behalf, I consider it desirable that notices of applications in all proceedings such as these should be served on him and in turn he should give notice to the applicants' advocate and the court of his intentions, i.e., whether he wishes to appear or not. If he appears it will be for the court to decide whether his attendance was necessary or not, the question of fee being adjusted accordingly. I do not accept that the provisions of s. 7 (6) of the Ordinance are intended to prevent the Registrar from appearing, the provisions being concerned with what happens after confirmation and not before.

For the reasons stated above, I am satisfied that the Registrar of Companies is entitled to be heard in this matter and the objection by the petitioner's advocate cannot be sustained.

Objection overruled.

For the petitioning company:

J. Balsara, Dar-es-Salaam

For the Registrar-General:

Registrar-General, Tanzania.

Dowdall

Bilquis Cinema Limited v Monteiro [1967] 1 EA 145 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	10 March 1966
Case Number:	47/1965
Before:	Sir Charles Newbold P, Sir Clement de Lestang Ag VP and Law JA
Sourced by:	LawAfrica
Appeal from:	The Supreme Court of Aden – Blandford J.

[1] *Arbitration – Limitation of action – Whether time taken in abortive arbitration to be excluded from limitation period.*

[2] *Contract – Subsequent verbal renewal of written agreement – Whether effective.*

[3] Limitation of Action – Exclusion of time from limitation period – Abortive arbitration proceedings – Time excluded-Limitation Ordinance, s. 14 (1) (A.).

[4] Master and Servant – Written service contract – Effect of later verbal renewal.

Editor's Summary

The respondent was engaged by the appellant's predecessor-in-title to serve as a cinema operator in Aden. An agreement in writing was executed in India on April 13, 1959, in terms of which inter alia the respondent and his family were to be provided with free second-class passages from Bombay to Aden; his monthly salary was to be rupees 300 or 450/- plus a cost of living allowance;

and he was to be paid overtime, if called upon to work more than eight hours per day, at 1 1/2 times his salary rate and at double rate on Sundays and public holidays. The respondent took up his duties and on January 17, 1960, he was appointed chief operator and his salary was increased to Shs. 1,000/- per month. In April, 1961, the respondent was appointed manager at the same salary, and, after the termination of his contract, he remained in the appellant's employ for a further year until his work permit was withdrawn. He and his family returned to India in August, 1962. The dispute between the parties arose over the contention by the appellant that the enhanced salary of Shs. 1,000/- per month was to be inclusive of overtime and work on Sundays and public holidays, as against the contention by the respondent that the higher salary attached to his new status as chief operator and later as manager and that his contractual entitlement to overtime and to double time on Sundays and public holidays was not affected. This dispute was referred to an arbitrator in December, 1962, but the proceedings were abortive and in May, 1963, the respondent filed suit. The court awarded damages of Shs. 32,423/96 to the respondent and it was (inter alia) against the award for overtime and the 'oral' renewal of the contract that this appeal was brought. An argument was also raised on limitation. The appellant's witness in the lower court stated that "the salary increase to Shs. 1,000/- was for working on Sundays and holidays . . . the contract remained the same as it was except as to the rate of pay."

Held –

- (i) there was complete unanimity between the parties that the terms of the service agreement continued to apply to the new contract created by the oral agreement on January 17, 1960, except as to the right to double pay for working on Sundays and holidays;
- (ii) there was no agreement on the right to double pay for Sundays and public holidays. The appeal therefore succeeded on that point and the amount of Shs. 10,398/96 awarded in the lower court was disallowed;
- (iii) the new contract was subject to the same terms and conditions as formerly applied.
- (iv) following the case of *Firm Behari Lal* the period during which the dispute was referred to abortive arbitration proceedings would be taken into account in calculating amounts falling outside the period prescribed by the Limitation Ordinance (Cap. 86). s. 14 (1).

Appeal allowed in part.

Cases referred to in judgment:

- (1) *Ramdutt Ramkissendass v. E. D. Sassoon & Co.* (1929), I.L.R. 56 Calc. 1048.
- (2) *Firm Behari Lal Baij Nath Prasad v. Punjab Sugar Mills Co. Ltd.* (1943), 30 A.I.R. All. 162.
- (3) *Nuridin Bandali v. Lombank Tanganyika Ltd.*, [1963] E.A. 304.
- (4) *Darnley v. London, Chatham and Dover Railway* (1867). 2 L.R. (H.L.) 43.

The following judgments were read:

Judgment

Law JA: This is an appeal by the defendant from the judgment and decree of the Supreme Court of

Aden in Civil Suit No. 103 of 1963. The plaintiff in that suit, whom I shall refer to henceforth as the respondent, claimed from

the defendant company (hereinafter referred to as the appellant) sums amounting in all to Shs. 46,336/46 consisting of various benefits allegedly due to him under a contract of service in respect of gratuity, overtime pay, leave pay, casual leave pay, passages and salary in lieu of notice.

The respondent failed in his claims for casual leave pay and salary in lieu of notice, and as no cross-appeal has been filed in this court is not now concerned with these matters. He was awarded Shs. 3,000/- on his claim for gratuity, of which the appellant conceded liability for Shs. 2,000/-; Shs. 32,423/96 for overtime pay; Shs. 3,000/- for leave pay, which the appellant concedes was properly awarded; and Shs. 2,600/- for passages. The appellant appeals against the whole of the award in respect of overtime pay, and against the award in respect of gratuity to the extent of Shs. 1,000/-, and against the award for passages to the extent of Shs. 875/-. The appellant also appeals against the order for costs made in favour of the respondent in the court below, and against the order awarding the respondent interest on the decretal amount from June 1, 1962.

The history of the events leading to the litigation, the subject of this appeal, is that the respondent was engaged by the appellant's predecessor in title to serve as a cinema operator in Aden. An agreement in writing was executed between the parties in India on April 13, 1959. The respondent and his family were to be provided with free second-class passages from Bombay to Aden and his monthly salary was fixed at rupees 300, or Shs. 450/-, to which was to be added a cost of living allowance at the rate payable by the Aden Government to Government employees drawing the same salary. Although it appears that the Aden Government was not paying such a cost of living allowance when the respondent arrived in Aden on June 3, 1959, the appellant in fact voluntarily paid him an additional allowance of Shs. 250/-, so that the respondent's total monthly emoluments amounted to Shs. 700/- and this sum was in fact regularly paid to him until his salary was subsequently increased, as will appear hereinafter. By his contract of service, the respondent was to be paid overtime pay if called upon to work for more than eight hours a day, at 1 1/2 times his salary, and at twice his salary for work done on Sundays and "other closed holidays". He was also to be entitled to one month's leave with full pay for every eleven months of service and to ten days' casual leave a year, and to free housing and transport, and to repatriation to India, together with his family, on the termination of his services.

When the respondent arrived in Aden, the cinema was still under construction. It did not begin to function as a cinema until January 5, 1960. Nevertheless it is clear that the respondent attended daily and helped to supervise the completion of the building, and in this he must have given satisfaction because, although he had not yet begun his duties as a cinema operator, he asked for an increase in salary in December, 1959, and on January 17, 1960, he was appointed Chief Operator and his salary was increased to Shs. 1,000/- a month. The appellant contends that this enhanced salary was to be inclusive of overtime and work on Sundays and public holidays; the respondent's case is that the higher salary attached to his new status as Chief Operator and that his contractual entitlement to overtime pay and to double pay on Sundays and public holidays was not affected. This dispute constitutes substantially the main point for decision in this appeal. In April, 1961, the respondent was promoted to manager, at the same salary, shortly before the expiry of his contract; but the respondent continued to be employed as manager for two consecutive further periods of six months each, with the consent of the Aden Immigration Authorities. In May, 1962, the respondent's employment came to an end because no further extensions of his work permit were sanctioned by the Immigration Authorities.

and in or about August, 1962, the respondent and his family returned to India. On June 1, 1962, the respondent wrote to the appellant putting forward various claims for leave pay, gratuity and overtime. On June 8, 1962, the respondent wrote a further letter, particularizing his claim for overtime and for work on Sundays and public holidays. On June 27, 1962, he received a reply to the effect that his claims were inconsistent with what had been agreed, and that they had been handed over to the appellant's lawyer "for finding out your legitimate dues". The respondent then instructed an advocate who on July 8, 1962, wrote to the appellant a letter setting out the respondent's claims in full, and offering to refer the dispute to arbitration in accordance with cl. 21 of the contract of service. The appellant's advocate replied to his letter on July 18, 1962, saying that the respondent's claims were not admitted, and agreeing to refer the matter to arbitration. This was done in December, 1962, but for some reason the arbitrator, in February, 1963, withdrew from the reference and refused to act, whereupon the respondent instituted legal proceedings by filing suit on March 15, 1963. In the event the respondent was awarded Shs. 38,523/96 made up as follows:

(a) Gratuity for three years.....	Shs. 3,000/-
(b) Overtime (including double pay for Sundays and public holidays from January 1, 1960, to May 31, 1962).....	Shs. 32,423/96
(c) Three months' leave pay.....	Shs. 3,000/-
(d) 2 1/2 single sea passages.....	Shs. 2,600/-
Total.....	Shs. 41,023/96
Less received on account.....	Shs. 2,500/-
	<u>Shs. 38, 523/96</u>

It will be convenient to dispose of some of the minor grounds of appeal first. Ground 16 is to the effect that the trial judge erred in allowing costs to the respondent on the part of the claim which was disallowed. I can see no merit in this ground of appeal. What the judge did was to award the respondent the costs of the suit. In my opinion this was a correct exercise of discretion as the respondent recovered Shs. 38,523/96 out of the Shs. 46,336/- claimed by him. He was substantially successful and therefore entitled to his costs generally. Costs do not have to be allocated to the various issues and the fact that a plaintiff may have failed on some issues does not necessarily deprive him of any part of the costs of the action if he has succeeded on the principal issues, as was the case here. Again, I see no merit in ground 17, which claims that the respondent was not entitled to interest on any part of his claims. On the judge's findings, the respondent was entitled to be paid the sums recovered by him in the suit at the latest from the moment his employment finally terminated on May 31, 1962, and in my opinion it was within the judge's discretion to award interest from June 1, 1962. The necessary power is to be found in s. 32 (1) of the Civil Courts Ordinance (Cap. 25) which empowers courts to award interest on the principal sum adjudged, not only from the date of the suit but for any period prior to the institution of the suit. Ground 14 is to the effect that the respondent was not entitled to more than Shs. 1,725/- for sea passages on repatriation instead of the Shs. 2,600/- awarded by the judge. The original contract of service entitled the respondent and his family to second-class sea fares on repatriation, and the appellant submitted that this was a maximum of Shs. 690/- for

each fare by reason of some figures appearing in a document headed "Nominal roll of emigrant". I am not satisfied that it was proved that those figures limited the amount of the fare nor am I satisfied that the judge erred in awarding the amount claimed by the respondent. Ground 15 reads as follows:

"In any event any part of the respondent's claim for 'overtime' prior to March 16, 1960, should have been held as barred by limitation."

It is common ground that the period of limitation prescribed by the Limitation Ordinance (Cap. 86) is three years, so that prima facie all claims prior to March 15, 1960, are barred. It was for this reason that the trial judge rejected the respondent's claim for overtime for the period from June 3, 1959, to December 31, 1959. Why then did the judge allow the respondent's claim for overtime for the period from January 1, 1960, to March 15, 1960? It is not clear from the judgment, but the judge did refer to the fact that the dispute between the parties was referred to arbitration on December 29, 1962, and I assume that he excluded from computation of the period of limitation the time reasonably expended on the abortive arbitration proceedings. Whether he was justified in so doing depends on the correct interpretation of s. 14 (1) of the Limitation Ordinance, which provides that any time

"during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or in a Court of Appeal, against the defendant, shall be excluded, where the proceeding is founded on the same cause of action and is prosecuted in good faith in a court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it."

Counsel for the respondent has submitted that the time reasonably expended on the abortive arbitration proceedings should be excluded from computation, the proceedings before the arbitrator being analogous to civil proceedings in a court of first instance, and he relies in support of this proposition on the case of *Ramdutt Ramkissendass v. E. D. Sassoon & Co.* (1) in which the Privy Council held as follows:

"... that civil proceedings in a court must be held to cover civil proceedings before arbitrators whom the parties have substituted for the courts of law to be the judges of the dispute between them."

The Board in *Ramdutt's* case (1) was concerned with the question whether an arbitrator should exclude the time spent in prosecuting in good faith the same claim before another arbitrator who was without jurisdiction, and applied s. 14 (1) of the Limitation Ordinance by analogy, and the extract from the Board's judgment quoted above should be read in context. However, in the case of *Firm Behari Lal Baij Nath Prasad v. Punjab Sugar Mills Co., Ltd.* (2) a situation similar to the one now under consideration arose, and it was held that proceedings before arbitrators appointed by the parties are civil proceedings in a court within the meaning of s. 14 and therefore time spent in those proceedings must be excluded in computing limitation in a subsequent suit in a civil court. As Collister, J., observed in delivering the judgment of the court:

"If the contrary view be held, the result will be unfortunate and will operate very harshly on a litigant who, as here, has been guilty of no laches and has been prosecuting his case with due diligence and in good faith."

In the same case, it was held that the refusal of an arbitrator to act amounts to a defect "of a like nature" to a defect of jurisdiction, within the meaning of s. 14.

I consider with respect that the reasoning of Collister, J., is correct and that it can and should be applied to the present case. I am accordingly of the opinion that the time spent by the parties on the abortive arbitration proceedings was properly excluded from computation of time, and that ground 15 must accordingly fail.

The only other minor ground which requires consideration is ground 13, relating to gratuity. By his contract of service, the respondent was entitled to one month's salary as gratuity for every completed year of service. The appellant concedes the respondent's entitlement to gratuity for the first two years of his service, that is to say, until the expiry of the contract in April, 1961, but disputes his entitlement to gratuity for the third year, when the respondent was employed for two successive six-month periods as manager. The trial judge held that the entitlement to gratuity, about which nothing was specifically agreed between the parties when the respondent was re-engaged as manager for the two six month periods, was incorporated by reference into the new oral agreement. I agree with this finding. The respondent continued to be employed at the same salary, and it is reasonable to suppose that the parties contemplated that he should not lose his entitlement to gratuity without receiving some compensatory benefit in its place, and that this would have been agreed specifically had the matter been considered. In my view ground 13 fails.

The remaining twelve grounds of appeal relate to the award of Shs. 32,423/96 in respect of overtime pay and pay for working on Sundays and public holidays. The trial judge found as a fact that the respondent did work the hours of overtime, and on Sundays and public holidays, as claimed by him in the plaint. He also found that the respondent did, in January, 1960, claim from the appellant overtime in respect of the equivalent of 125 days for the period June 4 to December 31, 1959, although he disallowed that claim as being barred by limitation. There was evidence to support these findings, which are to some extent corroborated by the muster-rolls and time sheets kept by the appellant and exhibited at the trial, and I would dismiss all the grounds of appeal which challenge these findings of fact. In my view, four grounds of appeal remain for consideration, as follows:

- “3. The learned judge erred in law in allowing respondent's claim for 'overtime', after having found and held that it was not specifically agreed to by the parties at the meeting of January 17, 1960. The learned judge erred in law in holding the term of the Service Contract regarding 'overtime' pay continued to remain operative after the 'novatio'.
5. The learned judge erred in law in that after the expiry of its term, the Service Contract was orally renewed by the parties. The alleged 'oral' renewal is bad in law and is of no legal effect. Furthermore, in this connection, the learned judge did not consider the proper law of contract to be applied.
11. The learned judge erred in law that the provisions of the Service Contract as to 'overtime' applied to respondent's employment as 'Manager', in that the Service Contract was not designed to set out the terms of employment other than of 'artisans and shop-assistants'.
12. The learned judge erred in law to hold that the managerial employment would include a term for 'overtime' work.”

As appears from the pleadings and from the record of the proceedings in the court below, it was not appreciated by the parties that the agreement between them in January, 1960, when the respondent's salary was increased and his designation altered, constituted a new contract. In *Nurdin Bandali v. Lombank Tanganyika Ltd.* (3) ([1963] E.A. at p. 313) the effect of a subsequent verbal agreement on a prior written contract was considered, and the following dictum

of Lord Cranworth in *Darnley v. London, Chatham and Dover Railway* (4) was cited with approval:

“When parties, who have bound themselves by a written agreement, depart from what has been so agreed on in writing, and adopt some other line of conduct, it is incumbent on the party insisting on, and endeavouring to enforce a substituted verbal agreement, to show, not merely what he understood to be the new terms on which the parties were proceeding, but also that the other party had the same understanding – that both parties were proceeding on a new agreement, the terms of which they both understood.”

Applying those principles to the present case, it is clear, from the pleadings, that most of the terms and conditions of the service contract were mutually understood to apply to the new agreement between the parties. In particular, in the written statement of defence, para. 5 indicates that the appellant acknowledged that the service contract remained in force for its full term; paras. 10 and 11 recognize the respondent’s entitlement to gratuity as contained in the service contract; paras. 14 and 15 admit his entitlement to leave pay, and para. 16 his right to passages on the termination of his employment. Paragraph 12 impliedly recognizes the respondent’s right to overtime pay, his claim in this respect being resisted on the grounds only that he was not required to work overtime and that he did not in fact work overtime. Only in para. 13 is it contended that one of the respondent’s entitlements contained in the service contract ceased to apply to the new contract of service, and that was the right to double pay on Sundays and public holidays, the allegation being that the respondent agreed that his increased salary should cover his wages for working on Sundays and public holidays. Thus the appellant admitted, in the written statement of defence, that all the respondent’s entitlements contained in the original service agreement continued to apply to the new contract of employment created in consequence of the verbal agreement of January, 1960, with the single exception of the right to double pay for working on Sundays and public holidays. There can be no doubt that this was the appellant’s understanding of the effect of the new contract, because its main witness, Mr. Abdulla Jaffer Mirza, stated plainly in cross-examination:

“The only increase he got was the increase to Shs. 1,000/- effective from January, 1960. It was for working on holidays and Sundays. . . . it was to pay for holidays and Sundays. As far as I know the contract remained as it was except as to rate of pay.”

Thus there is complete unanimity between the parties that the terms of the service agreement continued to apply to the new contract created by the verbal agreement of January, 1960, except as to the right to double pay for working on Sundays and holidays. On this point, the trial judge held that no agreement was reached. The respondent “did not agree to relinquish his rights under clause 7 of the contract” and the appellant “knew it . . . but hoped by evading precise agreement on the point to shelve it.” In other words, there was no agreement on this point when the new contract was verbally negotiated, and the appeal must in my opinion succeed to the extent that any amount awarded in respect of work on Sundays and public holidays for the period that the service agreement was in force must be disallowed.

As regards the period following the expiry of the service agreement, the respondent continued to be employed by the appellant, but in the capacity of manager. The original service contract was considered by both parties to be in force until it expired in April, 1961, and the respondent would have had to return to India unless the Immigration Authorities in Aden agreed to extend

his work permit. The appellant applied for the necessary permit, and the respondent was allowed to remain in Aden to serve as a manager for six months, and he did so at the same salary as he had been paid as chief operator, that is to say, Shs. 1,000/- a month. When the six months expired, the permit was extended for another six months, but no further extension was allowed, and the respondent's employment with the appellant finally came to an end on May 31, 1962. As regards this period of about thirteen months' employment, the judge found that it formed a new contract of service, as it undoubtedly did. The trial judge found that this new contract was subject to the same terms and conditions as applied formerly, and I have no doubt that this was so. Had the appellant intended that the respondent's last period of employment was to be on different terms, the respondent would no doubt have been so informed.

It follows from what I have said that in my opinion this appeal succeeds to the extent only that the sums awarded in respect of double pay for work on Sundays and public holidays for the period January 1, 1960, to May 31, 1962, must be deducted from the decretal amount. The amount claimed and awarded under this head was Shs. 10,398/96. The respondent was awarded a total sum of Shs. 38,523/96; this should, I consider, be reduced to Shs. 28,125/- and the judgment and decree amended accordingly. I would not disturb the order for costs made in the court below, and I would allow the appellant one half of the costs of this appeal.

Sir Charles Newbold P: I have had the advantage of reading the judgment of Law, J.A., in draft and I agree with it. There will be an order in the terms proposed by him.

Sir Clement De Lestang Ag VP: I have had the advantage of reading in draft the judgment of LAW, J.A., with which I entirely agree. I have nothing to add.

Appeal allowed in part. Order accordingly.

For the appellant:

P. K. Sanghani, Aden

S. Gautama and S. M. Akram

For the respondent:

Horrocks, Williams & Beecheno, Aden

G. Horrocks

Damodar Jinabhai & Co Ltd and another v Eustace Sisal Estates Ltd [1967] 1 EA 153 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	6 April 1966
Case Number:	51/1965
Before:	Sir Charles Newbold P, Duffus and Spry JJA
Sourced by:	LawAfrica
Appeal from:	The High Court of Tanzania – Georges, C.J.

[1] *Contract – Misrepresentation – Law of Contract Ordinance (Cap. 433), s. 17, s. 18 and s. 19 (T.).*

[2] *Costs – Appeal against order for – Tanzania – Leave required for – Appellate Jurisdiction Ordinance (T.).*

[3] *Document – Construction of clause in agreement for sale – Whether draft of agreement admissible to interpret final agreement for sale.*

[4] *Estoppel – Judgment in earlier case – Whether operates as estoppel in subsequent case between different parties.*

[5] *Evidence – Draft contract – Whether admissible to interpret clause in final contract – Evidence Act, s. 92 (T.).*

[6] *Evidence – Estoppel – Judgment in earlier case – Whether operates as estoppel in subsequent case between different parties.*

[7] *Evidence – Intention of parties to contract – Admissibility of evidence as to intention of parties to contract – Admissibility of evidence as to intention of parties relating to clause in agreement for sale – Interpretation of contract – General observations as to admissibility of extrinsic evidence in Tanganyika.*

[8] *Evidence – Previous court proceedings – Whether record admissible in other subsequent proceedings – To contradict or corroborate – Evidence Act, s. 155 and s. 157 (T.).*

[9] *Sale of Land – Broker’s commission – Agreement for sale – Whether payable by the purchaser – Whether any misrepresentation.*

Editor’s Summary

E., a director and principal shareholder of the respondent company, agreed with a broker, R., to pay a commission on any sale of the respondent company’s estate to a buyer introduced by R. Pursuant to this agreement R. introduced K., a director of the first appellant company, to E. and, as a result of that introduction, the respondent company sold the estate to the appellant company under an agreement for sale. R. then demanded his commission, which the respondent company refused to pay. In a court action R. successfully claimed the commission from the respondent company, whereupon the respondent company sued the first appellant company (and the second appellant company which was a nominee company of the first appellant company to which the estate had been transferred on the sale) claiming to be reimbursed the amount of the commission under cl. 7 of the agreement which read: “The vendor shall not be liable for broker’s commission (if any)”. Evidence admitted in the court below established that at the time the agreement for sale was signed both parties to the agreement understood that the respondent company wished to receive the sale price free of any commission, although the broker had a claim against the respondent company for commission. The broker had told K. of his proposed claim. E. did not so inform K. and in fact said to K. that he did not know why he had brought the broker and saw no point in negotiating through him. E. concluded that there was no point in paying commission since the sale could be discussed and negotiated directly between the representatives of the parties. In the court below judgment

was given in favour of the respondent company against the first appellant company and the action against the second appellant company (the nominee) was dismissed, but the trial judge refused to award the latter company costs. The first appellant company appealed from the finding that cl. 7 imposed a liability on the first appellant to pay to the respondent the amount of the commission paid by the respondent to the broker. The main grounds of the appeal were: (1) the true interpretation of cl. 7 was not that the clause was tantamount to an indemnity but it merely protected the respondent from liability to pay the first appellant (or second appellant) any commission payable by the appellants; (2) the trial judge erred in excluding from evidence a draft of the agreement for sale; (3) the trial judge erred in holding that there was no misrepresentation (innocent or fraudulent) by E. to K.; (4) the second appellant should have been awarded its costs.

Held –

- (i) (by Duffus, and Spry, JJ.A., Sir Charles Newbold, P., dissenting) the true interpretation of cl. 7 was that the vendor would not be liable for any commission which the purchaser might have to pay, and did not amount to an indemnity. (Doubt was expressed as to the admissibility of certain of the evidence relevant to the intention of the parties relating to cl. 7 but even if the evidence was admissible it did not alter the true interpretation of the clause);
- (ii) the trial judge was correct in refusing to admit the original draft on the ground that it was inadmissible, being evidence of negotiations (although there may be some circumstances in which a draft may be admissible);
- (iii) on the evidence, E. was not guilty of any misrepresentation, either fraudulent or innocent, as defined by the Law of Contract Ordinance (T.);
- (iv) the Court of Appeal had no jurisdiction to entertain the correctness or otherwise of the refusal of the trial judge to order costs in favour of the second appellant because the second appellant had not sought or obtained the leave of the trial judge under s. 7 (2) (a) (ii) of the Appellate Jurisdiction Ordinance (T.) to appeal on the matter of costs.

Per Sir Charles Newbold, P.:

- (i) the record of the earlier case brought by the broker could be referred to only for the purpose of contradicting or corroborating the evidence given in this case;
- (ii) the judgment in the earlier case raised no estoppel in these proceedings.

Appeal of purchaser allowed. Appeal of nominee dismissed.

Cases referred to in judgment:

- (1) *Virbhai v. Bhatt* (Civ. App. No. 25 of 1964) (unreported).
- (2) *Nuridin Bandali v. Lombank Tanganyika Ltd.*, [1963] E.A. 304.
- (3) *Fidelitas Shipping v. V/O Exportchleb*, [1965] 2 All E.R. 4.
- (4) *Wood v. Luscombe*, [1965] 3 W.L.R. 996.
- (5) *Balwant Singh v. Kipkoech Arap Serem*, [1963] E.A. 651.
- (6) *Riziki binti Abdulla v. Sharifa Binti Mohamed*, [1959] E.A. 615.

(7) *Marie Ayoub v. Standard Bank of South Africa Ltd.* [1961] E.A. 743.

(8) *Mills v. United Counties Bank Ltd.*, [1912] 1 Ch. 231.

(9) *Bal Kishen v. Legge* (1899), 27 I.A. 58.

(10) *The Shannon Ltd. v. Venner Ltd.*, [1965] 1 All E.R. 590.

The following judgments were read:

Judgment

Sir Charles Newbold P: The respondent company (hereinafter referred to as “the vendor”) entered into a contract for the sale of a sisal estate to the first appellant company (hereinafter called “the purchaser”) which estate was

subsequently transferred to the second appellant company (hereinafter referred to as “the nominee”) as the nominee of the purchaser. In the contract for the sale cl. 7 reads as follows:

“7. The vendor shall not be liable for broker’s commission (if any)”.

A Mr. Rattansi (hereinafter referred to as “the broker”) claimed commission on the sale from the vendor and when liability was disputed sued the vendor and obtained judgment against it. The vendor then claimed to be reimbursed by the purchaser the amount it had paid under the judgment and, when the purchaser denied liability, the vendor sued the purchaser and the nominee claiming that cl. 7 of the contract constituted an indemnity by either or both of them. When the suit came on for hearing in the High Court the Chief Justice gave judgment in favour of the vendor against the purchaser but dismissed the suit against the nominee making, however, no order for costs in favour of the nominee. The purchaser appealed against the whole judgment imposing liability on it and the nominee appealed against that part of the judgment whereby no order for costs was made in its favour.

As far as the appeal of the purchaser is concerned there were two main issues argued on the appeal. First, that cl. 7 did not impose on the purchaser any liability in relation to broker’s commission payable by the vendor and, secondly, that even if it did it had been induced by a fraudulent misrepresentation and accordingly the purchaser was not bound by it.

Dealing with the first of those issues it was urged that the clause was not an indemnity as its wording was clearly not the wording of a normal indemnity clause. In general support of that main submission it was urged that the clause on the face of it meant only that the vendor was not liable to the purchaser for any broker’s commission and that if it did not mean that then it was meaningless and void for uncertainty. It was also urged that if, in fact, the parties meant different things by it then they were not *ad idem*.

Before I deal with these submissions I think I should refer to four matters which were raised by Mr. Nazareth, who appeared for the purchaser, though the precise reason for raising some of them was not very clear to me. The first matter was that the Chief Justice should have looked at a previous draft of the contract in order to determine the meaning of cl. 7. The Chief Justice refused to do so and I entirely agree with his decision. It is true that in certain circumstances evidence of surrounding circumstances may be admissible in order to interpret a document (see s. 29, proviso (6) of the Evidence Act) but in no case is evidence of prior negotiations admissible (see *Virbai v. Bhatt* (1)) and the evidence of a prior draft which has been rejected, of a contract is *ipso facto* nothing other than evidence of prior negotiations. The second matter was that cl. 7 should be construed in the light of an assurance given by an advocate acting for both parties that it did not affect the purchaser. I have grave doubts as to whether the evidence was admissible, but as that point was not taken I shall assume that it was. I have no doubt that a statement by an advocate as to the interpretation of a clause is not a matter to which a court should have regard in the construction of the clause, though in certain circumstances a court might have regard to such a statement in order to determine whether a contract had been entered into as the result of misrepresentation. The third matter was an attempt by counsel for the appellant to refer to the previous proceedings between the broker and the purchaser which had been put in as an exhibit in this suit. Counsel for the vendor objected to any general reference to the proceedings on the ground that only specified parts of the record had been put in as an exhibit. I am not quite clear as to the precise reason why counsel for the appellants sought to refer to those proceedings but I understood that it was to refer to certain parts of the evidence taken therein as contradicting or corroborating the evidence of witnesses in the case now under appeal. We

allowed reference to be made de bene esse to the record of the prior proceedings for that limited purpose, stating that we would give our decisions in our judgment. While it is not clear from the appeal record why the record of the previous case was put in, nevertheless it would seem from the appeal record that the proceedings as a whole, that is, the plaint, judgment and evidence, were put in by consent and I consider that counsel would be entitled to refer to the evidence of a witness in those proceedings for the purpose, but the sole purpose, of contradicting or corroborating the evidence of the same witness given in these proceedings (see s. 155 and s. 157 of the Evidence Act). He would not, however, be entitled to refer to the evidence of any such witness in the prior proceedings as being evidence of the truth of the statement made in those prior proceedings. The fourth matter was that the judgment in the prior proceedings by the broker against the vendor operated as some form of estoppel against the vendor in these proceedings. Again I am not quite clear as to precisely how, or what part of, the judgment operates as an estoppel. Quite clearly it would not be an estoppel of record as the judgment was not given in a suit between the parties to these present proceedings (see s. 11 of the Civil Procedure Code). Equally clearly it could not operate as an estoppel in pais as a judgment cannot be said to form the basis for any such estoppel (see s. 115 of the Evidence Act and *Nurdin Bandali v. Lombank Tanganyika Ltd.* (2)). If it is suggested that it raises an issue estoppel it has not been made clear to me what is the issue decided in the former proceedings which binds the purchaser in these proceedings nor what issue in the two proceedings depended upon identical evidence (see *Fidelitas Shipping v. V/O Exportchleb* (3), and *Wood v. Luscombe* (4)). Finally no issue of estoppel was raised in the pleadings as it should have been if the purchaser seeks to rely on it (see *Balwant Singh v. Kipkoech Arap Serem* (5)) nor is it a ground of appeal. I do not consider, therefore, that the judgment in the previous proceedings operated in any way as an estoppel in these proceedings.

Returning to the first issue, I accept that the clause is not worded as a normal indemnity clause and that it does not expressly place any liability on the purchaser. The time, however, is now long past since the courts have been precluded from giving effect to the intention of the parties by reason of the failure to use any particular form of words. I would resist with my utmost endeavour any attempt to disinter that mediaeval ghost and leave it free to terrify the modern litigant with its complete unreality. Whatever may be the form of words, once the intention of the parties can be ascertained the courts will give effect to that intention unless the words used cannot possibly bear that meaning. Further, if the words used are on the face of them meaningless in relation to the surrounding circumstances in which they were used, then, if the court is satisfied that the words used were intended to give effect to an agreement between the parties, the court will not discard the words as meaningless or complete surplusage but will construe them in such a manner as to give effect to the intention of the parties; and in order to ascertain that intention the court will have regard to the surrounding circumstances. The existing facts in this case were that the vendor was insisting upon a net price to him free of any broker's commission; that a broker was making a claim against the vendor for commission which claim the vendor disputed; that the purchaser was aware of these facts; and that at no time was it suggested that the purchaser was to be liable for any broker's commission. In these circumstances, as the contract could only regulate the position between the vendor and the purchaser, a clause that the vendor is not to be liable for the broker's commission can clearly have only one meaning. That meaning obviously is that the purchaser is to be liable for any such commission. To state that because the clause does not place in so many words a positive liability upon the purchaser and therefore is not to be so construed is, in my view, to adopt an attitude ill-fitting to a modern world where contracts involving vast sums of

money are made in great haste and, possibly unfortunately, with little time for careful consideration of the words used. The fact that in this particular case the contract was drawn by a lawyer acting for both parties, who, it must be assumed, was conversant with the normal form of an indemnity clause, is no reason for giving full rein to pedantry and destroying a bargain made between the parties. There may well have been in the particular circumstances of this case good reason for departing from the normal form of words. The fact that a negative form of words would be construed by the courts in a positive manner does not mean that the parties entering into the contract might not prefer the negative form having regard to possible claims. I have no doubt that what the parties meant by these words was that the purchaser would be liable for any broker's commission should such commission be payable by the vendor. Consequently the parties were *ad idem* on the matter and the clause is neither meaningless nor void for uncertainty.

This was also the view of the Chief Justice. I cannot do better than refer to the words which he used in his judgment when dealing with this issue:

"If brokerage was a very live issue in the negotiations, and if a clause dealing with it is found in the agreement, the court should be loath to conclude that that clause was meaningless and of no effect. But that was the position which the defendant adopted. Mr. Salter was unable to conceive of any circumstances in which the words could affect the legal relationship of the parties. His view was that the plaintiff here was seeking to establish a right of indemnity and that a clear-cut unequivocal agreement would have to be shown before a party could be bound. It would have been so easy indeed for the parties to say 'the purchaser shall indemnify the vendor in respect of any commission which he may be held liable to pay in respect of the sale'. The arguments are powerful and have much merit.

On the whole, however, I am not persuaded by the argument. There is no authority, it would seem, for the proposition that a clear-cut agreement is necessary to establish an indemnity. It is a matter for interpretation as in any other agreement.

It is, however, a well established rule of interpretation that no part of an agreement should be held to be mere meaningless surplusage unless no interpretation reasonable in the circumstances can be assigned to it.

In my view, a meaning reasonable in the circumstances can be assigned to the clause. It could not possibly have been intended to affect the vendor's liability vis-a-vis the broker. It is inconceivable that any advocate could have so thought. It must, therefore, have been intended to regulate the liability for the payment as between the vendor and the purchaser if commission did in fact become payable. In those circumstances, if the purchaser agreed that the vendor would not be liable for it, he could only be understood to agree that he, the purchaser, would accept the liability. It may well be that the unusual drafting of the clause was motivated by the desire not to put anything down which would appear to indicate that the vendor thought that he might have been liable to Rattansi."

Dealing with the second issue, which was that the purchaser was induced by a fraudulent misrepresentation to enter into the contract and accordingly was not bound by cl. 7, counsel for the appellants urged on the appeal that the vendor had made a fraudulent misrepresentation that no commission was payable by the vendor if the broker took no further part in the negotiations. It is to be noted that this is not quite the same as the misrepresentation pleaded in para. 5 (b) of the defence which was "that no broker was instructed by or acted for the plaintiff for the sale of the said properties". Even if, however, I were to disregard

this difference I must draw attention to a remarkable fact: nowhere in the defence is it alleged that any misrepresentation was fraudulent and it is clear law that fraud must be specifically pleaded with the particulars required by O. 6, r. 4. Further, nowhere in his judgment does the Chief Justice deal with the issue of misrepresentation on the basis that it is alleged to be fraudulent misrepresentation nor is the memorandum of appeal framed on that basis. In these circumstances as fraudulent misrepresentation was neither alleged in the pleadings nor dealt with in the judgment nor the subject of a ground of appeal it is not open to the purchaser to raise this issue for the first time on appeal. As counsel for the appellants specifically stated that he did not base his submissions on an innocent misrepresentation, any issue based on misrepresentation falls to the ground. I might, however, state that I entirely agree with the Chief Justice in his finding that there was no evidence to support any suggestion of misrepresentation. In any event the purchaser was made aware by the broker of the broker's claim to commission and consequently the purchaser cannot be said to have been induced to enter into the contract by reason of any misrepresentation that no commission was payable (see s. 19 of the Law of Contract Ordinance). Finally, if there had been any misrepresentation the purchaser, having adopted the contract as a whole, would not be entitled to absolve himself from liability under one of the clauses of the contract even if that clause was severable which, in this case, it clearly is not since the clause intimately affects the purchase price.

Turning now to the appeal of the nominee, as this appeal relates solely to an order for costs and as any such order was in the discretion of the Chief Justice then under s. 7 (2) (a) of the Appellate Jurisdiction Ordinance, 1961, this court only has jurisdiction to hear the appeal if the leave of the High Court has been obtained. Nowhere in the record does it appear that such leave was obtained, consequently this court has no jurisdiction to hear the appeal. This point was not taken by counsel for the respondent and normally we would not decide an appeal on a point not taken without allowing counsel an opportunity of addressing us on the point. A question of jurisdiction is, however, a matter of which the court can and should take cognisance whether or not the matter is raised in argument and as the matter is quite clear we have thought it unnecessary to invite submissions from counsel on the point.

For these reasons I would dismiss the appeal of the purchaser. As my brethren take a different view, the appeal of the purchaser is allowed with costs and an order will be made in the terms proposed by Spry, J.A. As regards the appeal of the nominee I would strike it out as incompetent but make no order for costs thereon. As my brethren agree it is so ordered.

Spry JA: This an appeal from the judgment and decree of the High Court of Tanzania in a suit brought by the respondent company (to which I shall refer as the vendor) against the two appellant companies. The vendor had entered into a contract with the first appellant company (to which I shall refer as the purchaser) for the sale and purchase of a sisal estate and, in pursuance of that contract, the estate was transferred to the second appellant company as the nominee of the purchaser. Subsequently a broker, a Mr. Rattansi, claimed commission on the sale from the vendor and, when liability was denied, he successfully sued the vendor in the High Court. The vendor then claimed a right of indemnity against both appellant companies, and this claim led to the suit from which the present appeal is brought. In the event, the learned Chief Justice gave judgment in favour of the vendor against the purchaser but dismissed the suit as against the second appellant. The purchaser now appeals against the decision on the right of indemnity, while the second appellant company appeals against the refusal of the learned Chief Justice to award it its costs.

The vendor relied on a clause in the contract between the purchaser and itself which read:

“7. The vendor shall not be liable for broker’s commission (if any).”

It was submitted that on a proper interpretation, cl. 7 could only mean that the purchaser undertook to pay any commission that might be payable, and this submission was upheld by the learned Chief Justice. The first ground of appeal that was argued was against that finding.

I would begin by stating what I understand to be the law relating to the interpretation of contracts in Tanganyika. First, where the contract is in writing and its terms are clear and unambiguous, no extrinsic evidence may be called to add to or detract from it, but where necessary extrinsic evidence may be given of surrounding facts, although evidence of the negotiations is never admissible to vary the terms of the written contract. Secondly, where a contract is patently ambiguous, no extrinsic evidence may be given to explain it. Thirdly, where there is a latent ambiguity in a contract, extrinsic evidence may be called to explain it (Indian Evidence Act, 1872, ss. 92, 93 and 95, and *Riziki binti Abdulla v. Sharifa binti Mohamed* (6); *Marie Ayoub v. Standard Bank of South Africa Ltd.* (7); *Virbhai v. Bhatt* (1)).

A great deal of evidence was called in the High Court without objection, except as to one document to which I shall refer later. It appears to have been accepted by counsel before us that this evidence was admissible under s. 92, proviso (6), as being evidence of surrounding circumstances. With respect, I entertain some doubt whether much of the evidence was properly admissible under that proviso, but as no objection was taken, that question does not concern us.

The evidence did, I think, establish that a broker had been acting in the transaction; that the broker was initially in touch with the vendor with a view to finding prospective purchasers and that a rate of commission was agreed between them; that before any sale was negotiated, the broker was informed by the vendor that it was no longer interested in selling; that the broker subsequently brought a director of the purchaser (Mr. Kotecha) into contact with a director of the vendor (Mr. Eustace); and that a sale eventually resulted. The contract of sale was drafted by an advocate who was acting for both parties. It was also established that Mr. Eustace made it clear to Mr. Kotecha that he had no intention of paying any broker’s commission and that the latter knew that the broker believed he could recover commission from the vendor. It appears, also, that as between the purchaser and the broker, there was never any question of the purchaser being liable for commission. What was very much in dispute, however, was whether Mr. Kotecha agreed to pay commission if any were payable: on this question, the evidence of the two directors is directly contradictory, the learned Chief Justice preferring that of Mr. Kotecha, and finding as fact that he never “specifically” agreed to pay.

One effect, at least, of this evidence is to make it abundantly clear that possible liability for commission was a matter very much in the minds of both directors when the contract was signed.

The learned Chief Justice considered a submission that the vendor was “seeking to establish a right of indemnity and that a clear-cut unequivocal agreement would have to be shown before a party could be bound.” He thought the argument had much merit but he rejected it, observing:

“There is no authority, it would seem, for the proposition that a clear-cut agreement is necessary to establish an indemnity. It is a matter for interpretation as in any other agreement.”

He went on to refer to the rule of interpretation that no part of an agreement should be held to be mere meaningless surplusage unless no interpretation reasonable in the circumstances can be assigned to it. He took the view that

there was a meaning, reasonable in the circumstances that could be attributed to cl. 7, and only one meaning. He thought the proper interpretation of the clause was, that since, as between vendor and purchaser, the purchaser agreed that the vendor should not be liable for broker's commission, he must be understood to be making himself liable for it.

This interpretation was vigorously attacked on appeal by counsel for the appellant. He submitted that the apparent meaning of the words was simply that the vendor would not be liable to the purchaser for any commission which the latter might have to pay. Had the intention been to include an indemnity it would have been expressed in clear words. The contract was drafted by an advocate and, to an advocate, indemnity clauses are everyday matters. If this view were rejected, counsel for the appellants submitted that the parties should be regarded as not having been *ad idem* or that the clause should be held to be meaningless, and in either case he argued that the clause should be regarded as severable and should be rejected.

For my part, I think there is considerable merit in counsel for the appellants' main argument. This is not a case where the parties having, by oversight, failed to deal with some matter, the court is asked to imply a term. The matter of commission was expressly dealt with and it was dealt with in a negative way. As drafted, the clause provides a defence to any claim by the purchaser against the vendor. I do not think it is for the court to concern itself with the question whether, if the clause had not been inserted, the purchaser could successfully have made any claim. Such a claim would certainly be unusual, but there might be circumstances in which one would arise, and Mr. Eustace may have feared such a claim, even if in fact it did not lie, and may have sought to guard himself against it. It is a general rule of interpretation that where there is no express provision in a contract, the court will not imply any provision relating to the same subject-matter. One authority for this proposition is *Mills v. United Counties Bank Ltd.* (8) in which Fletcher Moulton, L.J., said ([1912] 1 Ch. at p. 241):

"... when I find a deed which fully expresses the contract between the parties I decline to add anything by way of an implied contract. I think it is quite clear that the parties here, who were negotiating and making a contract between themselves, had the whole matter fully before them, and that if this indemnity had been intended we should have found it expressed in the deed, and if they did not intend that the implied covenant of indemnity should exist between them, then we are bound not to read it into this deed."

That was a case where an indemnity would normally have been implied, had it not been for recitals and other provisions in the deed, which were held to negative the intention to give an indemnity. It seems to me that the same reasoning applied here. As the learned Chief Justice himself said, nothing would have been easier or more natural than for the parties to have inserted a positive undertaking on the part of the purchaser, yet, with the matter of commission very much in mind, they did not do so. In those circumstances it is not, in my opinion, open to a court to interpret the negative provision as a positive one; to do so is, in my opinion, to imply a term in the contract which the parties did not think fit to include, although they not only had the matter in mind but were even dealing expressly with it in the contract.

In arriving at this conclusion, I have ignored the evidence that was, in my opinion, inadmissible but I may add that if all the evidence recorded was properly admissible, my opinion would be the same. That evidence shows that there was much talk between Mr. Eustace and Mr. Kotecha on the possibility of the broker claiming commission, that Mr. Eustace made it clear that he wanted a net price, that Mr. Kotecha never expressly agreed to pay commission and that when he

saw the draft contract, he inquired whether cl. 7 affected him. Far from strengthening the case for the vendor, that evidence seems to me to make it less likely that cl. 7 was intended to have a positive effect.

Counsel for the vendor, sought to explain the form of the clause on the ground that Mr. Eustace, knowing that a claim might be made against the vendor by the broker, did not wish by the use of unguarded words to afford the broker any material which might help him to prove his claim. With respect, I see no merit in that argument. In the first place, in the interpretation of the clause, we are concerned with the joint intention of the parties as expressed in the document; what one party may have had in mind is not relevant. Secondly, I think it would have been just as easy to indicate in a positive as in a negative clause that the vendor did not consider itself under any obligation to pay commission. Thirdly, the negative provision was just as dangerous as a positive one, if, as the vendor contends, the only proper construction of it is as a positive covenant. And, above all, if the agreement between the parties was that any commission payable would be paid by the purchaser, it would have been Mr. Kotecha who would have been concerned to see that the agreement contained nothing to strengthen the broker's case: it would have been immaterial to Mr. Eustace provided he clearly had his right of indemnity, yet it is common ground that cl. 7 was inserted at the instance of Mr. Eustace.

For this reason, I would allow the appeal by the purchaser.

The second ground of appeal that was argued was that the learned Chief Justice erred in excluding a draft of the contract, which the purchaser sought to put in as evidence. Counsel for the appellants submitted that it was illogical and erroneous to exclude the draft; that it was as much a part of the surrounding circumstances as any other act or writing. He argued, relying on *Bal Kishen v. Legge* (9), that the law of India, on which the law of Tanganyika is, in this respect, founded, is similar to the law of England, as set out in *The Shannon Ltd. v. Venner Ltd.* (10). Without intending any disrespect to learned counsel I do not propose to go into that general question. In my view, the learned Chief Justice was quite right to exclude the draft. I am not to be understood as saying that a draft may not in some circumstances be admissible, as for example to prove an engrossing error. But to introduce a draft to show the form in which a clause was first framed is, to my mind, to admit evidence of negotiations. Indeed, when a draft has been submitted and re-submitted by advocates, approved subject to amendments, the draft may well embody the whole course of the negotiations. I would reject that ground of appeal.

The third ground of appeal that was argued was that the learned Chief Justice erred in holding that there had been no misrepresentation on the part of the vendor. Counsel for the appellants relied particularly on the evidence of Mr. Eustace, when he said that during his negotiations with Mr. Kotecha he had said that "my price is net and there is no point in paying commission since we can discuss it and negotiate directly". This, in counsel for the appellants' submission, amounted to a false representation, since it implied that, at that time, the vendor was under no contractual obligation to pay commission to the broker and that any liability to commission would arise only from the future employment of the broker, whereas, as was held in the proceedings between the vendor and the broker, there was a subsisting contract between them at that time.

The learned Chief Justice, after setting out the relevant evidence of Mr. Kotecha, which certainly did not allege any positive representations, observed:

"It seems clear that Eustace made no representation as pleaded unless his expression of the fixed intention not to have Rattansi in the matter could inferentially be so construed. Before signing the agreement, however, Kotecha knew that Rattansi was alleging the existence of an agreement

under which he could fix the plaintiff with liability. Kotecha made no inquiries about that, although his view was that apart from agreement the vendor was the person liable to pay.”

Counsel for the respondent submitted that that was a proper conclusion and he adopted it as his argument. I do not think it necessary to refer to the English authorities cited by counsel. The relevant law is contained in the Law of Contract Ordinance (Cap. 433), which provides in s. 17:

“17(1) ‘Fraud’ means and includes any part of the following acts committed by a party to a contract . . . with intent to deceive another party thereto . . . or to induce him to enter into the contract:

- (a) the suggestion, as to a fact, of that which is not true by one who does not believe it to be true;
 - (b) the active concealment of a fact by one having knowledge or belief of the fact; . . .
- (2) For the purposes of this Ordinance, mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech.”

Misrepresentation is defined in s. 18, which reads as follows:

“18. ‘Misrepresentation’ means and includes:

- (a) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believed it to be true;
- (b) any breach of duty which, without an intent to deceive gains an advantage to the person committing it, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him;
- (c) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.”

The effect of fraud or misrepresentation is contained in s. 19.

In the present case, it appears to me that Mr. Eustace could only be held to have been guilty of fraud if, at the time when he was negotiating with Mr. Kotecha, he knew that he was bound by his contract with the broker. The evidence given in this case certainly does not establish that knowledge, and an inference to the opposite effect can be drawn from the fact that the suit brought by the broker was defended. The findings of the learned trial judge in that case are certainly not evidence of the facts for the purposes of this case (see ss. 41, 42 and 43 of the Indian Evidence Act, 1872, as applied to Tanganyika), and the fact that the contract was held to be subsisting is inconclusive, since it is only Mr. Eustace’s knowledge of that fact that is in issue. Furthermore, a very high standard of proof is needed to support an allegation of fraud. I would, therefore, hold that fraud has not been established.

Again, I do not think the remarks to which counsel for the appellants referred can be regarded as a misrepresentation within the meaning of s. 18.

If that is so, s. 19 cannot be invoked and it is unnecessary to consider whether it would have afforded the appellant any remedy. In my view, this ground of appeal fails.

Finally, as I have said, there was an appeal by the second appellant company against the decision of the learned Chief Justice that, while the suit against that company should be dismissed, there would be no order as to costs. We heard argument on this, no objection having been taken. On referring to the Appellate Jurisdiction Ordinance (Cap. 451), it appears, however, from s. 7 (2) (a) (ii) that no appeal lay except with the leave of the High Court. The record does not show that leave was either sought or obtained. It would appear therefore that this court has no jurisdiction to entertain the appeal by the second appellant company, and since, as a matter of jurisdiction, the omission could not be waived, I would reject that part of the appeal as incompetent.

I would allow the appeal by the purchaser and set aside those parts of the judgment and decree which deal with the suit as against the purchaser and order that the suit as against the purchaser be dismissed with costs. I would allow the purchaser its costs of the appeal, with a certificate for two counsel. I would make no order for costs on the appeal by the second appellant company.

Duffus JA: I have had the advantage of reading the draft judgments of Newbold, P. and Spry, J.A. The difficulty in this case arises over the interpretation of a badly and loosely drawn up clause in the contract for sale between the respondent as vendor and the first appellant as purchaser of a sisal estate in Tanzania. The disputed clause reads:

“7. The vendor shall not be liable for broker’s commission (if any).”

In this case the respondent as vendor has sued and recovered judgment against the first appellant as purchaser for Shs. 150,000/- under the provisions of cl. 7, being commission which he had to pay to a Mr. Rattansi on the sale of the sisal estate.

The basic principle is that this contract must be interpreted according to the intention of the parties and that this intention must first be ascertained from the document itself and that the words of the document must be construed in their ordinary sense. This is subject to certain exceptions and in this case evidence of the surrounding circumstances was led by both parties to show the true meaning of the language as used in cl. 7.

I agree with Spry, J.A., that the ordinary meaning of the words in para. 7 bearing in mind that this is an agreement between a vendor and purchaser, must be that put forward by counsel for the appellant, and that is, that cl. 7 means the vendor shall not be liable to the purchaser for any broker’s commission which the purchaser might have had to pay. The learned Chief Justice at the trial, however, accepted the interpretation put forward by the respondent and in doing so relied on evidence of the circumstances in which this agreement was made and held that these words meant that the purchaser and not the vendor would pay whatever broker’s commission was payable on the deal and that the purchaser was therefore liable to indemnify the vendor for any commission that the vendor had to pay.

The following relevant facts were in my view established by the evidence either by admission of the parties or by the findings of the learned Chief Justice:

- (a) The first relevant fact is that the respondent company were the owners of the sisal estate in question and that they, through Mr. Z. M. Eustace, a director and the principal shareholder in the company, entered into a binding contract with the broker Rattansi to pay him a commission of 2 1/2 per cent. on the purchase price of any sale of the estate to a buyer introduced by Rattansi. This agreement was clearly set out in the correspondence between the respondent and Rattansi

and in particular in the letter from Rattansi to the respondent dated January 15, 1963, a letter from the respondent company dated January 16, 1963, a reply to this letter from Rattansi dated January 20, 1963, and then a reply from the respondent company dated January 23, 1963.

- (b) It is a fact that this agreement was still in existence and binding on the parties when Rattansi introduced a representative of the appellant company to Mr. Eustace and following on this introduction the respondent company eventually sold the estate to the appellant company.
- (c) On the sale being completed Mr. Rattansi claimed his commission from the respondent company who refused to pay and Mr. Rattansi then sued the respondent company and recovered Shs. 150,000/- as commission on the sale. The respondent company did not appeal but accepted the judgment and now seek by this action, to recover this amount under cl. 7 of the agreement between the appellant company and themselves.

These are the basic facts but the respondent company in establishing the circumstances leading up to the agreement relied on three factors which are admitted by Mr. P. D. Kotecha, a director of the appellant company. This is clearly set out in Kotecha's cross-examination at the trial from which I will quote:

"Q: So when you signed the agreement of June 1, 1963 three factors were relevant to the matter

- (i) Eustace has from the beginning been insisting on a net price free of severance allowance commission on other allowance.
- (ii) That Eustace had made it clear that he did not wish to negotiate with a broker or pay a broker commission.
- (iii) Rattansi had told me that he had an agreement which would enable him to claim at the end of the deal.

I agree with these things.

With that knowledge I signed the agreement of June 1, 1963, including cl. 7."

On the other hand the appellant company relied on the following further circumstances:

- (a) It is clear that the respondent company never at any time informed the appellant company before the signing of the agreement that there was then in existence a binding contract between themselves and Rattansi to pay Rattansi commission on the purchase price of the sisal estate. This is important having regard to the alternative defence to the action that if cl. 7 was construed as an indemnity to repay the vendor then the purchaser would not be liable due to a misrepresentation by the agent of the respondent company to the effect that no broker was instructed or acted for the respondent company at the time of the sale of the property.
- (b) In his evidence both at the trial between Rattansi and the respondent company, and at the trial of this case Mr. Eustace of the respondent company admits that he said this to Mr. Kotecha. I quote:

"In the evening Mr. Prabudhas Kotecha came to my house and we were discussing the Gomba deal and I told Mr. Kotecha I don't know Mr. Kotecha, why you brought Rattansi today and I don't see the point of

negotiating this deal through him. As I explained to you in the morning yesterday I said my price is net and there is no point in paying commission since we can discuss it and negotiate it directly.”

In my view this passage does amount to a statement by Mr. Eustace to the effect that up to that stage of the negotiations no commission was payable to Rattansi and it appears that he was warning the appellant company not to continue the transaction through Rattansi in case it should create a liability to pay commission.

In arriving at the intention of the parties it is important to consider what was, at the time, the knowledge common to both parties. The circumstances showed that the vendor desired a contract to ensure that no commission would be payable by him to Rattansi and that their agent Eustace was of the view, as he stated to the purchaser’s agent, that the vendor was then under no obligation to pay Rattansi, but both the vendor and the purchaser knew that Rattansi had introduced the purchaser’s agent to the vendor’s agent and both apparently felt that there might be an obligation to pay commission, and Eustace was warning Kotecha to be careful not to incur any liability to Rattansi. Eustace believed, if he was not being fraudulent, that the vendor was under no liability as the contract with Rattansi had been terminated, but Rattansi had introduced the purchaser’s agent and if Rattansi was not acting for the vendor then it was probable that he was the purchaser’s agent and accordingly the purchaser would be liable to pay commission to Rattansi. In circumstances such as these it was not unreasonable that the parties should insert that clause, even if it was quite unnecessary, with the view that this would, in any event, protect the vendor from having to pay any liability for broker’s commission incurred by the purchaser. This, as I have stated is, in my view, the plain meaning of cl. 7 and accordingly should be the interpretation given by the court.

I agree generally with the judgment of Spry, J.A., and in my view the appeal of the first appellant should be allowed and the vendor’s action dismissed.

On the question of misrepresentation I am of the view that the vendor’s agent did misrepresent to the purchaser’s agent that the vendor was not at the time the contract was entered into under a binding agreement to pay commission to Rattansi, but as pointed out by the learned Chief Justice and the President of this court, the purchaser did have such information as should have caused further inquiries to be made and the true position discovered, and accordingly the proviso to s. 19 (1) of the Law of Contract (Cap. 433) would apply, and in any event cl. 7 is not severable from the contract as this affects the purchase price.

I also agree that for the reasons stated by the President and Spry, J.A., there is no jurisdiction to hear the appeal of the second appellant and this should be struck out. I agree with the order for costs as proposed by Spry, J.A.

Appeal allowed.

For the appellants:

J. M. Dave & Co., Dar-es-Salaam

J. M. Nazareth, Q.C., and J. M. Dave

For the respondent:

Morrison & Co., Dar-es-Salaam

J. A. Mackie-Robertson, Q.C., and Morrison

Chemelil Sisal Estate Ltd v Makongi Ltd
[1967] 1 EA 166 (CAN)

Division: Court of Appeal at Nairobi
Date of judgment: 3 February 1966
Case Number: 16/1965
Before: Newbold Ag P, Duffus and Spry JJA
Sourced by: LawAfrica
Appeal From: The High Court of Kenya – Madan, J.

[1] Appeal – Abandonment of ground – Effect.

[2] Land – Failure to obtain consent of Divisional Land Board to lease – Whether there is cause of action under reg. 9 (3) of Land Control Regulations, 1961 (K.) made under Kenya (Land) Order in Council 1960 – What moneys recoverable on failure to obtain consent.

[3] Land Control Ordinance – Failure to obtain consent of Divisional Land Board – Lease void – Moneys recoverable under reg. 9 (3) of Land Control Regulations, 1961 (K.) – Observations on possibility of owner maintaining actions for trespass, mesne profits and possession or conversion of crops.

[4] Landlord and Tenant – Effect of failure to obtain consent of Divisional Land Board to lease of agricultural land in declared area – Observations on possibility of owner maintaining actions for trespass, mesne profits and possession, or conversion of crops.

Editor’s Summary

M. was in possession of agricultural land (to which the Land Control Regulations 1961 applied) under a purported lease between the appellant company and himself, and towards the end of 1961 it was agreed that the terms of this lease were those set out in a “lease” dated December 31, 1961 (known as “the December lease”). Subsequently it was agreed that the December lease should be between the appellant company and a company to be promoted (namely, Makongi Ltd., the respondent company) by M. On November 7, 1961, M. made a rental payment of Shs. 30,000/- in accordance with the terms of the December lease, which was signed on or about November 11, 1961, and executed by M. as director of the respondent company: which, however, was not incorporated until November 27, 1961. The December lease became void under reg. 9 of the Land Control Regulations, 1961 (called “the Regulations”) because the consent of the Divisional Land Board was never obtained. The respondent company claimed the recovery of moneys paid under the December lease totalling Shs. 400,800/- from the appellant company under reg. 9 (3) of the Land Control Regulations, 1961, the relevant part of which reads: “Any money or other valuable consideration . . . paid in the course of any dealing, or under any agreement, which . . . becomes void under this regulation . . . shall be recoverable as a civil debt by the person who paid it from the person to whom it was paid.” The court below found substantially in favour of the respondent

company on the ground that the moneys were paid under a dealing in land which created an implied lease, and that implied lease had become void. The implied lease was found to have been entered into on a date unspecified but sometime in November. The judge held that reg. 9 (3) was imperative in intention and punitive in purpose. One of the defences by the appellant in the court below was to the effect that the failure to obtain the consent of the Divisional Board was the fault of the respondent company in refusing to take steps to get consent although asked by the appellant company to do so. This defence was not dealt with in the judgment of the court below. There were twenty grounds of appeal but the main grounds were: (i) payments made by Makongi were not made under any "dealing" or "agreement" invalidated under reg. 9 and therefore were not recoverable; (ii)

if moneys were recoverable then various items of set-off, principally the value of crops taken off the land by the respondent company while in occupation (which was disallowed in the court below) should be allowed against moneys recoverable; (iii) the failure to obtain consent of the Divisional Land Board was the fault of Makongi.

Held – on ground (i)

- (a) that (as from November 27, 1961), there was a “dealing” in land in the course of which moneys were paid. (Leave to apply to amend the plaint to include “dealing” granted);
- (b) (by Newbold, Ag. P., and Duffus, J.A., Spry, J.A. dissenting): reg. 9 (3) created a cause of action which entitled the respondent to recover the amounts it had paid in the course of the “dealing”.

On ground (ii)

- (a) the object of reg. 9 (3) was not imperative in intention and punitive in purpose. The purpose was to restore the parties to the status quo ante; but
- (b) a set-off should not be allowed in respect of the value of produce won from the land by the respondent company; although the appellant could set-off any claim properly the subject matter of a set-off under O. 8, Civil Procedure (Revised) Rules, 1948 (K.) which did not arise under an agreement made void in respect of that claim.

Ground (iii) was regarded by Newbold, P. as providing a sound ground of appeal, but as this ground had been abandoned by the appellant at the hearing of the appeal no decision was made based on it.

(Per Duffus, J.A., obiter. An owner of land upon which another party has entered pursuant to a transaction made illegal by these regulations might be able to maintain an action for trespass or recovery of possession with mesne profits; or possibly for conversion for fruits or produce taken off the land.)

Case remitted back to the trial judge for valuation of items permitted as a set-off against the respondent company’s claim. Four-fifths of costs of the appeal awarded to appellant. Costs in court below to be in the discretion of the trial judge.

Order accordingly.

Cases referred to in judgment:

- (1) *Kiriri Cotton Co. Ltd. v. Dewani*, [1960] E.A. 188.
- (2) *Diment v. Roberts*, [1925] 1 K.B. 9.

The following judgments were read:

Judgment

Newbold Ag P: This appeal has given me the greatest difficulty. In essence, the respondent company (hereinafter referred to as “Makongi”) sought to recover from the appellant company (hereinafter referred to as “Chemelil”) the sum of Shs. 400,800/–, with interest and costs, as being the total amount paid by Makongi, the lessee, to Chemelil, the lessor, under what purports to be a lease dated December 21, 1961 (hereinafter referred to as “the December lease”) which became void under reg. 9 of the Land Control Regulations, 1961 (hereinafter referred to as “the Regulations”). Under para. (3) of that regulation “any

money or other valuable consideration . . . paid in the course of any dealing, or under any agreement, which . . . becomes void under this regulation, . . . shall be recoverable as a civil debt by the person who paid it from the person to

whom it was paid” and it is under this provision that the claim in the suit was made.

On the facts found by the trial judge – and there was ample justification for his findings – no party to these proceedings emerged with any credit. The trial judge felt constrained on his interpretation of reg. 9 of the Regulations to give judgment in favour of Makongi for virtually the full amount of the claim. I cannot help feeling that where a person has agreed a rental for the use of land and has had the use of the land then there can be little justice in any claim made by him for the return of the rent. It may be that the law gives him the right to the return of money paid for something which he has enjoyed; if it does so, then the courts have no alternative but to enforce the law. For my part, however, I would seek to avoid any interpretation of a regulation which results in an obviously unjust answer. There are other unsatisfactory features of the appeal. Before the trial judge two, in many ways quite separate, cases were consolidated and this has resulted in some confusion in relation to the evidence. This confusion is all the more pronounced because no issues were framed by the trial judge in relation to either of the consolidated suits. Further, although the claim to the return of Shs. 400,800/- is based in the plaint upon money paid under the December lease which had become void under the Regulations, the trial judge gave judgment in respect of money paid under a dealing in land which created an implied lease which became void, the lease being entered into on a date which he did not specify but which, if I read his judgment correctly, was some time in November, and this judgment was given without any amendment of the pleadings. Finally, the defence in para. 3 (d) specifically pleaded that

“... the defendant says that any failure to obtain any consent required from the Divisional Board was due to the acts and defaults of the plaintiff which did not desire such consent to be obtained and refused or neglected to apply for the same when asked or advised to do so and the plaintiff is accordingly ... debarred from relying on any such lack of any legally necessary consent and/or otherwise taking advantage of its own wrong”

and this plea was the subject of argument before the trial judge, although it was not referred to in his judgment, and was a specific ground of appeal. This plea was specifically abandoned when the appeal was argued. Makongi based its claim to the return of the money upon the fact that as consent had not been obtained to the December lease it had become void. On the facts found by the trial judge, Makongi, through its agent, had specifically stated that it did not wish the various formalities in relation to the proposed lease, including the obtaining of consent, to be complied with. In other words Makongi had objected to the performance of formalities and yet based its claim upon the failure to perform them. This is nothing other than a plaintiff seeking to take advantage of his own wrong and using a statute as an instrument of fraud. But equity will not permit such a course of conduct. Having regard to the facts found in this case, it seems to me that as this specific issue had been raised in the defence, had been argued before the trial judge and had been the subject of a ground of appeal, the appellant would have had an unanswerable case had it not been specifically withdrawn on appeal. However, I think it wrong, save in the most exceptional circumstances, for a court to give judgment on an issue which has been specifically raised and equally specifically withdrawn; there may be circumstances which give rise to such a course of conduct and of which the court is unaware. In any event, in a civil case the court should normally give judgment on the issues placed before it by the parties.

Reduced to their simplest form, the relevant facts may be stated as follows. Some time towards the end of 1961 Chemelil agreed to lease to a Mr. Mavrelis agricultural land within a declared area to which the Regulations applied. The

terms of the lease were those set out in the December lease. Mr. Mavrelis was at the time of the agreement already in possession of the lands under a purported lease thereof from Chemelil to himself. Some time after this agreement was made it was further agreed that the lease should not be from Chemelil to Mavrelis but to a company which was to be formed with Mavrelis as a director. Mavrelis continued in possession of the lands as from November 1, 1961, and on November 7, 1961, made a payment of Shs. 30,000/- in accordance with the terms of the December lease. Makongi was incorporated on November 27, 1961, was regarded by itself, by Chemelil and by Mavrelis as the lessee of the lands on the terms of the December lease and made various payments to Chemelil, either directly or through its agent, Mavrelis, in accordance with such terms. No consent was ever obtained to the December lease or to any dealing with the land as required by the Regulations. The December lease was a document purporting to be, inter alia, a lease of such lands and purporting to have been properly executed by Makongi and Chemelil on December 21, 1961. The claim by Makongi made in its plaint was to the return of moneys paid under the December lease which it averred had become void due to lack of consent under the Regulations. The judge found that the December lease was signed on or before November 11, 1961, and that it had not been properly executed by either party for the reason, in the case of Makongi, that it was executed before Makongi came into existence and, in the case of Chemelil, that the seal was not affixed to the document. The judge, however, was of the opinion that whatever might have been the deficiencies of the December lease nevertheless they did not affect the position, as the relationship of lessor and lessee existed between Chemelil and Makongi by reason of an implied agreement arising from their conduct in regard to the land and that the terms and conditions of this implied agreement were those set out in the December lease. It is true that the judge does not find this relationship in so many words but this is what I understand him to have held when he stated “. . . the plaintiff company was in occupation of the land and it was paying rent. I think therefore equities demand it be held that a tenancy was thus created”. The judge took the view that reg. 9 was imperative in intention and punitive in purpose, that it created a cause of action which enabled Makongi to recover from Chemelil, subject to minor deductions, the amounts paid under this implied lease, and that it did not permit Chemelil to succeed on the vast majority of the claims which Chemelil sought to set-off against the claim by Makongi.

Basically the appeal was argued on two main issues. The first was that the moneys paid by Makongi to Chemelil were not paid under any dealing or agreement invalidated under reg. 9 of the Regulations and, accordingly, such moneys were not recoverable under para. (3) of that regulation. The second was that if any moneys were recoverable under that paragraph then Chemelil was entitled to set off various amounts against the claim of Makongi.

Dealing with the first issue, counsel for Chemelil attacked the conclusions of the trial judge from a number of directions, all of which had as their focal point the fact that the December lease was not invalidated by reason of the absence of consent but for some other reason, whether it be the absence of the seal or that the agreement was entered into prior to the incorporation of Makongi, or otherwise. I find it unnecessary to deal specifically with these various points as, whatever merit there may be in any of them, I am satisfied that as from the date upon which Makongi was incorporated, that is November 27, 1961, there was a dealing in land in the course of which money was paid and that this remains the position no matter what the reason for the invalidity of the December lease.

At first, I was of the view that the relationship of lessor and lessee existed between Chemelil and Makongi in respect of the lands to which the Regulations

apply by reason of an implied agreement arising from their conduct in regard to the land; and that the terms and conditions of this implied agreement were those set out in the December lease. On further consideration, however, I am of the opinion that the court should not imply an agreement if an express agreement to the same effect is made void by statute. I am satisfied, therefore, that in respect of the lands to which the Regulations apply no agreement between the parties creating an interest in those lands can be implied. It is clear, however, that de facto possession of the land was given to Makongi; and this constitutes a dealing in the land within the definition of "deal" contained in the Regulations. It is also clear that payments were made by Makongi to Chemelil in respect of this de facto possession; and this constitutes a payment of money in the course of dealing with the land. Under para. (1) of reg. 9 this dealing was made void as no consent had been given to it. Thus though de facto possession was given pursuant to the de facto agreement of Chemelil, no legal possession was transferred and the de facto agreement had no legal effect. The trial judge was of the view, and I agree with him, that para. (3) of reg. 9 creates a cause of action entitling Makongi to recover the amounts it had paid in the course of dealing which became void. As Makongi had de facto obtained the use of the land in respect of which the payments were made, the result created by para. (3) would appear to be most unjust, but I can find no escape from the clear words of the paragraph. Very often the metaphysical concepts which result from a statutory declaration that a transaction carried out between parties is void bear little relation either to justice or to the realities of the situation. It may be that as reg. 9 declares both the dealing and the agreement giving possession as void, Makongi was liable to Chemelil in trespass and conversion subject to any question of limitation. If this were the position it would indeed be poetic retribution for what appears to be an unjust claim.

A further matter which has caused me great concern is that the claim in the plaint is based upon the December lease but judgment has been given in favour of Makongi upon an implied agreement entered into some time in November upon terms which were similar to those contained in the December lease. Counsel for the appellant submitted that a plaintiff should not succeed on a claim which he had not made in his pleadings; and I feel the force of that argument. Counsel for Makongi urged that the matter could have been regularized by a simple amendment to the pleadings and that in any event as evidence was given on the matter at the trial no prejudice had been caused. This may well be so, nevertheless no application for amendment was made at the trial and, indeed, no application for amendment was made on the appeal. The result is that if Makongi were to succeed it would succeed on a claim different from that set out in the pleadings. I cannot repeat too forcefully the fact that a judgment should be founded on the pleadings or at least on specific issues stated by the judge. While I feel the great force of counsel for the appellant's argument, I nevertheless consider that in all the circumstances of this case I would not allow the appeal on a point which is one of pure technicality as all the facts were before the trial judge. I would for my part grant an amendment to the pleadings to cover the facts upon which judgment was given, and as the matter will be referred back to the trial judge I assume that an application for amendment will be made then. As I have said, I consider that Makongi is entitled to recover on the basis of payments made in the course of a dealing and not under an implied agreement.

While para. (3) of reg. 9 enables Makongi to recover payments made in the course of a dealing, or under an agreement, which is void under reg. 9, that regulation only makes void a dealing with, or an agreement to deal with, land to which the Regulations apply. In the case of an agreement the only thing which becomes void is the agreement in so far as it relates to dealings with agricultural land in a declared area. In other words, if in the same agreement two separate

properties are leased, one being agricultural land in a declared area and the other land elsewhere, the agreement remains perfectly valid in respect of the other land and reg. 9 (3) would apply only to payments made in respect of the agricultural land in the declared area. Equally, it is only payments made in the course of dealing with such land that are recoverable. Turning to the schedule of payments attached to the plaint setting out the amounts which Makongi claims to be able to recover under reg. 9 (3), it will be seen that a payment of Shs. 30,000/- was made before the incorporation of Makongi. This payment cannot have been made by Makongi in the course of a dealing with the land. If an agreement could be implied then it might be argued that Makongi had adopted the payment but, as I have said, no agreement can be implied. Thus, in my view, Makongi cannot recover this item under reg. 9 (3). Nor can I see how sums paid as a refund of duty by the Ministry of Agriculture to Chemelil for the very reason that Makongi was not entitled to claim the refund can be said to have been paid by or on behalf of Makongi and thus recoverable under reg. 9 (3). The judge has held that the sum of Shs. 1,000/- of cash advanced cannot be recovered. The last payment specified in the schedule is for Shs. 35,500/-. This payment was made under the terms set out in the December lease and related to a licence in respect of Volo Sisal Estate. It has not been proved that this payment was made in the course of any dealing with land to which the Regulations apply and in my view this payment is not recoverable under reg. 9 (3). At the appeal counsel for the respondent conceded that the claim must be reduced by Shs. 5,000/- in respect of payments relating to the gold mine. In the result, subject to any question of set-off, I consider that Makongi was only entitled to recover Shs. 324,500/-.

Dealing with the second issue, I entirely agree with counsel for the appellant's submission that the object of reg. 9 is to prevent an interest in land being acquired without the requisite consent and as far as possible to restore the parties to the status quo. It is for this very reason that I consider para. (3) of the regulation creates a statutory cause of action. I am unable to agree with the trial judge in his view that the regulation is imperative in intention and punitive in purpose. If this were so then, as the duty to obtain consent is placed upon both parties to the deal, it would punish both parties and not merely the party who happened to provide valuable consideration in the form of money. I think that, in accord with my view of the object of reg. 9, the widest interpretation should be given to the words "valuable consideration" in para. (3) of that regulation. But however wide an interpretation one gives to these words I cannot accept that reg. 9 (3) should be so construed as to enable a purported lessor to recover from a purported lessee under the cause of action given in that regulation the value of anything which the lessee has, by his activities, won from the land leased. Accordingly I cannot accept that Chemelil is entitled, on the basis of the claim as it is framed in the defence, to set-off the value of sisal and sugar cane won from the leased lands. I do not, however, see any reason whatsoever why Chemelil should not set-off any claim which may properly form the subject matter of a set-off under O. 8 and which does not arise under an agreement made void in respect of that claim. The value of the licence to purchase African-grown sisal and any sums due from Makongi to Chemelil for payments made by Chemelil on behalf of Makongi. for work done by Chemelil at the request of Makongi, or for the hire or purchase by Makongi of articles belonging to Chemelil would appear to be proper subjects for a claim by way of set-off, even though these claims have some connection with the land, as these claims do not appear to arise under an agreement made void in relation to them. The trial judge did not make any finding as to the proper value of some of the items which Chemelil sought to set-off, and I would remit the matter to him with directions that Makongi is entitled to recover on its claim the sum of Shs. 324,500/- but

there is to be set-off against that sum such amount as he may consider to be the value of the claims made by Chemelil by way of set-off and which may properly form the subject of a set-off under O. 8, and to enter judgment accordingly. The trial judge in his judgment allowed a set-off of Shs. 2,147/85 in relation to the telephone account and there has been no cross appeal against this. In effect therefore the items which the judge will have to consider are those set out in para. 4 (iii) and items three and four of para. 5 of the defence as any appeal in respect of the last three items of that paragraph was not proceeded with.

At one stage certain members of the court considered that on a proper interpretation of para. (3) of reg. 9 no statutory right of action was created and accordingly Makongi's claim failed. This point was not taken before the trial judge nor was it taken originally before us but it does arise from the pleadings by virtue of the denial of liability in the defence. As this court is called upon to give judgment on the proper interpretation of a regulation, we considered that it would be wrong for a court to give judgment on the basis that a regulation created a cause of action if in fact it did not. We also considered that it would be wrong to interpret the regulation in a way different from the submissions made by either party without giving the parties an opportunity of arguing the matter. Accordingly we set the appeal down for further argument on the point as to whether reg. 9 (3) created a cause of action. As I have stated, I am quite satisfied that reg. 9 (3) creates a statutory cause of action and as Duffus, J.A., agrees with this view and with the terms of the order I have proposed it is ordered accordingly. As regards the costs of the appeal, as the appeal was not entirely successful I would allow Chemelil four-fifths of the costs of the appeal with a certificate for two counsel. As regards the costs in the High Court, both in respect of the original hearing and in respect of any submissions which the trial judge may permit to be made consequent upon the remission to him, I would order that they be in the discretion of the trial judge. As the other members of the court agree it is ordered accordingly.

Spry JA: These proceedings began with a plaintiff in which the respondent company (to which I shall refer as "Makongi") sued the appellant company (to which I shall refer as "Chemelil") for the sum of Shs. 400,800/-, with interest and costs. The basis of the claim was that this amount had been paid by Makongi to Chemelil, mainly as rent, under a lease dated December. 21, 1961, which was void under para. (2) of reg. 9 of the Land Control Regulations, 1961 (Legal Notice No. 142 of 1961) for lack of the requisite consent, and which amount was consequently recoverable as a civil debt under para. (3) of that regulation.

The defence included denials of the allegations in the plaintiff, an allegation in the alternative that Makongi was estopped from making the claim and the assertion of a set-off.

The learned trial judge found in favour of Makongi, except in respect of two small matters, one the disallowance of an item of Shs. 1,000/- and the other the allowance of a set-off of Shs. 2,147/85, and gave judgment accordingly for Shs. 397,652/15, interest and costs.

At the trial, no issues were framed, in contravention of the provisions of O. 14, r. 1 (5) of the Civil Procedure (Revised) Rules, 1948. The suit was consolidated with another suit (Civil Case No. 275/63) in which Makongi claimed damages for professional negligence against certain advocates. These facts led to the evidence ranging over a wide field, as well as to arguments as to what evidence was admissible. The present appeal is concerned solely with the suit between Makongi and Chemelil.

There were twenty grounds of appeal but as argued they can be grouped under four heads. The first was that money is only recoverable under para. (3) of reg. 9 where the dealing or agreement is void under the regulation and it was

argued that here the lease pleaded was, at least as between Makongi and Chemelil, non-existent or void ab initio and could not therefore have been avoided by the regulation. Secondly, it was argued that the object of para. (3) is restitution and that Chemelil was therefore entitled to set-off against the moneys it had received the consideration for which those moneys were paid. Thirdly, it was argued that a substantial part of the moneys claimed had not in fact, and should not be deemed to have, been paid by Makongi. Fourthly, it was submitted that various specific items of claim or set-off were wrongly allowed or disallowed.

It may be convenient to begin by quoting the provisions of para. (3) of reg. 9, which reads as follows:

“(3) If any money or other valuable consideration has been paid in the course of any dealing, or under any agreement, which is or becomes void under this regulation, such money or consideration shall be recoverable as a civil debt by the person who paid it from the person to whom it was paid.”

The first, and indeed the main, argument advanced by counsel for Chemelil was that the relief afforded by para. (3) is limited to payments made in the course of a dealing, or under an agreement, which becomes void under the regulation. He argued that, on the learned trial judge’s findings of primary facts, Makongi was not a party to the lease or, in the alternative, that the lease was void ab initio. With respect, I see no merit in that argument. The word “deal” is given a very wide meaning in the regulations, where it is defined, in relation to land, to mean:

“(i) dispose, or part with the possession, of the land, or

(ii) for himself or on behalf of any other person, acquire, or obtain possession of, the land,

whether, in either case, by means of conveyance, transfer or assignment (by way of sale, gift, exchange, settlement or otherwise howsoever), by partition, lease, licence or letting, or by means of succession, or in any other way whatsoever;”

Even assuming that the deed of lease would have been void apart from the regulation, it is quite clear that Chemelil gave possession of the land to, and accepted rent from, Makongi and that Makongi went into possession of the land and paid rent for it: these facts, in my opinion, constitute a dealing within the meaning of the regulation and one which was avoided ab initio by the regulation. In other words, Makongi obtained physical possession of the land but was never legally in possession, and since the delivery of physical possession constitutes a dealing, the provisions of para. (3) of the regulation apply to the rent paid in respect of that possession.

Counsel for the appellant also argued that Chemelil was not entitled to prove by evidence any contract other than the lease relied on in the plaint, but I would agree with counsel for Makongi that it is too late to raise this objection: had the point been taken earlier there might, and probably would, have been an application for leave to amend. The fact that in law there was a dealing rather than a contract is, in this connection, immaterial.

Counsel for the appellant’s second main proposition was that the learned judge erred in his interpretation of para. (3) of reg. 9, when he described it as “imperative in intention and punitive in purpose”. Counsel for the appellant submitted that, on the contrary, the clear intention of the paragraph was to restore to each party money or valuable consideration furnished to the other and, he argued that, if each party has the right to recover, the paragraph cannot be regarded as punitive. If rents paid were recoverable without accounting, the result would be one-sided and inequitable. If, on the other hand, the purpose of

para. (3) was, as counsel contended, restitution, a person who has received money under a transaction which is avoided should be able to set-off against it any valuable consideration given for it.

Counsel compared para. (3) with the former enactment which it replaced, that is, the proviso to s. 7 (2) of the Land Control Ordinance (Cap. 150, 1948 Revised Edition), and pointed out that the latter related only to written agreements and only gave a right to recover money. He argued that this clearly showed an intention to extend the scope of the relief. He submitted further that the words “other valuable consideration” should not be regarded as governed by the word “paid” so as to restrict their meaning.

Counsel for the respondent, on the other hand, argued that the words “other valuable consideration” should, on the principle of *noscitur a sociis*, be related to money, and that the use of the word “paid” and the reference to recovery as a civil debt indicated that the relief is limited to money or money’s worth and to liquidated amounts. His basic contention was that the wording of para. (3) carried a clear meaning and must be interpreted strictly, whether or not the result appears to be harsh or unfair in any particular case.

I have no hesitation in agreeing with the first part of counsel for the appellant’s submission. Under s. 14 (1) (f) of the Kenya (Land) Order in Council, 1960 (Legal Notice No. 589 of 1960), the Governor had power to provide penalties for breaches of the regulations and that power was exercised in relation to reg. 19, but the Governor did not think fit to impose any penalty for the breach of reg. 9 (1). Furthermore, the regulations appear to place an equal burden on the parties to a dealing to obtain consent, since dealing is defined in reg. 2 to include both disposing of and acquiring possession of land and reg. 9 (1) forbids dealing in land without consent. *Prima facie*, then, when there is a breach, the parties are in *pari delicto*. Had the regulations been punitive in purpose, it would seem that the parties should be equally liable to punishment, yet, if the learned judge’s decision is correct, the effect of para. (3) in the present case is to punish one party only and to enrich the other. Again, in the relatively simple case of a sale, the vendor recovers his land and the purchaser his money, so that it cannot be said that either is punished. Counsel for the respondents observed that in such a case the purchaser would have had the interim use of the land rent free, but the answer to this is, I think, that the vendor would have had the use of the money free of interest. I think, therefore, that the learned judge’s interpretation must be wrong and this is of importance as it coloured much of his judgment.

I cannot, however, see how the profits which Makongi made from its use of the land can be pleaded as a set-off against the amounts (if any) recoverable under para. (3) of reg. 9, as claimed in the defence and as argued by counsel for the appellant. This would seem to introduce a liability to account generally which is certainly not explicit, and, in my opinion, cannot properly be regarded as implicit, in the paragraph, and might give rise to counterclaims which are clearly outside the scope of the section.

It appears to have been assumed throughout the trial that para. (3) of reg. 9 creates a right of action and at the hearing of the appeal counsel for the appellant stated expressly, in answer to the court, that he was not disputing in principle that the paragraph creates a right to recover money. We think that in applying a statute this court must adopt the interpretation we believe to be correct, even though that interpretation was not part of the case for either party. For this reason, we invited counsel to address us specifically on this matter, when counsel for both sides took the view that the regulation creates a right of action, enforceable by either party, and differed only on what is recoverable under that right.

I would, of course, agree with counsel for the respondent that where the words of a statute are unambiguous, it is not open to a court to distort them in order to

correct what may seem an injustice. It is, however, a recognised rule of interpretation that where the words of a statute are capable of two interpretations, and one would produce an equitable and the other an inequitable result, the courts will always lean towards the former. In my opinion, the words “shall be recoverable as a civil debt” in para. (3) are susceptible of two interpretations: one possible interpretation is that adopted by the learned judge, that they create a right of action; the other is that they do no more than negative the proposition that might otherwise have been argued (on the merits of which I express no opinion), that no money is recoverable in respect of a transaction made illegal by para. (1) of the regulation, or, in other words, that they mean no more than that money or valuable consideration paid shall not be irrecoverable.

Counsel for the respondent sought to draw an analogy with the recovery of money under rent restriction legislation but I do not think this is a true parallel. In all rent restriction legislation “the duty of observing the law is firmly placed . . . on the shoulders of the landlord for the protection of the tenant: and if the law is broken, the landlord must take the primary responsibility” (*Kiriri Cotton Co., Ltd. v. Dewani* (1)), whereas, as I have said, the Land Control Regulations, 1961, place an equal responsibility on both parties to a proposed transaction.

It may, however, be observed that in a case under the Rent Restriction Acts, *Diment v. Roberts* (2), Atkin, L.J., after referring to cases in which the word “recover” was treated as equivalent to “sue for”, remarked “so ‘recoverable’ would mean capable of being sued for”. This is of no authority in deciding *how* para. (3) should be interpreted, since it was said in an entirely different context, but it is not, I think, irrelevant in deciding *whether* para. (3) has a clear and unquestionable meaning or whether it is open to interpretation.

Counsel for the respondent also relied on the words “as a civil debt” and I confess that this has given me the greatest difficulty, particularly the use of the word “civil”. After some hesitation, I think these words do no more than negative the possibility that a statutory penalty was being created.

If there are two legitimate interpretations of para. (3), I have no doubt that it is the second of those set out above that should be preferred. It would appear to avoid anomaly and injustice if not in relation to all dealings, at least to the majority of dealings of an everyday nature. In effect, it would enable either party to a dealing avoided by the regulation to recover any money paid for a consideration which has wholly failed as a result of the avoidance of the dealing.

In the present case, it is quite clear that there was no failure of consideration. Up to the date when possession of the land was yielded up by Makongi to Chemelil, both parties obtained what they had contracted for, Makongi the possession and use of the land demised and Chemelil the contractual rent. In such circumstances, I cannot see how Makongi can have any right to recover the rent paid and I do not think para. (3) of reg. 9 has any relevance. I would therefore allow the appeal.

Since that, in my view, disposes of the matter, I propose to deal only briefly with the remaining grounds of appeal. Under the third main head are grouped two submissions, the first, that a deposit of Shs. 30,000/- made by the promoter of Makongi before the incorporation of the company could not be regarded as money paid by the company and the second that various payments of rent made by the personal cheque of a director of Makongi were similarly not paid by the company. I see no merit in either submission. Moneys paid by a promoter on behalf of a company in course of incorporation, if subsequently debited to the company on its incorporation, must, in my opinion, be regarded as moneys paid by the company for the purposes of para. (3), and I have no doubt whatever that moneys paid by an

agent on behalf of a company after incorporation are,

for those purposes, moneys paid by the company. Had I considered Makongi entitled to recover moneys paid, I would have rejected these grounds of appeal.

Finally, there are certain miscellaneous payments. There was a sum of Shs. 5,000/- paid as rent or royalty for the use for two months of a gold mine. Counsel for the respondent conceded that this was a matter outside the land dealing and that this sum should not have been included in the claim. Secondly, there was a sum of Shs. 35,500/- representing payments made to a third party, Volo Sisal Estate Ltd., in consideration of benefits obtained under a licence granted by that company to Chemelil. It appears that the benefit of this licence was assigned to and enjoyed by Makongi. Under the terms of the lease, these moneys were to have been payable by Makongi to Chemelil but it appears that as a matter of convenience they were in fact paid direct to Volo Sisal Estate, Ltd. I would regard these moneys as in the same category as the rent for the land and in my view they are not recoverable because there was no failure of consideration. Then, by way of set-off, Chemelil claimed to be entitled to Shs. 95,000/- representing an estimate of the value of a licence to buy African-grown sisal the benefit of which was apparently enjoyed by Makongi; this claim falls into the same category as the general claim to set-off. Lastly, there was a claim by way of set-off to Shs. 12,750/- payable to Chemelil by Makongi for work done by the former at the request of the latter under contracts evidenced by two letters. This was not specifically dealt with by the learned judge but was covered by a general ruling that a set-off could not be pleaded unless the amount claimed had been paid in the course of the particular dealing on which the suit was founded. The learned judge based his ruling on his interpretation of para. (3) of reg. 9 as punitive in purpose. As I have said, I reject that interpretation but even regardless of that, I can see no reason, when the paragraph refers to the recovery of money “as a civil debt”, why any set-off should not be allowed which would be admissible in any ordinary civil suit. It does not appear to have been disputed that the work was done nor is it alleged that payment was made. I would therefore allow this set-off.

However, for the reasons that I have given earlier, I think the suit was misconceived and that the judgment of the learned trial judge was based on a misconception of the effect of para. (3) of reg. 9, and I would allow the appeal.

Duffus JA: This action arose out of a purported lease of land in the Kisumu/Londiani district of Nyanza Province, land admittedly within a declared area for the purpose of the Land Control Regulations, 1961. I have had the advantage of reading the draft judgments of the Acting President and of SPRY, J.A. The relevant facts are fully set out in these judgments. It is agreed that the consent required by reg. 9 of the Land Control Regulations, 1961, was never given.

Regulation 9 (1) reads as follows:

“9 (1) No person shall deal with any land, or with any share in a private company which for the time being owns any land, unless consent has been given to the dealing under and in accordance with the provisions of these Regulations, and every such dealing in respect of which such consent has not been given shall be absolutely void for all purposes.”

The word “deal” is defined in reg. 2 and the relevant portion of this definition states:

“ ‘deal’ means –

(a) in relation to land –

(i) dispose, or part with the possession, of the land or

(ii) for himself or on behalf of any other person, acquire, or obtain possession of, the land, whether, in either case, by means of conveyance, transfer or assignment (by way of sale, gift, exchange, settlement or otherwise howsoever), by partition, lease, licence or letting, or by means of succession, or in any other way whatsoever;"

In this action the respondent company (to which I will, for convenience, also hereinafter refer to as "Makongi") seek to recover from the appellant company (hereinafter referred to as "Chemelil") all the moneys that it paid under the purported lease by virtue of the provision of para. (3) of reg. 9 which states:

"9(3). If any money or other valuable consideration has been paid in the course of any dealing, or under any agreement, which is or becomes void under this regulation, such money or consideration shall be recoverable as a civil debt by the person who paid it from the person to whom it was paid."

The purported lease was to have taken effect from November 1, 1961. The evidence establishes that one Mr. Mavrelis, a director and shareholder in Makongi, continued in possession of the land in question as from November 1, 1961, until Makongi was duly incorporated as a company on November 27, 1961, when it entered into possession. Chemelil therefore parted with the possession of the land from the start of this transaction so that pursuant to the provisions of reg. 9 (1) the entire transaction or dealing with the land was absolutely void for all purposes from its very inception, and the provision of para. (2) of reg. 9 which allowed four months within which to obtain the necessary consent to an agreement to deal with land would not apply. The transaction here was not an agreement to deal but was a dealing with land within the meaning of para. (1). The transaction was therefore always illegal and void.

During the consideration of our judgment in this appeal, a point arose as to whether the provisions of para. (3) of reg. 9 gave a statutory right of action or whether it only acted so as to negative the general rule that money paid under an illegal contract is irrecoverable. This point had not been taken at the trial or in the arguments before us and we therefore heard further submissions from counsel on this point. In their further submissions learned counsel all agreed that the provisions of para. (3) of reg. 9 did create a new cause of action.

I have found some difficulty in arriving at what is the correct interpretation to be placed on reg. 9. Regulation 9 prohibits any dealing with agricultural land in a declared area unless the required consent is first obtained and any such dealing is not only illegal but is declared to be absolutely void for all purposes. This would mean that any person entering into possession of land subject to these Regulations in pursuance of a transaction for which consent has not been obtained does so illegally, and on the other hand that any person paying money or other valuable consideration in pursuance of such a transaction does so under an illegal contract and could not as a general rule recover such amount. The original consent of the owner to the entry on his land having, by statute, been declared illegal and absolutely void for all purposes, it would appear to follow that any person entering the land by virtue of such an illegal consent is unlawfully on the land, and as the consent was void from the time it was given, that his original entry was also illegal, and accordingly that the owner might be able to successfully maintain an action for trespass or for recovery of possession with a claim for mesne profits or possibly the owner might maintain an action for conversion if the tenant cut and then sold any fruits or produce of the land. In this case, however, Chemelil, the owners, makes no such claim and this aspect of the case has not been fully argued or considered.

The learned trial judge regarded reg. 9 (3) as being punitive in its purpose. With respect, I cannot agree, as in my view the intention of the legislature was clearly to place the parties back in the same position as they were before the illegal contract was entered into. It is apparent that the object of the Kenya (Land) Order in Council, 1960 under which the Regulations were made, and of the Regulations themselves, was to control the ownership and possession of lands as therein defined, and the intention of this legislation was not to protect any particular class of persons. All parties, both those disposing or parting with possession or those acquiring or obtaining possession of the land, were equally bound by and liable under the Regulations. Regulation 10 provides that any person can apply for the necessary consent to the deal.

The operative words in para. (3) are “shall be recoverable as a civil debt by the person who paid it from the person to whom it was paid”.

I agree that the words “shall be recoverable as a civil debt” could have been used in this instance in a permissive sense, i.e. that the words allowed moneys so paid to be recoverable, notwithstanding that they were paid under an illegal contract.

On the other hand the person paying would have no right of action but for para. (3), and any action that he brings must be by virtue of this right. The words “as a civil debt” in my view define the right that is thus given, that is, that the payment of money in this particular type of contract which has been declared illegal and void by the Regulations is a civil debt recoverable by action. The cause of action in this instance arising from the payment of moneys on a contract declared void for all purposes. If the words “shall be recoverable” are to be construed as meaning “shall not be irrecoverable” then it is difficult to explain the necessity of the words “as a civil debt”. These words appear to show that the expression “shall be recoverable” does establish a new cause of action which is to be classed as a “civil debt”.

I am therefore of the view that para. (3) does by itself create a new cause of action. On the other hand the words “as a civil debt” also, in my view, govern the procedure and method of recovery, and show very clearly that the procedure to be followed is the same that would apply to any civil case under the Civil Procedure Rules. I cannot therefore agree with the learned trial judge that the “set-off” must be also confined to moneys or other valuable consideration paid within the meaning of para. (3). The set-off would, in this instance, be governed by O. 8, r. 2 of the Civil Procedure Rules.

I agree with the findings of the learned President on the facts of this case. In particular I agree on the claim that Makongi can only recover such amount as it has paid to Chemelil in the course of this particular deal. This would not therefore include the amount paid by Mr. Mavrelis before Makongi came into being, the two amounts in respect of a refund on diesel oil, the payment in respect of the licence of Volo Sisal Estate, nor the amount already disallowed by the trial judge of Shs. 1,000/- for cash advanced. Learned counsel for the respondent also concedes that Shs. 5,000/- paid in respect of the gold mine should be deducted. The amount of the claim should, therefore, be reduced to Shs. 324,500/-.

On the set-off I agree that Chemelil cannot recover any amount for the sisal and canes cut under the claim as made in the set-off. The trial judge has already correctly allowed Shs. 2,147/85 on the telephone account, and I agree that the case be remitted to the trial judge to decide Makongi’s liability to Chemelil in respect of the use of its licence to purchase African grown sisal, and for the cleaning of the sisal and sugar cane and preparing fire breaks as set out in the set-off.

I agree with the order proposed by the President, including his order as to costs.

Order accordingly.

For the appellant:

Daly and Figgis

J. M. Nazareth, Q.C., and P. J. S. Hewett

For the respondent:

Hamilton, Harrison and Mathews

B. O'Donovan, Q.C., and J. N. Desai

Karmali v Mulle and others
[1967] 1 EA 179 (HCK)

Division:	High Court of Kenya at Mombasa
Date of judgment:	6 December 1966
Case Number:	147, 148, 149 and 151/1966 (Consolida)
Before:	Wicks J
Sourced by:	LawAfrica

[1] *Landlord and Tenant – Recovery of possession – Whether failure to give notice in accordance with provisions of Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, 1965, s. 4 (K.) deprives landlord of a cause of action under Act.*

[2] *Rent Restriction – Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, 1965, s. 1 (K.) – Act retrospective in operation.*

[3] *Rent Restriction – Recovery of possession – Landlord and tenant (Shops, Hotels and Catering Establishments) Act, 1965, s. 1 (K.) – Act retrospective in operation.*

Editor's Summary

On May 11, 1966, the plaintiff landlord filed a plaint seeking to evict four defendants from shop premises in Mombasa Municipality. Notices to quit purporting to terminate the tenancies at the end of April, 1966 had been served upon the four defendants but these notices did not comply with the provisions of s. 4 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, 1965 (hereinafter called “the Act”). Pursuant to s. 1 of the Act, on September 19, 1966, by a Legal Notice (283 of 1966) the Act was declared to have come into operation in the Mombasa Municipality as from May 3, 1966, and for the purpose of s. 1 (2) of the Act, January 1, 1966 was the date fixed as the date on which tenancies were required to have been subsisting in the Mombasa Municipality. The landlord's advocate contended that

as from May 1, 1966, the defendants were trespassers, that the Act was not retrospective in operation and the case fell to be decided according to the law prevailing on the date the plaint was filed, namely May 11, 1966, at which date legal notice 283 of 1966 had not been published.

Held –

- (i) the four defendants were ‘tenants’ protected by the Act, and, as the notices to quit did not comply with s. 4 of the Act, the plaint disclosed no cause of action;
- (ii) the Act was retrospective in operation so as to protect the tenants.

Actions dismissed.

Cases referred to in judgment:

- (1) *Reman v. City of London Real Property Co., Ltd.*, [1921] 1 K.B. 49.

(2) *Hutchinson v. Jauncey*, [1950] 1 K.B. 574.

Judgment

Wicks J: This is an action by the plaintiff, as owner of shop premises, to recover possession from the defendant, whose tenancy the plaintiff purported to terminate at the end of April, 1966. Three other cases, C.C. Nos. 148, 149 and 151, all of 1966, concern three other shop premises, and it is agreed between all the parties to these actions, and to this, that the actions be consolidated.

One of the defences to the actions is that the defendants claim they are protected from eviction by the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, 1965, which I will refer to as the Act, and this court has no jurisdiction to grant the reliefs prayed for. This defence being that the plaintiff does not disclose a cause of action, it is proper that I should consider it first, and embark on the other issues only if I am satisfied that there is a cause of action.

Section 4 of the Act sets out the procedure which must be followed should a landlord wish to terminate or alter the terms of a tenancy; s. 6 provides that a tenant who wishes to oppose a notice of termination of tenancy may refer the matter to a Tribunal and the notice served by the landlord shall have no effect until the matter has been determined by the Tribunal; and s. 10 provides that where a tenant fails to refer the matter to the Tribunal within time, the landlord is at liberty to take action for possession in the normal way. It is not suggested that the notices served by the plaintiff comply with the provisions of the Act, with the result that if it is found that the Act does apply, the plaintiff does not disclose a cause of action and the action must be dismissed.

Section 1 of the Act is:

- “(1) This Act may be cited as the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, 1965, and shall come into operation on such date as the Minister may, by notice in the Gazette, appoint:

Provided that the Minister may appoint different dates for different areas of Kenya, and may by notice in the Gazette exempt any area of Kenya from the operation of this Act.

- (2) This Act shall apply to any tenancy of a shop, hotel, or catering establishment, in any area in which this Act is in operation, which was subsisting on such date whether before or after the date of coming into operation of this Act in such area as the Minister shall, in the notice by which the Act is brought into operation in such area appoint, or which is created subsequently, and notwithstanding any provision in any other written law requiring a tenancy to be registered, evidence may be given of such tenancy whether registered or not.”

By Legal Notice 283 of 1966, May 3, 1966 was fixed as the date on which the Act was deemed to have come into operation in Mombasa Municipality, and January 1, 1966 was fixed as the date on which tenancies were required to have been subsisting in the Mombasa Municipality for the purposes of sub-s. (2) above.

The notices to quit purported to terminate the tenancies at the end of April, 1966 and counsel, who appears for the plaintiff, submits that after that date, that is as from May 1, 1966 the defendants, having failed to vacate the premises, have been trespassers, and trespassers are not protected by the Act, that the Act is not retrospective in its operation and, Legal Notice 283 of 1966 being dated September 19, 1966 and the plaintiffs filed on May 11, 1966, the case falls to be decided according to the law as it existed when the action was begun, that is as

on May 11, 1966, the day on which the plaint was filed, and that the plaintiffs acquired a vested right on that day and they should not be deprived of that right. I agree with counsel for the plaintiffs that under the general law of landlord and tenant, where a landlord has taken the necessary step to put an end to a tenancy, the person in occupation ceases to be a tenant, but it is now settled law that this principle does not apply in the case of premises which are brought within, and are intended to be protected by, rent control and tenancy protection legislation. The authority usually relied on for this proposition is *Reman v. City of London Real Property Co., Ltd.* (1) where ([1921] 1 K.B. at p. 54) Bankes, L.J., said that it was clear that in all the Rent Restriction Acts the expression “tenant” has been used in a special, a peculiar sense, and as including a person who might be described as an ex-tenant, someone whose occupation had commenced as tenant and who had continued in occupation without any legal right to do so except possibly such as the Acts themselves conferred upon them. This is clearly the purport of the Act, which gives persons in possession certain rights in relation to the premises they occupy after the expiry of a notice to quit.

Whether or not the operation of the Act is retrospective depends on the interpretation of the provisions of the Act itself. There is a parallel between s. 1 of the Act and s. 10 of the Landlord and Tenant (Rent Control) Act, 1949 of England where that section and two other sections were expressed to apply “whether the letting in question began before or after the commencement of that Act”. Similarly s. 1 of the Act is expressed to “apply to any tenancy . . . which was subsisting . . . whether before or after the date of coming into operation of this Act”. In the case of *Hutchinson v. Jauncey* (2) very much the same argument was advanced on behalf of the landlord as was urged by counsel on behalf of the plaintiffs. In that case Evershed, M.R., considered the argument and the authorities and came to the conclusion that the effect of the words in s. 10 of the Landlord and Tenant (Rent Control) Act, 1949 of England, was to make the Act retrospective in its operation so as to protect the tenant. Evershed, M.R. expressly approved the principle laid down in *Reman’s* case (1) that in relation to certain legislation the term “tenant” includes a person who might be described as an ex-tenant, and came to the conclusion that having found that the Act had retrospective effect and the occupant of premises was a “tenant” under the Act, the landlord cannot be heard to say that the action crystallized on the issue of the summons and the hearing of it must proceed as if the Act had not been passed and that the law applicable was the law as it existed at the date of the hearing. With respect I adopt the reasoning of Evershed, M.R. in *Hutchinson’s* case (2) and, applying it to the case before me, find the defendants are tenants within the meaning of the Act, that the Act is retrospective in operation, and the law applicable is the law as it existed at the date of the hearing. I find that the tenancies of the defendants are protected by the Act and, the notices to quit not complying with the provisions of s. 4 of the Act, the plaint does not disclose a cause of action.

Actions dismissed with costs.

For the plaintiff:

Atkinson, Cleasby & Satchu, Mombasa

D. N. Khanna and Mansur Satchu

For the defendants

K. M. Pandya and H. A. T. Anjarwala, Mombasa

Re Modern Retreading Co Ltd

[1967] 1 EA 182 (HCT)

Division: High Court of Tanzania at Dar-Es-Salaam
Date of judgment: 20 June 1966
Case Number: 52/1961
Before: Platt J
Sourced by: LawAfrica

[1] Company – Liquidation – Fraudulent preference – Whether bonus was remuneration for services or share of profits – Misfeasance under Companies Ordinance (Cap. 212), s. 158 (1) (g) (T.).

[2] Practice – Company winding-up – Amendment of liquidator’s notice of rejection of proof on appeal – English Companies (Winding-up) Rules, 1929, r. 105 (T.).

Editor’s Summary

The applicant and the petitioner were the two directors of a family business incorporated as a private company in 1956. The applicant was the company’s factory manager and the petitioner appeared to have been in general control and responsible for maintaining the company’s books. In 1959 a Mrs. Rana was appointed a director and worked in the company’s office. A dispute arose between the directors and this led to a resolution ousting the petitioner from his directorship, which in turn prompted the petitioner to pray for the winding-up of the company. On October 15, 1961, the applicant and Mrs. Rana resolved to credit themselves with a bonus of Shs. 11,000/- out of the profits. At that time the company had made a trading profit for the year 1960 but was still insolvent due to its debts from previous years. On October 20, 1961, without the knowledge of the applicant and Mrs. Rana, the petitioner presented his petition. Mrs. Rana had not claimed for the bonus resolved to her but the applicant put forward proof of his claim (among others) during the winding-up of the company in terms of the order granted on March 14, 1962. This claim was rejected by the liquidator and the applicant contested this rejection by this appeal to the court. The ground given by the liquidator for his rejection of the claim was that payment of the bonus claimed amounted to a fraudulent preference or a misfeasance. At the hearing he applied to amend his notice of rejection to include a further ground of rejection under s. 158 (1) (g) of the Companies Ordinance (Cap. 212) (T.) that the applicant was instrumental in the allowing of this bonus to himself while the company was running at a loss and other creditors were not paid and that the applicant was liable to make good the loss to the company.

Held –

- (i) the amendment applied for should be allowed;
- (ii) the bonus was a division of the profits among the directors;
- (iii) the declaration of the bonus was an obligation within s. 49 of the Bankruptcy Ordinance (Cap. 25) (T.) although no actual payment had been made;
- (iv) whereas it might be wrong for the directors to grant only themselves a bonus, by virtue of that fact alone they need not prefer themselves over other creditors as was required to be proved by s. 260 of the Companies Ordinance, and there was therefore no fraudulent preference;

- (v) if the bonus had been remuneration for past services it would be a sum due to the applicant by virtue of his contract of service and therefore not caught by s. 158 (1) (g) of the Companies Ordinance. In the circumstances, the bonus was a misfeasance by virtue of a misapplication of the profits and was correctly rejected under s. 158 (1) (g).

Application dismissed.

Cases referred to in judgment:

- (1) *Birkbeck Permanent Benefit Building Society Re*, [1912] 2 Ch. 183.

- (2) *Re County Marine Assurance Co., Ex parte Rance* (1870), 6 L.R. Ch. App. Cas. 104.
- (3) *Re Overend, Gurney & Co. Ltd.* (1865), 1 Ch. App. Cas. 528.
- (4) *Re Stenotyper, Ltd., Hastings Bros. v. Stenotyper, Ltd.*, [1901] 1 Ch. 250.
- (5) *Hutton v. Westcork Railway Co.* (1883), 23 Ch. 654.
- (6) *Towers v. African Tug Co.*, [1904] 1 Ch. 558.
- (7) *Re Leicester Club and County Race Course, Ex parte Cannon* (1885), 30 Ch. 629.
- (8) *Re Dale and Plant, Ltd.* (1890), 43 Ch. 255.
- (9) *Re New British Iron Co., Ex parte Beckwith*, [1898] 1 Ch. 324.
- (10) *Re Dover Coalfield Extension Ltd.*, [1907] 2 Ch. 76.

Judgment

Platt J: This is an application by way of motion against the decision of the Official Receiver and Liquidator (to whom I shall refer hereafter as the liquidator), rejecting in part the proof of claim put forward by Hajura Singh Dhillon (whom I shall call the applicant) during the winding-up of the company by the court known as the Modern Retreading Co. Ltd. (in liquidation) as ordered by this court on March 14, 1962. The applicant claimed that the company was indebted to him in the sum of Shs. 43,247/96. However, by his notice of rejection dated July 5, 1965, the liquidator rejected the claim to the extent of Shs. 37,726/55. The amount of the claim so rejected was made up of three items as follows:

- (a) Shs. 25,000/- being the applicant's contribution to the share capital of the company;
- (b) Shs. 11,000/- claimed as bonus by the applicant; and
- (c) Shs. 1,726/55 claimed as salary and wages for the year 1958.

Two items amounting in all to Shs. 5,521/41 for arrears of salary were admitted by the liquidator to proof.

The applicant's motion prayed for an order that the decision of the liquidator be reversed or varied to the extent of Shs. 12,726/55 being the sum of Shs. 11,000/- claimed as bonus and Shs. 1,726/55 claimed as salary and wages for the year 1958 as set out in (b) and (c) above. The rejected claim for Shs. 25,000/- in item (a) was not challenged. At the hearing of the appeal, the applicant did not pursue his claim for Shs. 1,726/55 in item (c) admitting that it was time-barred. The sole remaining issue concerned the claim for the bonus of Shs. 11,000/- in item (b).

This having been made clear, the liquidator then applied to amend his notice of rejection, in order to add a further ground of rejection under s. 158 (1) (g) of the Companies Ordinance (Cap. 212). The notice of rejection as served on the applicant is as follows:

"As to Shs. 11,000/- claimed as bonus, that you were instrumental to the allowing of this bonus to yourself while the company was running at a loss and other creditors of the company were not paid, that the allowing of the bonus was a "fraudulent preference" and as such void and amounted to a misfeasance on your part and as such you are liable to make good the loss which the company has suffered as a result of this."

If the amendment were to be allowed, the result would be that the first ground of rejection would be that the bonus was a fraudulent preference and as such was void and, therefore, the liquidator was entitled to

reject the proof. It is then said that the “allowing of the bonus” amounted also to a misfeasance which made the applicant liable to refund the bonus. The added ground of rejection would mean that the bonus amounted to a sum due to the applicant, which being

in the nature of a dividend or profit due to the applicant in his character as a member of the company, did not permit him to prove his claim in competition with other creditors not members of the company. This ground did not seek to impeach the bonus as improper, but simply entitled the liquidator to reject the proof of the applicant as a creditor of the company, although the claim would be taken into account as amongst the contributories. It will be seen, therefore, that the rejection of the claim as a fraudulent preference or as a misfeasance entitled the liquidator to disregard it for all purposes whereas the rejection of the claim as a member of the company's dividend or profit only entitled the liquidator to reject the claim as against other creditors. It follows that the amended rejection would amount to a last ditch stand by the liquidator in the event of his failing to prove fraudulent preference or misfeasance.

Learned counsel for the applicant opposed the proposed amendment, but having in mind that his client, the applicant, had travelled some considerable distance in order to give evidence at the hearing of the appeal, he elected to continue with the hearing and argued the points raised on the original notice of rejection as well as the amended ground of rejection, leaving it open to the court to decide, after consideration of the authorities, whether the amendment could properly be allowed. I should record here that I am grateful to the learned counsel for his consideration, since the matter raised by the liquidator at short notice is not without considerable difficulty. Indeed, after the applicant had given evidence, it was represented to me during the arguments that followed, that the issues in the case raised somewhat novel points upon which a ruling by the court was sought.

Although I doubt whether it is necessary for me to decide whether the court has power to grant an amendment, such as the liquidator seeks in this case, I will set out the position as I see it. The liquidator acknowledged that he had no authority upon which he could rely to show that he was entitled to amend his notice of rejection, but urged that in some circumstances, unless an amendment were allowed, injustice might be occasioned. He thought that perhaps the court could exercise its inherent powers by analogy with s. 273 (1). But, with respect, that section deals with the default of the liquidator in carrying out formal procedures which the court can require him to complete on the application of a creditor, a contributory or indeed the Registrar of Companies. On the other hand, learned counsel for the applicant suggested that in giving notice of rejection, the liquidator was in a position analogous to that of a magistrate who, when once he has passed judgment, cannot alter his judgment when the matter goes on appeal. It was pointed out that as the applicant was entitled to be given the reasons for the liquidator's rejection against which he was entitled to appeal, he would not be in a position to prosecute his appeal if the grounds for rejection were altered, and I presume the argument extends to the applicant's embarrassment in prosecuting his appeal. As far as the difficulty of prosecuting an appeal is concerned, there may well be instances in which an amendment ought not to be allowed but, in general, it seems that the applicant's difficulty would normally be eased by an adjournment giving him time to reconsider his position and, perhaps, also by an order for costs. But concerning the position of the liquidator, as being analogous to that of a magistrate, with respect, I am unable to agree that this is so. No doubt, the liquidator is required to examine a proof of debt, lodged with him by a creditor which may entail an investigation of the evidence supporting the proof. Rule 105 of the English Companies (Winding-up) Rules, 1929, which are applicable to this country and to which I shall refer hereafter as the Rules, provides that the liquidator shall examine every proof of debt lodged with him, and the grounds of the debt, and in writing admit or reject it. in whole or in part or require further evidence in support of it. If he rejects the proof he shall state in writing to the creditor the grounds of the rejection. Rule

109 provides that in a winding-up by the court, for the purpose of any of his duties in relation to proofs, the liquidator may administer oaths, and take affidavits. Thus, it has been held that he is bound to act judicially in the exercise of these powers in coming to a conclusion either admitting or rejecting the proof. But here the analogy with a magistrate ends. He is in reality an officer of the court, in the case of a winding-up by the court, charged with the duty of taking the practical steps of winding-up a company, and to this end, to ascertain the assets and liabilities of the company and the persons who are creditors and contributories. One of the steps to be taken is the admission to proof of debts legally incurred by the company and the rejection of debts for which the company is not liable. Having made his decision, two processes for review of the decision have been laid down in the Rules. The first, authorised by r. 106, provides that if a creditor or contributory is dissatisfied with the decision of the liquidator, in respect of a proof, the court may on the application of the creditor or contributory, reverse or vary the decision. The second method of review is sanctioned by rr. 107 and 108. Rule 107 provides that if the liquidator thinks that a proof has been improperly admitted, the court may, on the application of the liquidator, after notice to the creditor who made the proof, expunge the proof or reduce its amount. Rule 108 provides that the court may also expunge or reduce a proof upon the application of a creditor or contributory if the liquidator declines to interfere in the matter. It follows, therefore, that creditors or contributories as well as the liquidator himself may apply to the court to review the decision taken by the liquidator and at the hearing of the application the liquidator is a party entitled to put before the court all the relevant information justifying his action or showing in what way his decision should be varied. These powers substantially differentiate the position of a liquidator from that of a magistrate.

But the Rules to which I have referred do not indicate the exact practice by which a review of the liquidator's decision is to be carried out, and if I understand the position correctly, no clear practice rules have been drawn up, the matter being left to the court to apply such rules by analogy pertaining to other similar procedures. As the liquidator found, I have also been unable to find any reported authority suggesting that an amendment may or may not be permitted to the notice of rejection. But for what it is worth, there is a footnote in Stiebel's *Company Law and Precedents*, in the Third Edition dealing with the English Companies Legislation of 1929 on which the Companies Ordinance (Cap. 212) of this country is based, to the effect that an amendment had been granted at least on one occasion in England. The footnote is as follows:

"In *Birkbeck Permanent Benefit Building Society* 00213 of 1911 Neville, J., December 4, 1912, it was held that on such an application the liquidator could rely on grounds not stated in his notice of rejection. The application was adjourned to enable the applicant to consider a point so raised."

The footnote refers to a passage at p. 1112, where the learned author is dealing with r. 106 to which I have referred above. Of course, I have been unable to trace the report of this decision, if indeed it was reported, and its authority resides in the fact that it is the kind of point of which the learned author would be well aware, since he was the Registrar of Companies (Winding-up) Department of the High Court of Justice in England. Although this footnote does not have the authority of a legal precedent, it seems to me that it is based on good sense as well as principle. It will be seen that by virtue of s. 190 that the exercise of the liquidator's powers, which are set out therein, shall be subject to the control of the court, in a winding-up by the court. The purpose of the whole exercise of a winding-up is to see that the assets of the company are properly administered and distributed. It would seem strange that the assets should be whittled away

by costs due to multiplicity of actions in court. Thus, if a liquidator rejected a proof on grounds which appeared to him to be reasonable at the time, but were later found inadequate, in view of other facts which showed that a different ground of rejection was proper, it would be a waste of the assets to grant an application overruling the liquidator's decision on the first grounds, so admitting the debt to proof, if the liquidator was then bound to bring a second action asking the court to expunge the debt so proved on grounds later discovered. It would seem sensible to allow the liquidator to amend his notice of rejection to include the proper ground of rejection at the time of the first application, thereby avoiding multiplicity of actions and costs out of the assets. It is clear that the costs of proving a claim are to be borne by the claimant, and if the court should find that the application of an alleged creditor is unfounded, then the costs would be borne by the applicant. If, on the other hand, the application should succeed, the costs would come out of the assets of the company. There is good reason, therefore, to allow the liquidator to amend his notice of rejection so long as the applicant is given the opportunity to consider his position.

I would hold, therefore, that by virtue of its inherent powers to control the liquidator's actions as provided by s. 190 of the Companies Ordinance, that the court could allow an amendment of the notice of rejection. In the instant case, I would have been prepared to allow the liquidator's application to amend by adding a further ground of rejection under s. 158 (1) (g) of Cap. 212. This view seems to me to be consonant with the court's power to vary the liquidator's decision, by virtue of r. 106.

However this may be, because of the far-reaching results of the first ground of rejection, namely, fraudulent preference, it is necessary for me to consider whether the bonus which is disputed is, in fact, void. It would be convenient if I set out the facts at this stage.

The Modern Retreading Co. Ltd. was incorporated in 1956. It was a family business conveniently incorporated as a private company. There were two directors, the present applicant and Mr. Teja Singh, the petitioner, who successfully sought the winding-up of the company. There appears to have been a shareholder who was the mother of the applicant. In about 1959 or 1960, a third director, a Mrs. Rana, was appointed to the Board. The company was located in Moshi and the applicant lived in this town. The petitioner lived in Arusha and was the director of a similar company there. The applicant installed the machinery and maintained and supervised the running of it. For all practical purposes, the applicant was the technical manager of the company's factory. But the petitioner seems to have been in general control, and responsible for maintaining the company's books. In about 1959, Mrs. Rana began to work in the company's office. Disputes arose between the directors as to the control of the company and it is alleged by the applicant and Mrs. Rana, that the petitioner did not attend meetings or allow them to inspect the books. These dissensions led to a resolution ousting the petitioner from his directorship, which in turn prompted the petitioner to pray for the winding-up of the company. The petition was granted on the grounds that it was just and equitable to do so due to the bitter quarrel between the directors. But before the petition was presented on October 20, 1961, and without knowledge that the petitioner would take this course of action, the remaining directors, the applicant and Mrs. Rana resolved to credit themselves with a bonus of Shs. 11,000/- out of the profits for the year 1960. This resolution was passed on October 15, 1961. It appears that at the time the liquidator rejected the proof of the complaint concerning the bonus in his favour, he had not seen the minutes of the meeting of the company, at which the resolution was passed. But this was produced in court, and it was simply recorded that there should be a bonus of Shs. 11,000/- to each of the working directors. The liquidator did, however, acknowledge that the bonus

had been entered in the ledger book for the year 1960 and that it was reflected in the profit and loss accounts of the company for that year. Thus, it will be seen in the ledger dealing with the applicant's account, that a sum of Shs. 9,600/- was credited to the applicant by way of salary for the year 1960. There was, however, debited to his account the sum of Shs. 10,958/70 as being the amount drawn by him from the company. This showed an overdrawal of Shs. 1,358/70. There was also credited to the applicant the bonus of Shs. 11,000/-. A balance was, therefore, struck of a credit in favour of the applicant in the sum of Shs. 9,641/30. As far as this application is concerned, the applicant appears to have been a creditor of the company by way of arrears of wages totalling Shs. 5,521/30 up to the year 1961, as well as on the basis of the bonus less the applicant's over-expenditure for that year. I should, perhaps, note here that Mrs. Rana has not sought to substantiate the bonus resolved in her favour amounting to Shs. 11,000/-. Her view is apparently that she considers that the creditors of the company should be paid first and it is, perhaps, not without interest that her husband is one of the major creditors. At the time that these bonuses were resolved upon, it appears that the company had made a trading profit for the year 1960, but was still insolvent due to its debts from previous years. The liquidator points out that the profit and loss account for 1960 shows that the excess of liabilities over assets amounted to Shs. 50/787/82 and that the creditors were shown as claiming a total of Shs. 109,719/82 when the share capital was only Shs. 100,000/-. The applicant sought to explain the position of the company as not being in a critically insolvent state. He pointed out that the bank overdraft had been reduced from Shs. 60,000/- to Shs. 37,747/57 and that payments due to the bank had been met every month during 1960-61. His point was that the company's indebtedness to the bank was spread over a number of years and that there was no pressing claim from the bank. This may well be true. But the assets of the company such as the buildings and machinery had been charged in favour of the bank. Apart from the bank, there were creditors claiming a total of Shs. 71,992/25 as against debtors liable to a total of Shs. 48,853/96. Of these debtors, Mr. Teja Singh is alleged to owe Shs. 25,000/- being the unpaid sum due on his shares. This claim is disputed and I am not clear whether in reality this sum was forthcoming. Whether the remainder of the debts may be classed as good or bad, I am also not clear. The ready cash was quite small and certainly unable to pay creditors other than those who are members of the family. Thus it appears quite clear that the company was insolvent in that it would be unable to pay debts from its available resources without selling major assets such as plant. At the same time, it may well be true that the company's business had taken a turn for the better, and I have no reason to doubt the applicant's statement that the years 1960 and 1961 were good trading years. According to the applicant, the profit noted in the balance sheet of Shs. 1,520/73 was the net profit after the deduction of Shs. 22,000/- being the sum of the bonuses credited to the accounts of the applicant and Mrs. Rana. I accept, therefore, that the total profit for the year 1960 was Shs. 23,520/73. But this compares unfavourably with the total debt of the company or even the debt apart from the company's debt to the bank. It is indeed this aspect of the company's affairs that has most dismayed the liquidator.

The applicant has strongly argued that he is entitled to the bonus, because he had worked throughout the early years while the company was being established, at a low salary. It does not appear to be disputed that his starting salary was Shs. 700/- per month, though this was raised to Shs. 1,000/- per month by resolution of the directors in 1960. Although it is not quite clear, it seems that the augmented salary was to commence in January, 1961. It appears to be true, therefore, that the applicant had borne the brunt of seeing the company on to its feet at an extremely modest salary. The bonus indeed is stated to be

in favour of the working directors. But several questions arise for decision the first of which is whether the bonus was a remuneration for past services or whether it was a share of the profits between the applicant and Mrs. Rana. The applicant argues that it was remuneration for past services while the liquidator argues that it was nothing but a share of the profits. There seems to be no dispute that the resolution was passed at a lawfully convened meeting. But the liquidator points out that the meaning of the term "bonus" is a special division of the profits in addition to that which share-holders may normally expect by way of dividends. Therefore, in the context of the resolution, this bonus must be construed as a division of the profits and not remuneration. The applicant prays in aid the background of the company and the unwritten understanding between himself and the petitioner, that when the company had made a profit he would be properly remunerated for his past services. While this is not an unusual incident in the development of a company, there is nothing so far as I am aware in the minutes suggesting that this was so.

In these circumstances, the articles of the company seem to me to afford the clue as to the proper interpretation of the resolution granting the working directors a bonus. Article 39 is as follows:

"Dividends

Article 39: A general Meeting declaring a dividend or bonus, may, by a subsequent resolution, authorise the directors to apply the same or any part thereof in paying up pro tanto the capital uncalled or the amount of any call or calls made and unpaid on any shares in respect of which the dividend is declared, and the directors may give effect to such resolution accordingly, but any member whose shares are fully paid up shall be entitled to be paid his proportion of the dividend in cash."

According to the article, therefore, a bonus could be declared out of the profits. On the other hand, arts. 32 and 33 deal with the question of remuneration and they are as follows:

- "32. The directors shall be paid for their services out of the funds of the company such remuneration as may from time to time be determined by the board of directors.
- 33. If any director, being willing, shall be called upon to perform extra services or to make special exertions in going or residing abroad or otherwise for any of the purposes of the company, the company may remunerate such director as may be determined by the directors, and such remuneration may be either in addition to or in substitution for his remuneration above provided and may also refund to such director all reasonable expenses incurred by him whilst on the company's business."

The directors, therefore, also had power to specially remunerate a director if he should be called upon to perform extra services in going abroad or otherwise in the interests of the company. But, in the instant case, the directors do not appear to have acted as far as the resolution goes, under art. 33. Rather do they appear to have acted under art. 39. If it were a question of remunerating for past services, it seems very difficult to understand why Mrs. Rana, a comparative new-comer, should be remunerated at the same rate as the applicant who had given services of a far more important nature. Perhaps some colour might be afforded the applicant's argument by the fact that it was the "working directors" who were to receive this bonus; but working directors in that context would seem to imply a bonus for present services, since Mrs. Rana had only been a director from 1960. It seems difficult to escape the conclusion that what the directors did in reality was to divide amongst themselves, in large degree, the first harvest of profits made by the company. It may be that the motive

in the case of the applicant was to compensate him for the lean years. But I have come to the conclusion that a bonus was declared out of the profits in accordance with art. 39, and that had this been a question of remuneration under art. 33, the minutes would have reflected the fulfilment of the conditions precedent as set out in the latter article.

If this is so, the question is whether this amounted to a fraudulent preference. Section 260 (1) is pertinent:

“260 (1) Any transfer, mortgage, delivery of goods, payment, execution or other act relating to property which would, if made or done by or against an individual, be deemed in the bankruptcy a fraudulent preference, shall, if made or done by or against a company, be deemed, in the event of its being wound up, a fraudulent preference of its creditors, and be invalid accordingly.”

The reference to the Bankruptcy Laws may be found in s. 49 of the Bankruptcy Ordinance (Cap. 25) which is as follows:

“49. Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due out of his own money in favour of any creditor, or of any person in court for any creditor with a view to giving such creditor, or any surety or guarantor for the debt to such creditor a preference over the other creditors shall, if the person making, taking, paying or suffering the same is adjudged bankrupt on a bankruptcy petition presented within six months after the date of making, taking, paying or suffering the same be deemed fraudulent and void as against the trustee in bankruptcy.”

It is clear that as s. 260 requires s. 49 to be read together with it, that the declaration of this bonus comes within the ambit of s. 49 in so far as the company was insolvent and the resolution was passed a week before the petition for winding-up. But it is argued that no payment was made, and that the applicant was not a creditor who had been preferred over other creditors, since his claim was simply to rank *pari passu* with other creditors. The liquidator disputes both arguments. It is agreed that there was no physical payment of money but it is said that it is a “payment” none the less as the bonus was credited to the applicant’s account, or alternatively it was an obligation incurred by the company. On the second argument, the liquidator submitted that the very fact that the directors had shared in the profits to the exclusion of anyone else indicated that they wished to prefer themselves.

I shall deal first with the argument that there was a payment. Reliance was placed on *Re County Marine Assurance Co., Ex parte Rance* (2).

The facts in that case were that the directors of a company which was insolvent, resolved to divide a profit amongst the shareholders, and that in the case of Rance, his share should be paid to the bank, which was then to repay the money to the company against a call for the amount outstanding and unpaid on the shares held by him. Apart from the fact that the company was castigated by the court for improvidently distributing the profit at a time when no provision had been made for its liabilities, it was also held that in the circumstances there had been a payment to Rance. James, L.J., said that a bonus declared in favour of a man and applied in payment of a just debt due from him whether to the company or to anyone else was money paid to him. And, in his view, the money had been improperly paid. Mellish, L.J., held that “if a sum of money, with a man’s consent, is placed at his credit, in any particular fund in which he had an interest or is paid to any creditor of his so as to discharge a debt or obligation due from him, that is a receipt of money by him”. It will

be noted, however, that in that case the company had the ready money to make a division of the profits, whereas in this case there does not appear to have been such ready money. It was in the nature of a credit entry; but the overdrawn amount in the applicant's account of Shs. 1,358/70 which was a debt due by the applicant, was deducted from the credit of the bonus. It would, therefore, appear that there had been a set-off of this sum owed by the applicant, although it may be doubtful whether there can be said to have been any more than a promise to pay the balance of the bonus. What is certain is that the applicant cannot claim more than the balance as a debt due to him.

This brings me then to the next argument that the transaction may still be a fraudulent preference even as to the balance since this was an obligation incurred by the company. Of course, the words "obligation incurred" are those of s. 49 of the Bankruptcy Ordinance and not those of s. 260 of the Companies Ordinance. In describing the type of transactions envisaged as a fraudulent preference s. 260 of the latter Ordinance refers to "any transfer, mortgage, delivery of goods, payment, execution, or other act relating to property" which would, if done by an individual, be deemed in the bankruptcy of that individual a fraudulent preference. The words "or other act relating to property" may be taken as having been spelled out in s. 49 of the Bankruptcy Ordinance for, in the latter section, "every obligation incurred" by a debtor is one of the transactions which would be deemed a fraudulent preference in the event of the debtor's bankruptcy. Therefore, it seems to me that the liquidator was right in submitting that, if the bonus did not amount to payment, it was an obligation incurred by the company and as such it was an act which could be deemed a fraudulent preference.

The remaining question is whether the transaction amounted to a fraudulent preference in fact. If the declaration of the bonus was lawful then apart from s. 158 (1) (g) of the Companies Ordinance, the applicant would be entitled to claim it as a debt due to him by the company in the same way as other creditors. (See *Overend, Gurney & Co. Ltd.* (3), in which it was held, inter alia, that in general members of a company are entitled to satisfaction of their debts *pari passu* with the rest of the creditors.) It is not a "preference", as the liquidator suggested, for the company to declare dividends or remuneration which the members of the company then claim together with other creditors. Of course, they cannot claim such debts if they had not been lawfully determined by the company. To my mind, there is a distinction between the directors granting themselves a bonus, which other shareholders do not share in, and a fraudulent preference. Whereas it may be wrong for the directors, as in the instant case, to grant only themselves a bonus, but by virtue of that fact alone they may not prefer themselves over other creditors, as is required to be proved by s. 260 of the Companies Ordinance. Learned counsel for the applicant, quite properly, in my view, stressed this point. In one sense, the applicant was a creditor to the extent of arrears of wages which the liquidator has admitted to proof; but the bonus did not seek to repay him and, therefore, prefer him to other creditors. In another sense, as far as 1960 is concerned, the company set-off a debt due from the applicant but incurred a liability as to the balance. But, by this liability, the company did not seek to prefer him, in payment, to other creditors. Giving as careful attention as I can to the facts, I do not think the evidence before me is such that I can spell out an intention to prefer. It is well established that the test of a fraudulent preference is the intent to prefer one creditor over other creditors. (See *Re Stenotyper Ltd., Hastings Brothers v. Stenotyper Ltd.* (4).) In the *Stenotyper* case (4), a preference did, in fact, materialise but as it was held that the purpose of the company was to safeguard its chairman and not to prefer a creditor, the transaction was not void as a fraudulent preference. As I have said, I think the facts show that the directors concerned

thought that their company was about to enter better days with the quarrels with the petitioner apparently settled and the company beginning to make a trading profit. In these circumstances, they decided to vote themselves a share of the profits without any thought that the company would be wound-up or that other creditors would not, in due course, be paid. For these reasons, I think the rejection of the claim as a fraudulent preference was not well-founded and the application on those grounds succeeds.

The notice of rejection complains that the applicant was instrumental in the allowing of this bonus to himself while the company was running at a loss and the other creditors of the company were not paid, which amounted to a fraudulent preference and a misfeasance. Having rejected the allegation that this amounted to a fraudulent preference, I pass now to consider whether the act complained of amounted to a misfeasance. The liquidator's argument is that by allowing themselves the bonus, the applicant and his co-director did not make provision for the debts of the company and, therefore, they committed a breach of trust which made them liable to repay the bonus.

The language employed by the liquidator appears to refer to s. 270 (1) of the Companies Ordinance which provides a summary procedure for causing a director (inter alios) who has misapplied, or retained, or become liable for money of the company, or is guilty of misfeasance or breach of trust, to contribute such sum to the assets. However, whether or not a misfeasance summons is appropriate in this case, and it may well not be, the liquidator is, of course, entitled to reject the proof of the claim on grounds of misfeasance.

Learned counsel for the applicant argued that there had been no misfeasance since the directors were entitled to act as they had acted. But his argument was based on the ground that the bonus was remuneration for past services. As I have said, in my opinion, the proper construction of the resolution granting the bonus was that it was to be a share of the profits. Learned counsel further argued that neither the shareholders nor the creditors had raised any objection to the bonus. While it may be true that the court is not anxious to interfere in the direction of the directors on matters of this sort, whether the bonus represented remuneration for past services or a share of the profits, this being a matter which businessmen should be allowed to decide for themselves, nevertheless, the court is bound to interfere if the decision taken by the directors amounts to a misfeasance or a breach of trust. This will be so even if the shareholders or creditors have given their blessing to the action taken. Considering for the sake of argument that learned counsel for the applicant is correct in his submission that the directors had granted the bonus as remuneration for past services, that is no doubt in itself a decision which they might properly take. But the principle upon which remuneration for past services is justifiable is that such payments are likely to conduce to the advantage of the company in future. Therefore, to justify such payments, the company must be a going concern. (See *Hutton v. Westcock Railway Co.* (5).) No doubt, the *Hutton* case (5) was an extreme example of where the company was not a going concern because it was about to be wound-up. But, in the instant case, it can hardly be said that the company was a going concern when it had only just begun to fulfil the hopes of its promoters and directors. It was still insolvent and its hold on commercial life precarious. Thus, in my opinion, had the bonus represented remuneration for past services on the analogy with the *Hutton* case (5) I should have been bound to hold that the award of the bonus in the circumstances of this company was a misapplication of the assets of the company.

But, as I have said, the bonus in this case was not concerned with remuneration but profits and the real question is that posed by the liquidator, namely, whether the directors were entitled to make a division of the profits at a time when the

company was insolvent. In addressing his arguments to the court on this point, the liquidator appeared to be concerned with the payment of the bonus to the directors. If that had been the case, of course it would have been clear that the payments of the bonus would have amounted to a payment out of capital, this being an act ultra vires of the company, even if the shareholders or the creditors took no objection. The case of *Towers v. African Tug Co.* (6) is a clear example of this principle. In that case the company, which was still in debt, made a current profit, out of which it was resolved to pay an interim dividend to the shareholders, with their consent. One director and the secretary of the company thought that this was improper but eventually concurred in the decision. The company then realised its mistake, and during the following two years, whilst it made profits in those years, these profits were applied towards the company's debts. At the end of this period of two years, the company was more or less in balance, but the dissenting director and the secretary brought an action praying that the court should cause the other directors to repay the dividends improperly resolved upon. In giving judgment calling upon the director and secretary who had brought the action to repay the dividend they had themselves received, the court took it for granted that at the time that the interim dividend was paid, it could not be said that the company had earned the dividend since it was still in debt, and the payment of the dividend amounted to a payment out of capital, which was an act ultra vires of the company and which could not be ratified by the shareholders. This authority, so far as I am aware, has never been doubted; and had the bonus been paid to the directors in the instant case, it would no doubt have been a payment amounting to a payment out of capital, as indeed the liquidator argued.

In this case the bonuses were not paid but were simply credited to the accounts of the two directors concerned. I presume that in fact there was no ready money to pay the bonuses. The question is whether the principle of the *Towers* case (6) still holds good for the action of the directors in the instant case. I should, perhaps, note here that the liquidator relied on the case of *Ex parte Rance* (2), to which I have referred above, to show that the directors had not properly considered the company's position before declaring the bonuses. However, I think that there is a distinction to be drawn in that in *Ex parte Rance* (2) the directors do not appear to have drawn up a proper profit and loss account nor taken advice from qualified persons as to whether the company was in a position to divide the profits in that case. In the instant case, a proper profit and loss account was drawn up and the applicant stated that the bonus was only granted on advice from the auditor. This does not appear to have been disputed by the liquidator. I do not think, therefore, that *Rance's* case (2) is in point. At the same time, by crediting the bonus to the directors, the apparent profit was no longer available for the repayment of the company's debts, but had been distributed between the two working directors. If the directors had chosen to sue the company on its obligation to pay them the bonus, the company would have been obliged to realise some of its capital assets in order to pay them. It seems to me, therefore, that the action of the directors amounted to a misappropriation of the company's assets in their favour at a time when the company was insolvent. On the authority of *Towers' case* (6), the directors were bound to hold that the company had not yet earned the dividend and any profits should have been applied towards the company's debts. I have come to the conclusion, therefore, that the action of the directors was ultra vires the company and could not be ratified by the shareholders. The liquidator was, therefore, entitled to reject the bonus in favour of the applicant on the ground that it was a misfeasance. Presumably if a misfeasance summons had been brought, the obligation incurred by the company would have been set aside and the applicant required to repay his debt of Shs. 1,357/80.

It is, therefore, unnecessary for me to decide whether the liquidator might also have rejected the proof on the amended ground under s. 158 (1) (g) of the Companies Ordinance. The liquidator, however, asked for a ruling as to which of two authorities was applicable to the case, if it should be held that the bonus amounted to remuneration. Of course, if the view taken earlier is correct that the bonus amounted to a division of the profits, then the transaction would be caught by s. 158 (1) (g) of the Companies Ordinance, and the applicant's claim would be properly rejected in competition with other creditors. But if it were proved that the bonus was properly seen as remuneration for past services, then I have no doubt that the bonus would not be caught by s. 158 (1) (g) in that it would be a sum due to the applicant, not as a member of the company, but by virtue of his contract of service as a director. The authorities cited by the liquidator were the *Leicester Club and County Race Course, Ex parte Cannon* (7), and secondly *Re Dale and Plant Ltd.* (8). There was apparently a conflict in these authorities as to whether fees due to a director were due to him as a working member of the company or by virtue of his special services as a director. The subsequent cases followed *Re Dale and Plant* (8) and distinguished *Ex parte Cannon* (7). (See *Re New British Iron Co., Ex parte Beckwith* (9). But the matter may be considered as settled by the decision of *Re Dover Coalfields Extension Ltd.* (10).) The following observations were made in the judgment:

"I think it may be taken to be settled at any rate as far as I am concerned by *Ex parte Beckwith* (9) that the right to director's remuneration does not arise from the possession of the qualification share. A director is entitled to his remuneration by reason of the contract of service between him and the company for which he is acting as director. His obligation as a member of the company by reason of his share is a distinct and separate obligation, the consequence being that in *Ex parte Beckwith* (9) the director was treated as being entitled to receive his remuneration not in his capacity as member but by virtue of his independent contract and was, therefore, entitled to prove for that remuneration in competition with other creditors of the company."

It seems to me that as the distinction between *Re Dale and Plant* (8) and *Ex parte Cannon* (7) (which was based on the different manner in which the Articles provided for the director's remuneration) was no longer addressed to the court in the *Dover* case (10), but that the contract of service under which a director performed his duty was the basis of the decision, that *Ex parte Cannon* (7) is no longer authoritative. This appears to be the view of Stiebel in his book on Company Law and Precedents quoted above.

In the result, I am of the opinion that the liquidator was right in rejecting this proof not on the grounds that it was a fraudulent preference amounting to a misfeasance, but that it was a misfeasance proper by virtue of a misapplication of the profits of the company out of which the disputed bonus was credited to the applicant's account. In the alternative, it would have been a correct rejection under s. 158 (1) (g) of the Companies Ordinance. Accordingly, the application is dismissed, the costs of which shall be borne by the applicant.

Application dismissed.

For the applicant:

Sayani and Co., Dar-es-Salaam

N. A. Velji

For the respondent:

Official Receiver, Dar-es-Salaam

S. H. Rajani (Deputy Official Receiver, Tanzania)

Ambalal N Patel Ltd v Marietti
[1967] 1 EA 194 (HCK)

Division: High Court of Kenya at Kisumu
Date of judgment: 8 February 1967
Case Number: 106/1965 (O.S)
Before: Chanan Singh J
Sourced by: LawAfrica

[1] Costs – High Court – Objection proceedings to execution by attachment of land – Whether “value of the subject-matter” is value of land or amount for which attachment levied – Remuneration of Advocates Order, 1962, Sched. 6, para. (1), item (f) (K.).

[2] Costs – High Court – “Getting up” fee – Whether allowable in proceedings brought by originating summons – Objection to application for execution by attachment of land – Remuneration of Advocates Order 1962, Sched. 6, para. (2) (K.).

Editor’s Summary

The appellant applied to execute for a sum of Shs. 9,000/- by attachment and sale of a farm. The respondent, a director of the company which owned the farm, filed objection proceedings in the course of which he valued the farm at Shs. 200,000/-. These objection proceedings were dismissed and costs awarded to the appellant. The appellant then filed a bill of costs claiming an instructions fee of Shs. 5,000/- on the basis that “the value of the subject-matter” in the objection proceedings was the value of the farm, and also claiming a “getting up fee, of Shs. 1,250/-. The District Registrar, on taxation, taxed off Shs. 3,500/- from the instructions fee, and disallowed the “getting up fee” altogether. The appellant appealed.

Held –

- (i) the value of “the subject-matter” was the amount claimed in the execution proceedings, viz., Shs. 9,000/- and not the value of the farm;
- (ii) no getting up was necessary in this case and no “getting up fee” was allowable.

Appeal dismissed.

No cases referred to in judgment.

Judgment

Chanan Singh J: This is an appeal from the decision of the District Registrar, Kisumu, on two items in the bill of costs taxed by him on September 30, 1966. The facts, in so far as they are relevant to this

appeal, are as follows:

The appellant had succeeded in a civil action against a company of which the respondent was a director. As a result, that company owed the defendant Shs. 9,000/- odd. To recover this sum the appellant filed an application for execution asking for attachment and sale of a farm at Koru.

A Mr. Gionata Marietti, a director of the plaintiff company in the main suit, filed objection proceedings in his own name. These proceedings were dismissed and the appellant was awarded costs.

In its bill of costs, the appellant claimed Shs. 5,000/- as instructions fee. The District Registrar taxed off Shs. 3,500/- in effect awarding Shs. 1,500/-. Counsel for the appellant says that objection proceedings are a separate suit and are treated as such by the court by being given a new case number. This seems unexceptionable. But counsel goes on to argue that “the value of the subject-matter”

is the value of the property to which objection proceedings relate and that the amount which the attaching creditor seeks to recover is not relevant to the objection proceedings which are a new suit, not a continuation of the old suit.

The value of the property was declared by the respondent in this originating summons as Shs. 200,000/-. He also requested the court to determine the following two questions:

- “(a) Is the plaintiff’s company the owner of the attached property?”
- “(b) Should the attachment be raised and the property released to the plaintiff’s company?”

Counsel for the appellant argues on the basis of these questions posed by the respondent himself that he was trying to get the entire property (valued at Shs. 200,000/-) released from the attachment and that instructions fee should, on the analogy of actions for possession, be related to Shs. 200,000/-, not Shs. 9,000/-.

The learned District Registrar did not accept this argument. I do not see how I can. Counsel for the appellant’s client was interested in recovering his own money which amounted to Shs. 9,000/-. If the appellant had succeeded in getting the property auctioned, it could get out of it no more than Shs. 9,000/-. The balance would go to the owner of the property. Thus, the appellant’s interest was limited to Shs. 9,000/-. The respondent also was resisting an attachment for the recovery of this sum. If the worst happened, he could always get the property released by paying Shs. 9,000/-.

It seems to me, therefore, that the real dispute between the parties was whether or not the appellant could satisfy its decree out of the sale of the attached property if such sale should become necessary in default of payment of the decretal amount due in the main action before such sale and that the value of the attached property was not really in issue.

I hold that the value of “the subject-matter” which gave rise to the present proceedings and the amount that was in essence and substance at stake in these proceedings was Shs. 9,000/- and not Shs. 200,000/-, so that the scale fee in this case under item (f) of para. (1) of Sched. 6 of The Remuneration of Advocates Order, 1962 would be Shs. 750/-. I am therefore of the view that the instructions fee of Shs. 1,500/- awarded by the learned District Registrar was on the generous side, being double the normal fee allowable.

Counsel for the appellant also appeals against the decision of the learned District Registrar to disallow the “getting up” fee of Shs. 1,250/-. Paragraph (2) of Sched. 6 of the Remuneration of Advocates Order, 1962 provides for “a fee for getting up or preparing the case for trial”. While I am not prepared to say that “getting up or preparing” is never necessary in proceedings commenced by originating summons, I am satisfied that nothing of the sort was necessary in the present case. Before applying for attachment counsel for the appellant must have made inquiries about the ownership of the farm in question. No further preparation was needed. In fact, a simple affidavit clinched the issue.

In the result, I dismiss the appeal with costs.

Order accordingly.

For the appellant:

Kohli, Patel and Raichura, Kisumu

Raichura

For the respondent:
Shah and Shah, Nairobi
Ramnik Shah

Mugambi v Gatururu
[1967] 1 EA 196 (HCK)

Division: High Court of Kenya at Nairobi
Date of judgment: 10 February 1967
Case Number: 34/1966
Before: Madan J
Sourced by: LawAfrica

[1]Practice – Summary judgment – Whether a written defence filed in court should be considered in subsequently deciding upon an application for summary judgment – Civil Procedure (Revised) Rules 1948, O. 35, r. 2 (K.).

Editor's Summary

In the resident magistrate's court, Meru, a suit was filed for the recovery of Shs. 3,000/-. The defendant (by his advocate) entered an appearance and filed a written defence. Subsequently an application for summary judgment was made supported by affidavit under O. 35, r. 2 of the Civil Procedure (Revised) Rules, 1948 (K.). The defendant in person opposed this application without filing any affidavit in reply or giving any viva voce evidence, but mentioned the written defence filed in court. The magistrate granted the application and entered judgment for the plaintiff, but in his judgment paid no apparent attention to the written defence. The defendant appealed to the High Court.

Held – under O. 35, r. 2 of the Civil Procedure (Revised) Rules, 1948, the court is entitled to consider and should consider the merits of a written defence filed in court.

Appeal allowed with costs. Judgment below set aside and defendant granted unconditional leave to defend.

No cases referred to in judgment.

Judgment

Madan J: This appeal raises a point of practice which I am informed does not appear to have been determined, surprisingly, until now.

The respondent (I shall hereafter refer to him as the plaintiff) filed a suit in the resident magistrate's court, Meru, for the recovery of Shs. 3,000/- from the appellant (I shall hereafter call him the defendant). In his plaint the plaintiff averred that he is the eldest son and rightful heir and legal representative of the

estate of his deceased father. The plaintiff claimed Shs. 3,000/- being the amount due and owing by the defendant to the deceased's estate made up of Shs. 2,500/- the agreed price of certain land transferred and Shs. 500/- lent and advanced by the deceased to the defendant.

A firm of advocates entered an appearance and, on August 24, 1966, they also filed a written statement of defence on the defendant's behalf. A copy of the defence was duly served on the plaintiff's advocate. On September 1, 1966, the plaintiff moved the court under O. 35, r. 2. of the Civil Procedure (Revised) Rules, 1948, for summary judgment to be entered against the defendant.

The defendant did not file an affidavit in answer to the plaintiff's application for summary judgment but he appeared in person in court on the day of the hearing of the application. After an argument in objection by the plaintiff's counsel that the defendant's counsel duly served was absent, the learned magistrate, rightly in my opinion, allowed the defendant personally to argue against

the application. The defendant said a defence had been filed which disclosed triable issues. He further said the purchase price (of the land) had been paid and the loan (Shs. 500/-) was denied. He asked that the application be dismissed with costs. The learned magistrate entered judgment as prayed for the plaintiff.

On an application for summary judgment made under O. 35, r. 2, unless a defendant “by affidavit, by his own viva voce evidence or otherwise” satisfies the court that he has a good defence on the merits, or discloses such facts as may be deemed sufficient to entitle him to defend, the court may pronounce judgment against him.

In the instant case when the application for summary judgment was heard there was present on the court file the defendant’s written statement of defence, a fact of which the court was reminded by the defendant also.

Assuming that the written statement of defence disclosed sufficient facts as would entitle him to defend, did the defendant then satisfy the court “otherwise”, he did not do so by affidavit or by his own viva voce evidence, that he had a good defence on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend.

The learned magistrate in his judgment paid no heed to the defence. It is submitted that he was correct in doing so. Counsel for the plaintiff pointed to the absence of a comma after the words “viva voce evidence” in r. 2 which is to be found in the English rule (see Annual Practice 1932, O. 14, r. 1 (a) at p. 161). Counsel went on to argue that this difference in the Kenya rule restricts its scope to the defendant’s own viva voce evidence or the viva voce evidence of some other person on the defendant’s behalf. He said the rule permits a defendant to satisfy the court that he has a good defence on the merits, or to disclose such facts as may be deemed sufficient to entitle him to defend, in one of two modes only, i.e., by affidavit or by his own viva voce evidence or by the viva voce evidence of someone else on his behalf. The expression “or otherwise” does not entitle a defendant, argued counsel, to ask the court to look at a document, and the court may not look at it, unless it is properly brought before the court by reference to it in an affidavit or by viva voce evidence on oath.

In my view the restricted meaning sought to be attached to the rule in question would make it a bad rule and this court would not give effect to it. In a matter of interpretation the object of the legislation has to be taken into account. The proposed interpretation would be contrary to the object of the rule as it might result in depriving a defendant of his right to defend. It would be against natural justice to deprive a man of his right to defend unless the court in a plain and obvious case is satisfied without any doubt in the matter that a plaintiff is entitled to judgment and the defendant is seeking leave to defend for mere purposes of delay. The summary procedure is to be exercised with great care.

In my opinion, therefore, the expression “or otherwise” in r. 2 entitles a defendant to resist an application for summary judgment in manner other than by affidavit or by his own viva voce evidence but only by properly admissible means. But a method of satisfying the court otherwise than by affidavit or the defendant’s own viva voce evidence is not to be encouraged. I would not like to see it gaining ground.

In the instant case the defendant’s written statement of defence was properly filed in court. With respect I think the learned magistrate erred in ignoring it. It discloses an arguable case for the defendant which raises prima facie triable issues.

I would allow the appeal with costs, set aside the judgment and decree of the lower court and give the defendant unconditional leave to defend. The costs of the application for summary judgment will be in the cause.

Order accordingly.

For the appellant:

J. K. Winayak & Co., Nairobi

J. K. Winayak

For the respondent:

E. P. Nowrojee, Nairobi

Nzau v Republic
[1967] 1 EA 198 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	9 December 1966
Case Number:	1180/1966
Before:	Sir John Ainley CJ and Madan J
Sourced by:	LawAfrica

[1] Criminal Law – Practice – Evidence of demanding property with menaces – Whether correctly convicted under Prevention of Corruption Act (Cap. 65) (K).

Editor's Summary

The appellant, who was a member of the Syongila African Court, was convicted under s. 3 (1) of the Prevention of Corruption Act (Cap. 65) of corruptly receiving Shs. 20/- from one Wambua as an inducement to give favourable consideration to a case before that court to which Wambua was a party. Wambua's evidence was that he filed a case in the appellant's court in January 1966 and that the appellant threatened to "spoil" Wambua's case unless Wambua paid him Shs. 100/-. Wambua did not pay the money and although he lost the case, a rehearing was ordered. A trap was laid for the appellant before the retrial and the evidence was that the appellant again demanded money from Wambua saying, "If you cannot get Shs. 100/- you should give me Shs. 50/-." Wambua handed over four marked 5/- notes and this was corroborated by the police. The only ground of appeal was that the appellant was wrongly charged and that the facts revealed not the offence of corruption but the offence of demanding property with menaces. The court assumed that the money was paid by Wambua to the appellant because of the threat "I will spoil your case."

Held –

- (i) the appellant clearly received the money as an inducement to behave in a manner contrary to his duty as a judge;
- (ii) there was no reason why a corrupt contract or agreement must of necessity precede a corrupt receipt of money.

Appeal dismissed.

Cases referred to in judgment:

- (1) *Haji Moledina and another v. R.*, [1960] E.A. 678.

Judgment

Sir John Ainley CJ, delivered the following judgment of the court: In this case the appellant, a member of the Syongila African Court, was convicted of corruptly receiving Shs. 20/- from one Wambua as an inducement to give favourable consideration to a case before that

court in which Wambua was a party, contrary to s. 3 (1) of the Prevention of Corruption Act (Cap. 65).

He was charged with but acquitted of the offence of corruptly soliciting Shs. 50/- from Wambua as an inducement to give favourable consideration to the same case. Wambua swore that in January this year he filed a case in the Syongila Court and that the appellant said to him, "If you do not give me Shs. 100/- I shall spoil your case." Wambua did not give the appellant money, and when the case was determined by the Syongila Court judgment was against Wambua. It was ordered however that the case should be re-heard by the Syongila Court, and Wambua swore that before the re-hearing the appellant used words to this effect –

"If you cannot get Shs. 100/- you should give me Shs. 50/- and I will then look into your case."

With the assistance of the police a trap for the appellant was then laid. Wambua, in possession of four marked Shs. 5/- notes, drank with the appellant in a certain room. The appellant, Wambua swore, said, "Give me money." Wambua, so he swore, gave the appellant the marked notes, and his story was corroborated by policemen who came on the scene shortly afterwards.

We need not consider the evidence further.

The learned magistrate acquitted the appellant of the offence of soliciting because the case was one of word against word only, but as to the handing over of the Shs. 20/- he believed Wambua, supported as the story of the latter was, and upon these facts he convicted, as we have indicated, of corruptly receiving the money.

One point only has been argued on behalf of the appellant by counsel. The learned magistrate's findings of fact have not been challenged, but it has been said, moderately and persuasively, that the appellant was wrongly charged and that the facts found reveal not the offence of corruption but the offence of demanding property with menaces.

Before going further it will be as well to point out one peculiarity of this case. Unless it is assumed that some corrupt demand, solicitation or offer was made by the appellant, prior to the day on which the money passed, Wambua's evidence of the events on that day, July 21, makes no particular sense, and does not perhaps very clearly reveal an offence on the part of the appellant. Though the learned magistrate acquitted the appellant of corrupt solicitation he must have believed that the money which passed on July 21 passed as the result of some previous demand or solicitation connected with Wambua's case in the Syongila Court, and it has not been suggested that he erred in doing so. In fact if the account given by the prosecution witnesses of the events of July 21 is true, and it is not suggested that it is untrue, a demand or solicitation of the kind sworn to by Wambua must have been made. Beyond doubt the learned magistrate believed that such a demand or solicitation had been made.

What counsel for the appellant urges is that the money passed not as the result of a corrupt solicitation but as the result of a threat or menace to property, and for the sake of argument we will assume that the words "I will spoil your case" was in the circumstances of this case a threat to property. A demand with menaces it is argued is something quite different from a corrupt solicitation, and money which is handed over as the result of such a demand cannot be said to be corruptly received. A man cannot be guilty of both wrongs upon the same facts, it is said.

We will assume that the money which the appellant received was paid by Wambua because of the threat "I will spoil your case".

Now did the appellant, a judge of an African court, corruptly receive that money as an inducement to do something or to forbear to do something in connection with Wambua's case, in the decision of which it was his duty to assist. He received the money, and whether he adopted the beggar's whine or the beggar's bluster he clearly received the money as an inducement at the least to behave in a manner contrary to his duty as a judge. It remains to consider whether he did so "corruptly".

It is not necessary, we are glad to say, to enter into questions of corrupt motives and corrupt intents or to discuss in what circumstances if any a man may have a corrupt intent and a pure motive. It appears to us beyond all question that a judge who says that he will pervert justice, or offers to pervert justice or threatens to pervert justice or hints that he will pervert justice against a litigant unless he is paid money, and then receives money from the litigant is a corrupt judge, and he receives that money corruptly. Though what he has said he will do may have been couched in words of menace this does not to our minds render his conduct less corrupt than that of a judge who with precative words offers to pervert justice by favouring a party. If judges who behave as the appellant has behaved can be said to have been guilty of blackmail or kindred offences this does not dismay us, they are yet corrupt judges and may be charged and convicted as we think under the Prevention of Corruption Act (Cap. 65).

We have not ignored the case of *Haji Moledina and another v. R.* (1). In that case Sir Audley Mckisack the then Chief Justice of Uganda was faced with a problem not wholly dissimilar to that posed by the present case. There a policeman after making a number of false accusations against one Khushalbhai Patel said to him, "If you don't want to get into trouble, pay me Shs. 10,000/- and I will close the case". That was charged as the offence of demanding money by menaces. After this utterance the policeman bargained with Kushalbhai Patel and eventually indicated that he would accept Shs. 6,000/-. This was charged as corruption by a public officer contrary to s. 78 (1) of the Uganda Penal Code which, in 1960, made it an offence for a person employed in the public service to agree or to offer to permit his conduct in such employment to be influenced by the gift of any property. It was said that the policeman had agreed to permit his conduct to be influenced. The learned Chief Justice said:

"Certain points of law have been argued in respect of these two counts. Firstly, it is said that the two counts are irreconcilable; a demanding with intent to steal and with menaces cannot be based on the same facts as an agreement to permit one's conduct to be influenced by a gift. If the two counts were based on one and the same utterance I would agree."

The learned Chief Justice then went on to say:

"There was, as I have already indicated, a demand with menaces in the first place, and this was followed by a kind of bargaining which led to Khan (the policeman) agreeing to drop the case if given Shs. 6,000/-. The two counts, therefore, appear to me to be properly framed in relation to the prosecution evidence."

Counsel for the State argues that *Moledina's* case (1) may be regarded as more or less on all fours with the present case in that if there was a menacing demand at the outset a "kind of bargaining" must have supervened which led to the acceptance of Shs. 20/- after a far larger sum had been asked and that a corrupt agreement was clearly reached. We agree with what counsel says and it might be necessary to rely on that argument if as in *Moledina's* case (1) the appellant had been charged with "agreeing". The appellant was

not so charged. He was charged under a section which does differ from s. 78 (1) of the Uganda Penal Code as it read in 1960, with corruptly receiving money. With genuine respect to counsel for the appellant we see no reason why a corrupt contract or agreement must of necessity precede a corrupt receipt of money.

But if *Moledina's* case (1) cannot be distinguished from the present case and if that case is authority for saying that the appellant's conduct was not woefully corrupt then we decline to follow *Moledina's* case (1).

To our minds the appellant here was properly convicted and received a reasonable sentence.

Appeal dismissed.

For the appellant:

Daine and Wariithi, Nairobi

B. O'Donovan, Q.C., with *H. S. Daine*

For the respondent:

Attorney-General, Kenya

K. C. Brookes

Wachira v Republic [1967] 1 EA 201 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	18 November 1966
Case Number:	846/1966
Before:	Sir John Ainley CJ and Miles J
Sourced by:	LawAfrica

[1] *Criminal Law – Trespass – Proceedings under s. 10, Trespass Act (Cap. 294), (K.) – May be brought by occupier – “Occupier” includes owner kept out of occupation by trespasser.*

[2] *Land – Trespass – Occupier may institute criminal proceedings under Trespass Act (Cap. 294) (K.) – “Occupier” includes owner kept out of occupation by trespasser.*

[3] *Statute – Trespass Act (Cap. 294) (K.) – Interpretation of “occupier of private land” – Who may institute proceedings.*

Editor's Summary

The appellant was convicted of trespass upon private land contrary to s. 3 (1) and (2) and s. 11 of the

Trespass Act (Cap. 294) in proceedings instituted by a Mr. Kiroku as “occupier” of the land. The evidence showed that the appellant was in occupation of some 14.9 acres of land in the Kiambu District which had been conveyed by one Mrs. Beckley to the Land Development and Settlement Board for an estate in fee simple in May 1963. Some months previously there had been negotiations between the appellant and the Settlement Board in regard to a suggested loan of Shs. 32,000/- from the Board to assist him with the purchase of the land in question from Mrs. Beckley, but these negotiations were abortive. On June 1, 1963, after the Settlement Board had acquired the land, the trustees of the Board renewed negotiations with the appellant in regard to the sale of the land to him and on his paying the deposit of Shs. 8,000/-, the appellant was allowed to take possession of the land. A loan was negotiated and the first instalment of the purchase price was to become due for payment on March 31, 1964. The appellant did not sign the acceptance of the offer until August 29, 1964, and he had not, since the payment of the initial deposit, paid any money to the trustees. The land was never conveyed to the appellant and under the provisions of s. 174 of the Agriculture Act (as amended), the trustees sought to terminate the appellant’s interest and repossess the land.

The appellant had consistently refused to vacate and on October 6, 1965, the land was sold to Mr. Robert Kiroku. The land was not, however, conveyed to Mr. Kiroku as the appellant was still in possession and the last title on the Register of Crown Lands was under the conveyance to the Settlement Board in May, 1963.

Held –

- (i) “occupier” in terms of s. 2 of the Trespass Act (Cap. 294) means “the owner or the person lawfully in occupation of private land”; and “private land” means inter alia “land which is owned or occupied by any person by virtue of a private title”;
- (ii) by s. 54 of the Transfer of Property Act, 1882 of India, a contract for the sale of immovable property does not, of itself, create an interest in or charge on that property and s. 138 of the Transfer of Property Act cannot operate to cause an agreement for sale to confer an equitable interest in land upon a party to the agreement;
- (iii) proceedings under the Trespass Act can only be brought by the police or by an “owner” or “occupier” of the land;
- (iv) because the trustees had not conferred a freehold title on Mr. Kiroku he was not the “owner” or “occupier” of the private land in question;
- (v) therefore, the proceedings were instituted contrary to the provisions of the Act which creates the offence charged and were therefore a nullity.

Appeal allowed. Conviction quashed and sentence set aside.

No cases referred to in judgment.

Judgment

Sir John Ainley CJ, read the following judgment of the court: In this case the appellant was convicted of trespass upon private land contrary to s. 3 (1) and (2) and s. 11 of the Trespass Act by a subordinate court of the first class. The contention of the prosecution, which was accepted by the magistrate, was that the appellant without reasonable excuse had remained on private land without the consent of the owner. The appellant was fined Shs. 300/- and was ordered under s. 12 (1) of the Act to remove himself, his family, his stock and other property from the land within a period of fourteen days from the date of his conviction. He failed to obey this order and a public officer was authorised to remove him. This court authorised a stay of that order until the determination of the appeal.

We will now set out those provisions of the Trespass Act which have converted the tort of trespass into a crime against the State.

Section 3 reads:

- “3(1) Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.
- (2) Where any person is charged with an offence under sub-s. (1) of this section the burden of proving that he had reasonable excuse or the consent of the occupier shall lie upon him.”

“Occupier”, in that section, means by virtue of s. 2 of the Act, “the owner or the person lawfully in occupation of private land, any manager or agent of such person and, in respect of forest areas and railway land, the Chief Conservator of Forests and the General Manager of the East African Railways and Harbours Administration respectively” and “private land” means, inter alia, land which is

owned or occupied by any person by virtue of a freehold title. Now the land in question is a parcel some 14.9 acres in extent situated in the Kiambu District, and referred to in the Register of Crown Land as plot No. 5984/4.

This parcel was conveyed by one Mrs. Beckley to the Land Development and Settlement Board for an estate in fee simple on May 31, 1963, and the conveyance was registered at the Crown Land Office. By virtue of the Kenya (Amendment of Laws) (Agriculture) Regulations, 1963, a body known as the Settlement Fund Trustees became the successor of the aforesaid Board and it may thus be said with confidence that the land was then private land owned by the Trustees, as we will call the Settlement Fund Trustees. We must add here that the land has never ceased to be private land though who the present owner or owners may be comes into question, as we shall later show.

We shall now go back however to the days before the fee simple was acquired by the Land Development Settlement Board. On February 11, 1963, a document headed "Assisted Owner Loan – LR No. 5984/4, Limuru" was addressed to the appellant by someone signing "for" the Chairman of what was probably the Land Development and Settlement Board. This document offered the appellant a loan of Shs. 32,000/- to assist him with the purchase of the land in question for the sum of Shs. 40,000/- from Mrs. Beckley. It is not necessary to go deeply into the terms of the offer which was in fact accepted, because it is not seriously in dispute that on April 2, 1963, the deal, sale, loan or whatever it may be termed was called off.

As has been mentioned Mrs. Beckley then sold the land to the Board on May 31, 1963. The price was in fact Shs. 60,000/-.

Around this time it was fairly clearly the intention of the Settlement Board, or the Trustees, to start again as it were, and to sell the land to the appellant. It must be noted that the appellant had paid a deposit of Shs. 8,000/- towards the purchase of the land before the end of May, 1963, and on June 1, 1963, or thereabouts, he was permitted to take physical possession of the land. Then on July 16, 1963, the Trustees (who had now succeeded the Board) made an offer in very much the terms of the offer of February 11, 1963.

The offer of a loan of Shs. 32,000/- was made to assist the appellant to buy the land in question for Shs. 40,000/-, upon terms that the loan would be repayable within a period of twenty years by forty equal half yearly instalments of Shs. 1,441/- (which included interest at 6 1/2 per cent. per annum), and upon terms that the appellant would execute a "First Legal Charge" over the property in favour of the Trustees.

The first instalment of what was really the purchase price was to become due for payment on March 31, 1964, and subsequent instalments were to become due on each September 30 and March 31. Interest, it was said, would be charged on the loan from the date of possession up to March 31, 1964.

Then followed this term:

"In the event of non-payment on the due date of any of the above instalments and of such non-payment continuing for a period of thirty days, then the entire balance of the Loan and outstanding interest shall become immediately payable and the Settlement Fund may thereupon proceed to take possession of the property referred to in Conditions Nos. 1 and 2 hereof, and without recourse to a Court of Law, may dispose of such property as it may think fit, and after meeting all costs involved, credit the proceeds thereof against the Capital sum and interest outstanding."

The payment of the deposit of Shs. 8,000/- was acknowledged and the date of possession was stated to be June 1, 1963. It is not untypical of the behaviour

of the parties in this case that the appellant having entered into possession of the land, and having paid his deposit nearly seven weeks before this formal offer was made, should have delayed acceptance of the offer until August 29, 1964. Upon that date, however, he did unequivocally and unconditionally accept the offer by signing the form of acceptance at the foot of the offer. The appellant is prepared to talk for a very long time about his reasons for the delay. There was a matter of beacons, there was a matter of a tongue of land which turned out contrary to his original belief to be the land of his neighbour, and there was in his mind also the question of the price which he considered too high. However he did sign the acceptance quite unconditionally and when he swore that he only signed because he was told that there would be a revaluation he was not believed by the magistrate. We do not believe him either. This we venture to say is emphatically not a man who would be tricked, cajoled, or bullied into doing anything he did not want to do.

Now the appellant has not to this day paid the Trustees anything after the signing of the acceptance, and after some nine months the Trustees sent in a demand for instalments and interest by letter dated June 1, 1965. It may be noted that on June 1, 1965, the appellant had enjoyed possession of buildings and of nearly fifteen acres of land worth well over £100 an acre for two years at a cost to himself of £200 a year. We mention this to get the case into some kind of perspective, and note that today, after well over three years of occupation, no more than £400 has been paid to the Trustees. The appellant's reply to the demand of the Trustees may be quoted. It is dated June 29, 1965, and reads:

"I have had a lot of disputes over the land's valuation and the date of my having taken it, both legally and physically and my Acceptance Certificate which date back to August 28, 1964, but not either February 16, 1963, or June 1, 1963, indicate on your notice letter of June 1, 1965 and previous communication. I am agreeable to pay for insurance and one current instalment. On the contrary to your letter demand (a) revalue to be done as had been promised when signing.

- (b) Recognition of the date of my acceptance certificate August 28, 1964 but not as indicated No. and I am now agreeable to pay one instalment of Shs. 10 wrongly – July 16, 1963 and June 1, 1963 in your letter and February 16, 1963.
- (c) I request time to recover from my illness and I have doctor's documents to support this.
- (d) Calculation to be revised beginning from August 28, 1964.
- (e) Failing the above, I am inclined to request my refund plus money wasted on development.

Your letter therefore is not correct, as it refers to wrong dates."

It is also true that the appellant has not executed a charge, but we find it difficult to see how he can be blamed for that because, so far as we can see, the land was never conveyed to him.

Be that as it may he did not execute a first legal charge or any other charge, and on July 13, 1965, the Trustees took advantage of the amendment made to s. 174 of the Agriculture Act by s. 2 of the Agriculture (Amendment) Act, 1965, which came into operation on June 22, 1965.

Section 174, before this amendment, permitted the Trustees where an advance had been made and received upon land to exercise the remedies exercisable by the Land and Agricultural Bank under the Agricultural Credit Act, that is to say, the trustees could, and still can, where the principal or interest on a loan

made under the Agriculture Act is overdue, take possession of and sell by public auction the land upon which the loan is secured.

The two subsections added by the amendment to s. 174 were presumably designed to meet the very unsatisfactory situations which are likely to arise if the offers and acceptance of which there are examples in this case are treated as concluding these so-called loan or advance arrangements.

The two subsections are designed to cover, and to our way of thinking, do cover a case where a man pays a deposit and then without more ado is given possession of the land in question and fails to repay on the due dates what the Trustees choose to call "the advance" made of the balance of the purchase price, or as it may perhaps be more realistically put, fails to pay the agreed instalments of the balance of the purchase price.

We set out what is now sub-s. (3) of s. 174 so that our meaning may be made more clear:

- "(3) If any sum of money, whether principal or interest, due in respect of any advance made by the Settlement Fund Trustees, such advance not being secured upon any land under this Part, is unpaid for more than six months, whether or not action has been taken under sub-s. (2) of this section, the Settlement Fund Trustees may, without recourse to any court, terminate any interest (whether express or implied) in land in respect of which the advance was made, which may be vested in or deemed to be vested in the person to whom the advance was made, and thereupon such interest shall vest in the Settlement Fund Trustees, who may thereupon take possession of the land in question."

Counsel for the respondent has described this as Draconian legislation. The legislation would perhaps have been more effective if less Draconian had the robust phrase "without recourse to the courts" been omitted and the phrase "and on proof of such facts shall be entitled to an order of the court etc." substituted. Be that as it may, the Trustees by letter, or notice, dated July 13, 1965, invoked sub-s. (2) and sub-s. (3) of the aforementioned s. 174 and told the appellant to get off the land. He did not do so. He is still on the land. We have listened to all he had to say, as did the magistrate, but it appears to us that the appellant has had no right whatever to the possession of this land after he received that letter or notice. He is now and was at the commencement of the proceedings in the lower court a trespasser, or so we think.

No steps civil or criminal were immediately taken, however, to remove the appellant. The trustees by letter of July 16, 1965, instructed Dalgety's (East Africa), Ltd., to sell the property by auction on certain conditions one of which read "The Settlement Fund Trustees does not acknowledge any responsibility for the removal of 'squatters' (if any) from the property and the purchaser shall be deemed to purchase with full knowledge of the state and conditions thereof and shall be responsible for the removal of 'squatters' (if any)". We make no comment, save to say that it was, we hope, expected that the appellant would have gone before the auction.

On October 6, 1965, the auction was held, and the land was knocked down to Robert Nganga Kiroku for Shs. 32,500/-.

Mr. Kiroku paid 10 per cent. of this sum as deposit and on October 7, 1965, he received a "sale and loan" offer, similar to the one received by the appellant, which he accepted on that day. He undertook to execute a "First Legal Mortgage/Charge". He has never executed anything because this land has never been conveyed to him. It is said that the land has not been conveyed to him because the appellant is still in possession, and the last entry in respect of this land in the

Register of Crown Lands is that in respect of the conveyance of May 31, 1963, to which we have referred.

Now the proceedings under the Trespass Act were instituted by Mr. Kiroku on October 7, 1965, that is on the day he signed the acceptance, but the date is immaterial. The question is whether these proceedings could in law be instituted by Mr. Kiroku.

Section 10 of the Trespass Act reads:

“10 Proceedings for an offence under this Act may be instituted by the occupier of private land or the owner of a fence, as the case may be, or by a police officer with or without the consent of the occupier or owner as aforesaid.”

And prima facie one would suppose that proceedings under this unusual statute may only be instituted against a trespasser on private land by the occupier. We have already pointed out however that an occupier in this Act need not necessarily be an occupier; he may be an owner kept out of occupation by a trespasser, and that is what the State contend that Mr. Kiroku is. But to be the owner of private land, to be the owner of this land, Mr. Kiroku must be the owner of the land by virtue of a freehold title. This to our minds he emphatically is not, but to find so we have had to plunge into that legal jungle, the land law of Kenya.

Section 54 of the Transfer of Property Act, 1882, of India which applies to Kenya provides that a contract for sale of immovable property does not, of itself, create any interest in or charge on such property. The offer and acceptance document to which we have referred is at most, we think, a contract for sale, and on the law so far considered Mr. Kiroku is a very long way from being the owner of a freehold title. But then s. 138 of this Act is brought to our attention. That section reads:

“138. Nothing in this Act contained shall affect, or be deemed ever to have affected, the construction or operation of any grant or other transfer of land or of any interest therein heretofore made, or hereafter to be made, by or on behalf of Her Majesty, her heirs or successors, to, or in favour of, any person whomsoever; but, subject to the provisions of the Crown Lands Ordinance, or as the case may be, the Crown Lands Ordinance, 1902, every such grant or transfer shall be construed and take effect as if this Act had not been passed and, subject as aforesaid, all provisions, restrictions, conditions and limitations over contained in any such grant or transfer as aforesaid shall be valid and take effect according to their tenor.”

It is surely doubtful whether this section applies to anything save original Crown grants and transfers, but it does at any rate apply only to documents which purport to be grants and transfers. The section cannot we think so operate as to cause an agreement for sale to confer an equitable interest in land upon a party to the agreement contrary to the express provision of s. 54 of the Act. We must also draw attention to that part of the Crown Lands Act which deals with the registration of transactions affecting Crown Lands. However one turns this case it is surely clear that whatever rights Mr. Kiroku may have against the Trustees they have not, or at any rate had not when the trespass proceedings were begun, conferred on him a freehold title and that he is not the owner or occupier of this private land. He is certainly not the legal owner and in our view he cannot be said to have an equitable interest in the land.

The State are prepared to argue that even if Mr. Kiroku is not the “occupier” of this land yet these are criminal proceedings and under s. 89 (2) of the Criminal Procedure Code such proceedings can be initiated by any person.

This is not perhaps a case where the rule that the general does not derogate from the special fully applies, for here the special provision of s. 10 of the Trespass Act is later in point of time than the general provisions of the Criminal Procedure Code. This is a case where both provisions are expressed in affirmative language and it is a question whether, touching proceedings for trespass, both can stand together. If not then s. 10 of the Trespass Act, being the later provision, prevails so far as proceedings for trespass are concerned. To our minds the clear intention of the legislature is that the two provisions should not stand together. A special code of procedure has been provided for these very unusual criminal proceedings, and very obviously such a code had to be provided.

It would be strange indeed if anyone save the police who are under the control of the Public Prosecutor or the “occupier” were permitted to prosecute for trespass to land. Eviction must follow conviction and that a man should be evicted from land at the instance of anyone save a responsible body such as the police or of the lawful occupier or owner of the land is quite unthinkable. We reach the conclusion that these proceedings were instituted contrary to the provisions of the Act which creates the offence charged and that the proceedings are a nullity. For this reason we quash the conviction in this case and set aside the penalty inflicted together with the order of eviction. It is sad to see so much time and money wasted in a case which to a court exercising civil jurisdiction would probably present little difficulty. We venture to comment that s. 3 of the Trespass Act was probably designed to meet a very special situation. It is well known that within recent years peasants and labourers without any excuse save that they have no land of their own have “squatted” on the land of other people. A summary remedy for that situation is no doubt desirable. But if it becomes fashionable to use or to attempt to use the remedy in cases where there is a serious dispute as to title, however unreasonable the contentions of the defendant may be, very great difficulties and much waste of time and money may arise.

Appeal allowed.

The appellant in person.

For the respondent:

Attorney-General, Kenya

K. C. Brookes

Dattoo and another v Estate Duty Commissioner
[1967] 1 EA 208 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	10 November 1966
Case Number:	6/1966
Before:	Otto J
Sourced by:	LawAfrica

[1] *Estate duty – Life insurance policies – Assigned three years before death – Whether deceased retained substantial interest therein – Estate Duty Act, 1963, s. 7 (1) (d) and (f) and s. 12 (T.).*

[2] *Insurance – Life insurance policies – Assigned three years before death – Whether deceased retained interest under Estate Duty Act, 1963 (T.).*

Editor's Summary

The Estate Duty Commissioner had charged and levied duty on the proceeds of two policies of insurance on the life of the deceased. The policies were taken out by the deceased on his own life in 1960 and on January 22, 1962, he executed a transfer of them in favour of his wife with a proviso that in the event of his wife predeceasing him or of the policy maturing for some event other than death, the policy should revert to the deceased. The deceased continued to pay the premiums until the date of his death on May 10, 1965. An appeal was made under s. 32 of the Estate Duty Act, 1963 (T.).

Held –

- (i) the deceased still had an interest in the policies and from the nature of the assignment, he was still competent during his lifetime of disposing of the property in the policies;
- (ii) the provisions of s. 7 (1) (d) and (f) of the Estate Duty Act, 1963, were not inconsistent with or repugnant to each other;
- (iii) the deceased had a substantial interest in the property and had retained a benefit to himself in the proceeds of the policies.

Appeal dismissed.

Cases referred to in judgment:

- (1) *A.-G. v. H.R.H. Prince Ernest Augustus of Hanover*, [1957] 1 All E.R. 49.
- (2) *Wood and Another v. Riley* (1867), L.R. 3 C.P. 26.
- (3) *Wilcox v. Smith* (1857), 47 Drew. 40.

Judgment

Otto J: This is an appeal against the Estate Duty Commissioner, who has charged and levied estate duty on the proceeds of two policies of insurance on the life of the deceased. The facts themselves are simple and are not in dispute. The two policies of insurance were taken out by the deceased in 1960, on his own life, and on January 22, 1962, that is before the Estate Duty Act, 1963, came into force, he executed a transfer in favour of his wife. It is recited that he assigned the two life policies to his wife, the recital reading that he transferred all his right and interest in the two policies in favour of his wife, provided, however, that in the event of her predeceasing or upon the maturity of the policy other than by death, the policy should revert as if the transfer had never been made. The deceased at all times continued to pay the premiums up until the date of his death, and he died on May 10, 1965. It will be seen therefore that the assignment of the policies was made more than three years before the date of death and at a time when there was indeed no Estate Duty Ordinance in force. The appeal is made under s. 32 of the Estate Duty Act, 1963.

The Act itself recites in s. 7 that a tax, to be called the estate duty, shall be levied, s. 7 reading as follows:

- “7(1) Whenever any person dies, a tax to be known as estate duty shall, save as is hereinafter provided, be levied and paid on:
- (a) all property in which the deceased was at the time of his death competent to dispose;
 - (b) all property in which the deceased or any other person had an interest ceasing upon the death of the deceased;
 - (c) all property which immediately before the death was held for the use or enjoyment of two or more persons of whom the deceased was one either jointly or in accordance with or subject to the exercise of a discretion;
 - (d) the proceeds of any policy of assurance on the life of the deceased;
 - (e) any annuity commencing or benefit becoming due on the death of the deceased which was provided by the deceased, either by himself alone (including by the exercise of a general power of appointment by the deceased) or in concert or by arrangement with any other person, other than any annuity or benefit payable under any written law or to or in respect of a dependant of the deceased as such;
 - (f) any property of which or of any interest in which a disposition was made:
 - (i) within three years of the death of the deceased and after the twelfth day of June, 1963; or
 - (ii) at any time if, within three years of the death of the deceased and after the twelfth day of June, 1963, the deceased had any power of appointment, or power of revocation or of declaration of trusts in relation to the property, or received any income from the property, or received or retained any benefit under any agreement or arrangement, whether or not enforceable by law, made at any time under or in connection with the disposition,

if and to the extent that:

- (A) the property would have been liable to estate duty on the death of the deceased had the deceased died immediately before the disposition was made; and
- (B) the effect of the disposition concerned would, apart from the provisions of this paragraph, have been to diminish the aggregate value of the property liable for estate duty on the death of the deceased had he died immediately after the disposition was made:

Provided that in no case shall estate duty be chargeable, under the provisions of the foregoing paragraphs, more than once on the same share of or interest in any property in respect of the same death.

- (2) For the purposes of subparas. (A) and (B) of para. (f) of sub-s. (1) of this section, where any disposition of property was made prior to the date upon which this Act comes into operation, any question whether or to what extent the property would have been liable to estate duty on the death of the deceased had the deceased died immediately before the disposition was made, or whether or to what extent the effect of the disposition would, apart from para. (f) aforesaid, have been to diminish the aggregate value of the property liable for estate duty on the death of the deceased had he died immediately after the disposition was made, shall be determined as if this Act had been in operation both immediately before and immediately after the disposition was made.”

It will be seen that s. 7 (1) (d) specifically refers to the proceeds of a policy of assurance, and there is further reference in the Act to policies of assurance in s. 12, which reads:

“12(1) No estate duty shall be payable in respect of the proceeds of any policy of assurance:

- (a) in respect of which the deceased provided no premium during the three years immediately preceding his death; and
 - (b) in or over which the deceased had at no time during the three years immediately preceding his death any interest or power of disposition.
- (2) Subject to the provisions of sub-s. (1) of this section, where only part of the premiums paid in respect of a policy of assurance were provided by the deceased, estate duty shall be payable on the proportion of the proceeds of the policy which the amount of the premiums provided by the deceased bore to the amount of all the premiums paid in respect of the policy.”

It was the argument of learned counsel for the appellant that because these two policies of assurance had been assigned absolutely more than three years before the death of the deceased, they were not property such as to attract duty. Learned counsel referred to the words of s. 7 (1) (d), and said they were far too wide and general and I would agree that that is correct if one takes s. 1 (d) entirely out of its context and without reference to any of the other provisions of the Act. Certainly one could cite many instances of particular policies of assurance on the life of the deceased person which could never be said to be property of which the deceased was prior to his death competent to dispose. That is not property belonging to the deceased. Learned counsel requested that one should look at the objects and reasons for the imposition of estate duty, which were published with the draft Bill on June 11, 1963. After reciting that there had previously been a tax called estate duty and expressing the intention of reintroducing this duty, it was recited that “By cl. 7, duty is chargeable on the property of all persons dying on or after the date on which the Act comes into operation, on all other property which passes, and on certain benefits which arise, on the death, and on property disposed of by the deceased within three years of his death, if the aggregate value of the estate is five thousand pounds or more.” In his submission that one should look at the Memorandum of Objects and Reasons, counsel cited the case of *A.-G. v. H.R.H. Prince Ernest Augustus of Hanover* (1). Counsel also referred to the case of *Wood and Another v. Riley* (2). This case deals with the interpretation of enactments and in this connection it was the submission of counsel for the appellant that the provisions of s. 7 (1) (d) and s. 7 (1) (f) were inconsistent and that where there are two sections which are repugnant, it is the known rule that the provisions of the last section must prevail. Counsel said that here there had been a disposition of property made outside the three-year period and indeed at a time when no estate duty at all was payable. In the result it is submitted that the Commissioner is not entitled to levy any duty.

The Senior State Attorney appeared on behalf of the Estate Duty Commissioner, and while conceding that the arguments of learned counsel for the appellant were undoubtedly attractive, he said they could not possibly be a true and correct interpretation of the Estate Duty Act. Learned Senior State Attorney said that here the provisions of s. 12 were not satisfied, in that this section required two conditions before there can be any exemption in the payment of estate duty in respect of the proceeds of any policy of assurance. It was not in dispute that the deceased himself had provided the premiums for both policies during the three years immediately preceding his death, and indeed

counsel for the appellant agreed and he said it was not contested for a single moment that the deceased paid all the premiums in respect of these policies up until the date of his death. Learned Senior State Attorney also pointed out that there were specific provisions in the Act concerning policies of assurance and that one must consider the Act as a whole.

In reply counsel for the appellant said that it was not for the appellant to claim exemption under s. 12 until the Commissioner himself had satisfied the court that he was indeed entitled to levy estate duty under one or other of the provisions of s. 7. He said the burden was cast upon the Commissioner first to satisfy the court that the provisions did indeed entitle him to levy the duty and counsel quoted Dymond's Death Duties (11th Edn.) at p. 7, and counsel said he was not availing himself of the provisions of s. 12, because the Estate Duty Commissioner had not discharged the burden of proving that duty is payable.

The arguments of learned counsel for the appellant are indeed attractive and the provisions of the Estate Duty Ordinance are far from clear. I would agree that the provisions of s. 12 do not apply and cannot apply and counsel agreed that they were not attempting to claim exemption under the provisions of s. 12. The right to levy duty must in the first instance be found within the provisions of s. 7. I am of opinion that the interpretation of s. 7 as a whole does give the Estate Duty Commissioner the right to charge and levy duty in the present instance.

I was referred to Dymond's Death Duties (11th Edn.). I do not have the 11th edition, but the 12th edition, and the relevant provisions to which I was referred are identical, and this concerns the burden of proof and construction of taxing Acts. Various examples are given and, to use the words of Dymond, the onus is on the revenue to show that there are clear words which impose the tax or duty on the subject. One of the examples at p. 9 is worth quoting:

"If the Act is ambiguous, the subject is entitled to the benefit of the doubt; but the principle is, not that the subject is to have the benefit if, upon any argument that the ingenuity of counsel can suggest, the Act does not appear perfectly accurate; but that, if, after careful examination of all the clauses, a judicial mind shall entertain any reasonable doubt as to what the legislature intended, then the subject shall have the benefit of the doubt. (*Wilcox v. Smith* (1857), 4 Drew. 40, per Kindersley, V.-C., at p. 49.)"

In the instant case I am of opinion that these policies are liable to duty because the deceased still had an interest in the policies and, from the nature of the assignment, he was still competent during his lifetime of disposing of the property in the policies. It may well have been otherwise if the assignment had been framed differently. English authorities are of little or no assistance because the wording of the English Finance Acts are entirely different. Looking at the provisions of s. 7 as a whole I cannot see any real inconsistency between the provisions of s. 7 (1) (d) and s. 7 (1) (f). It may well be that the provisions of s. 7 (1) (f) could have been more clearly framed, but I cannot agree with the submissions of counsel that the two sections are indeed repugnant.

I hold that the deceased had a substantial interest and that this was property which the deceased was at the time of his death still competent to dispose, notwithstanding the assignment in favour of his wife. He certainly retained a benefit to himself in the proceeds of the policies. In the result the appeal is dismissed.

Appeal dismissed.

For the appellants:

Fraser-Murray, Roden & Co., Dar-es-Salaam

A. A. Lakha

For the respondent:

Attorney-General, Tanzania

Tampi and P. K. Laxman (Senior State Attorneys, Tanzania)

Nyamgunda v Kihwili
[1967] 1 EA 212 (HCT)

Division: High Court of Tanzania at Dar-Es-Salaam
Date of judgment: 6 December 1966
Case Number: 68/1966
Before: Otto J
Sourced by: LawAfrica

[1] *Native Law and Custom – Primary Courts of Tanzania – Whether customary law relating to law of persons prevails over Indian Evidence Act and English case-law – Government Notice No. 279 of 1963 (paras. 183 and 190) (T.) – Magistrates’ Courts Act (Cap. 537), s. 14 and para. 2, Fourth Schedule (T.).*

[2] *Evidence – Principles applicable in Primary Courts of Tanzania in cases involving customary law – Government Notice No. 22 of 1964 (T.).*

[3] *Evidence – Onus of proof of paternity in customary law cases in Tanzania – Whether corroboration required – Government Notice No. 22 of 1964 (T.).*

[4] *Paternity – Customary law – Tanzania Primary Court – Onus of proof – Whether corroboration required – Whether Indian Evidence Act and English case-law applicable – Government Notices Nos. 22 of 1964 and 279 of 1963, paras. 183 and 190 – Magistrates’ Courts Act (Cap. 537) s. 14 and para. 2, Fourth Schedule (T.).*

Editor’s Summary

A teacher at a school in Tanzania was accused of having sexual intercourse with a girl. The girl informed her father that she was pregnant by the teacher. The father raised an action in the Primary Court for compensation by the teacher, and was awarded the sum of Shs. 120/- as compensation against the teacher. On appeal by the teacher to the District Court the latter court held (the assessors dissenting) that it was not proved that the teacher had caused the girl’s pregnancy, and allowed the appeal. The father appealed further to the High Court on a number of grounds, the most important of which was that the District Court should have applied the relevant customary law in deciding whether the teacher had caused the girl’s pregnancy, and that consideration of English cases and the Indian Evidence Act relating to onus and degree of proof should have been excluded.

Held –

- (i) the Indian Evidence Act does not apply, nor do English cases;

- (ii) special rules for Primary Courts relating to evidence are contained in Government Notice No. 22/1964 (T.);
- (iii) the main rules applicable to these cases are paras. 183 and 190 of Government Notice No. 279/1963 (T.);
- (iv) the burden of proving his innocence was upon the teacher once the girl had named the teacher as the father of the child;
- (v) corroboration of the girl's evidence was not required.

Appeal allowed.

No cases referred to in judgment.

Judgment

Otto J: This is an appeal by the successful plaintiff in the Primary Court on a claim for compensation in the case of an illegitimate pregnancy. The plaintiff (present appellant) was the father of the girl and the defendant was a teacher at the school at which the girl was a student. The district magistrate, despite the fact that the assessors agreed with the Primary Court judgment, reversed the finding and the district magistrate found it unsafe

to uphold the lower court's judgment because of the girl's apparent conflicting statements. The lower court awarded the appellant the sum of Shs. 120/- as compensation. This would be in accordance with para. 190 of Government Notice No. 279 of 1963, which notice dealt with the Law of Persons.

Several grounds of appeal were put forward, but for the purpose of this decision it is only necessary to deal with the first five grounds, which were:

- "1. The learned district magistrate should have held that the appeal to the district court was filed out of time and should have therefore dismissed the appeal.
2. The learned district magistrate erred in holding that English cases can be quoted as authorities in a matter arising out of a primary court matter.
3. The learned district magistrate erred in holding that the Indian Evidence Act is binding on the primary court.
4. The learned district magistrate should have addressed his mind exclusively to the relevant customary law and to the rules of evidence made pursuant to the Magistrates' Courts Act, 1963.
5. The learned district magistrate misdirected himself as to the burden of proof and should have held that in the light of the relevant customary law the question at issue was whether the respondent had established that he had not caused the pregnancy to the appellant."

The appellant, as I said above, was the father of this girl and he complained that she had become pregnant as a result of intercourse with the respondent while the girl was a student at the school where the respondent taught. According to the facts the girl alleged that the respondent had intercourse with her on two occasions, first in May, 1965 and again in July. It was her evidence that the respondent said he would not tell the girl the result of her examinations and he would come to hate her very much, and it was only after these threats that the girl had intercourse with the teacher on the two occasions mentioned, and she said that as a result of this intercourse she became pregnant and reported the matter to her brother, telling him that the teacher, the present respondent, was responsible. The matter then came to be reported to the parents of the girl.

Dealing with the first ground of appeal, viz. that the district magistrate should have dismissed the appeal because it was out of time, counsel referred to s. 16 (3) of Cap. 537. This section requires any appeal to be filed within thirty days, provided, of course, that the district magistrate may extend the time. In dealing with this matter, the district magistrate said that although there was an application for leave to appeal out of time on the file, no specific order was made, but he, the district magistrate, assumed that the application was verbally allowed, and he further said that although there was this irregularity it had not been so serious as to occasion a miscarriage of justice. The grounds set out in the application for leave alleged inability to complete formalities because of illness. The district magistrate has not dealt thoroughly with this part of the application, but I would agree that in the normal course the application for leave to appeal out of time would in all probability have been granted and it was within the powers of the district magistrate to make a specific order to that effect at the date of hearing. Such a course is normal practice in such circumstances.

Turning to the next four grounds of appeal, which I will deal with together, it was the argument of learned counsel that the English cases quoted by counsel for the respondent did not apply nor did the Indian Evidence Act, nor was it necessary for there to be corroboration of the girl's story, and on all these points I agree that that was the correct approach. The correct law to be applied is to be found in the Fourth Schedule to the Magistrates' Courts Act, Cap. 537, and there para. 2 states as follows:

“In the exercise of its customary law jurisdiction, a primary court shall apply the customary law prevailing within the area of its local jurisdiction or, if there is more than one such law, the law applicable in the area in which the act, transaction or matter occurred or arose, unless it is satisfied that some other customary law is applicable; but it shall, subject to rules of court, apply the customary law prevailing within the area of its local jurisdiction in matters of practice and procedure to the exclusion of any other customary law.”

Section 14 of the same Act also refers to the application of customary law, and in matters of this nature, the Indian Evidence Act does not apply and the district magistrate is quite wrong to deal with this suit on the assumption it was a case of adultery and that the girl's story required corroboration. There are special rules for primary courts concerning evidence, which are contained in Government Notice No. 22 of 1964. This was not to be decided as a civil case of adultery or a criminal trial, as was the argument of the learned counsel for the respondent, and recourse should have been had to the rules governing the law of persons which, as I stated above, are found in Government Notice No. 279 of 1963, and there para. 183 reads as follows:

“The man whom the woman names as father of her child may not deny paternity unless he can prove that he had no sexual intercourse with the woman”,

and this together with para. 190, which reads:

“The man who is responsible for the pregnancy of a woman under the age of twenty-one years is liable to pay a fine of not less than Shs. 80/- and compensation to her father of not less than Shs. 100/-”,

are the two most important statements of customary law in this particular instance to be followed.

The assessors sitting in the district court, gave their opinions as follows:

“First assessor: I disbelieve the evidence of Salum Mohamed. The act of the sexual intercourse was a disgraceful one that is why the girl denied of the allegation. The magistrate reached a proper finding.

Second assessor: I agree with my co-assessor what made Salum Mohamed to ask the girl about her affair. The magistrate was right.”

The district magistrate in disagreeing with the assessors said that Salum Mohamed was an elder, but the evidence does not support this proposition and Salum Mohamed was merely recounting what he had heard. He had at no time been called to sit as an elder in this particular instance.

The primary court magistrate fully covered the evidence and he applied the correct law. The burden of proof in this instance was upon the respondent, once the girl had named the respondent as the father of the child. This was according to customary law which is applicable in the particular circumstances. The issue of corroboration, which was canvassed by counsel for respondent was not in the circumstances necessary, and I would further say there was no real contradiction in the girl's evidence as had been suggested. Counsel referred to 12 Halsbury's Laws (3rd Edn.) on the need for corroboration, but this was not a suit for divorce and the decision fell to be decided in accordance with customary law. Likewise the English case law quoted, did not apply.

I do not find it necessary to deal with any of the other grounds of appeal, although they also have merit. In the circumstances the appeal is allowed and

the judgment of the primary court is restored. The appellant will have his costs both in the district court and the High Court.

Appeal allowed. Judgment of Primary Court restored.

For the appellant:

M. J. Raithatha, Dar-es-Salaam

For the respondent:

N. P. Patel, Dar-es-Salaam

Kateba v Republic
[1967] 1 EA 215 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	21 December 1966
Case Number:	790/1966
Before:	Biron J
Sourced by:	LawAfrica

[1] Criminal Law – Possession of property reasonably suspected of having been stolen – What constitutes “possession” – Whether accused “in possession” after handing property to another person – Penal Code, s. 312 (T).

Editor’s Summary

The appellant offered to sell a radio in circumstances which apparently made one of the persons present, Hamisi, suspicious. Hamisi offered to buy the radio and took it away. Subsequently Hamisi sought out the appellant and took him to his house, where he collected the radio and then took it and the appellant to the police station, where the appellant was arrested and charged with being in possession of property reasonably suspected of having been stolen. He was convicted and appealed.

Held – the appellant, having parted with possession of the radio when it was taken from him by Hamisi, was not “in possession” of it when arrested.

Appeal allowed.

Cases referred to in judgment:

- (1) *R. v. Msengi bin Abdulla* (1952), 1 T.L.R. (R.) 107.
- (2) *Willey v. Peace*, [1950] 2 All E.R. 724.

(3) *R. v. Bakari Bakari*, [1962] E.A. 466.

Judgment

Biron J: The appellant was convicted of being in possession of property reasonably suspected of having been stolen and he was sentenced to imprisonment for twelve months. He is now appealing.

Evidence was given by a witness to the effect that the appellant approached him at a pombe club and offered to sell him a radio. The witness having expressed his interest, the appellant led him to a spot in the bush near a cemetery. On the way the prospective purchaser picked up two friends to witness the sale. All three testified to the effect that the appellant left them at a crossroads whilst he went, apparently, into the cemetery, whence he produced a radio and offered to sell it for Shs. 80/-. The intending purchaser declined to buy it as the price was beyond his means.

One of the two witnesses to the intended sale, Hamisi Selemani, offered to buy the radio and suggested that they should go before the local ten cell leader

in order to complete the transaction. The appellant objected and Hamisi, who is a T.A.N.U. Youth Leader, apparently suspecting the appellant, said that he would purchase the radio, and he took it to his own house. He subsequently sought out the appellant, identified himself as a T.A.N.U. Youth Leader, and after taking the appellant to his house, where he collected the radio, he took the radio and the appellant to the police station, where the appellant was consequently arrested and charged. In his defence, made in an unsworn statement, the appellant explained his possession of the radio by stating that it was given to him by his brother in part payment of a loan of Shs. 400/-. This explanation was, in the circumstances not surprisingly, rejected by the trial court, which convicted him as charged.

Section 312 of the Penal Code, under which the appellant was convicted, reads:

“312. Any person who has been detained as the result of the exercise of the powers conferred by s. 24 of the Criminal Procedure Code and is brought before a court charged with having in his possession or conveying in any manner anything which may be reasonably suspected of having been stolen or unlawfully obtained, and who shall not give an account to the satisfaction of such court of how he came by the same, is guilty of a misdemeanour.”

As has often been remarked, this is a highly technical section and calls for great caution in its application, and as remarked in the judgment in the case of *R. v. Msengi bin Abdullah* (1), it has given considerable trouble throughout its history. The technicalities and the pitfalls inherent in the section were considered by a full Bench in this case of *R. v. Msengi bin Abdullah* (1). The court, after delving into the history of the section and its origins from the corresponding provisions in English law and the cases decided thereunder, found that the section had in previous cases been too rigidly interpreted and held, inter alia, that it was not necessary for a police officer either to give, or even have, good reason for detaining a person he suspected. The court also laid down that although possession must be construed ejusdem generis with conveying, it is not strictly necessary that the accused must be stopped and apprehended in the process of conveying. It would suffice if he were caught and arrested in a building, having brought the suspected property there, as was held in *Willey v. Peace* (2), an English case wherein the appellant was found in possession of the property the subject matter of the charge, only when he was searched at the police station. There is also a recent local case to like effect, that of *R. v. Bakari Bakari* (3), wherein the accused, as the result of a police trap, brought a sewing machine to the shop of a pretended purchaser and was there and then arrested.

In his judgment the learned magistrate directed himself on the application of the section in so far as the aspect of detention by a police officer is concerned and he held that he was properly detained by him at the police station and consequently properly before the court. However, the learned magistrate did not apply his mind to the aspect of possession, which, as noted, must be ejusdem generis with conveying. In this instant case the appellant had parted with possession of the radio when it was taken from him by the T.A.N.U. Youth League member, Hamisi, and it was he who actually brought it to the police station. However extended a meaning is given to possession, to my mind it cannot be stretched so far as to cover the facts of this case. It cannot, in my judgment, by any stretch be said that the appellant was in possession of the property the subject matter of the charge, when he was arrested by the police officer.

In the circumstances the appeal must be and is allowed. The conviction, which is not supported by the Republic, is quashed and the sentence imposed thereon is set aside. If the appellant is not otherwise lawfully detained in custody he is to be released forthwith.

Order accordingly.

The appellant did not appear and was not represented.

For the respondent:

Laxman (State Attorney, Tanzania)

Keshavlal Bhoja v Tejalal Bhoja
[1967] 1 EA 217 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	29 March 1967
Case Number:	528/1966
Before:	Fuad J
Sourced by:	LawAfrica

[1] *Conflict of Laws – Administrator of estate appointed by Kenya court but resident in Uganda – Whether such administrator can be sued for an account in the Uganda courts.*

[2] *Executors and Administrators – Whether administrator of estate appointed by Kenya court but resident in Uganda can be sued for an account in the Uganda courts.*

Editor's Summary

The plaintiff, a resident of Uganda, brought an action in the High Court of Uganda for an account against the defendant who was also resident in Uganda, as administrator of their deceased father's estate. The defendant had been granted letters of administration by the Kenya court and the estate consisted solely of moveable property situate in Kenya. The defendant objected that the Uganda courts had no jurisdiction.

Held – the suit could not be maintained in Uganda.

Suit dismissed.

Cases referred to in judgment:

(1) *Freeman v. Fairlie* (1812), 36 E.R. 16.

(2) *National Bank of India Ltd. v. The Administrator-General of Zanzibar* (1925), 10 K.L.R. 88.

Judgment

Fuad J: Bhoja Ratna Patel, a resident of Kenya, died intestate in Nairobi on October 8, 1959. On February 12, 1964, letters of administration were granted to the defendant, one of the sons of the deceased, by the Supreme Court of Kenya. The plaintiff, another of the sons of the deceased, now brings this suit for an account against his brother. The parties are at present both residing in Uganda. The deceased's estate consists only of moveable property situate in Kenya.

Counsel for the defendant made a preliminary objection, submitting that this suit could not be maintained in Uganda since any cause of action the plaintiff might have arose only in Kenya – the defendant's duty was only to the courts of that country. Counsel for the plaintiff submitted that this court had jurisdiction to entertain this suit since all that was sought was an account of the defendant's administration of the estate and the parties at present resided here. Any foreign

law that might apply could, he argued, easily be ascertained and proved before this court, and it would be unnecessarily cumbersome for the parties to have to resort to the Kenya courts. Counsel for the plaintiff pointed out that the defendant was being sued personally.

I am of the opinion that counsel for the defendant's objection is well founded. I can do no better, I think, than set out a passage on the subject (with which I respectfully agree) at p. 586 of Dicey's Conflict of Laws (7th Edn.):

"Though a foreign administrator or other personal representative cannot in England be made liable for property held, or acts done by him, in his character of foreign administrator, yet he may by his conduct place himself in some position in which he, speaking broadly, as a trustee, or as a debtor, incurs legal liabilities which can be enforced in England. The most obvious case is where the administrator enters into a contract in England in respect of the estate, when he acquires the right to sue and may be sued personally as contractor. Moreover, if the administrator intermeddles with English property of the deceased, he will make himself liable as executor de son tort. But it does not appear that even an ancillary administrator can be sued merely because he is in England and in control of the net balance of the deceased's assets resulting from his local administration. This is explicable on the ground that he must be responsible in the country where he has been appointed administrator and should not therefore be also liable in England. But some of the older cases suggest that at one time the English courts were prepared to exercise a wider control over administrators, e.g., in India, and it seems probable that they would be able to exercise jurisdiction if the foreign administrator by staying too long in England frustrated efforts to compel him to account in the place of his administration."

There is no suggestion in the pleadings that there are any facts that would bring this action within the exceptions to the general rule that an administrator is only responsible in the country where he has been so appointed.

If I understand the case cited to me by counsel for the plaintiff (*Freeman v. Fairlie* (1)) correctly, the point there was that the executor had ((1812), 36 E.R. at p. 16) "blended the accounts of his executorship, supposing him to have kept them, with the accounts of his commercial house . . ." it seems that a question of possible breach of trust was involved. It may be, however, that this is one of the cases that the learned author of Dicey had in mind in the last sentence of the passage I have set out above.

This case is almost on all fours with a Kenya case that my researches have unearthed. I respectfully agree with the decision of Pickering, J., in *National Bank of India Ltd. v. The Administrator-General of Zanzibar* (2), where he held that no suit can be brought against an administrator in his official capacity, except in the courts of the country from which he derives his authority to act. I do not think that the inherent difficulties that the plaintiff faces can be overcome by suing the defendant personally and not in his official character; no facts are pleaded that would make this suit sustainable against the defendant not in his representative, but his personal, capacity.

I agree, therefore, with counsel for the defendant that the suit is misconceived. Under O. 6, r. 28, I dismiss the suit with costs.

Suit dismissed.

For the plaintiff:

Ponda, Ascaria & Co., Kampala

V. N. Ponda

For the defendant:

Uganda v Otto
[1967] 1 EA 219 (HCU)

Division: High Court of Uganda at Kampala
Date of judgment: 15 March 1967
Case Number: 155/1967
Before: Fuad J
Sourced by: LawAfrica

[1] *Criminal Law – Revision – Printer’s error in scale of terms of imprisonment in default of payment of fines in 1964 Revised Edition of Criminal Procedure Code (Cap. 107), s. 302 (d) (U.) – Effect.*

[2] *Statute – Printer’s error in revised edition of statute – Criminal Procedure Code (Cap. 107), s. 302 (d) (U.) – Effect.*

Editor’s Summary

The chief magistrate of Lira referred to the High Court at Kampala a case where an accused had been sentenced to pay a fine of Shs. 250/- or in default of payment to a term of imprisonment of five months. Under s. 302 of the Criminal Procedure Code Act (Cap. 107) Revised Edition 1964 the maximum period of imprisonment in default for a fine exceeding Shs. 100/- but not exceeding Shs. 400/- is stated to be six months – a printer’s error. In 1951 Revised Edition of the Criminal Procedure Code (Cap. 24) the maximum period of imprisonment for a fine exceeding Shs. 100/- but not exceeding Shs. 400/- was stated to be four months.

Held –

- (i) the 1964 edition did not in law alter the scale laid down in the 1951 edition. The scale in the 1951 edition is therefore the correct law and where it differs from the scale in the 1964 edition, prevails;
 - (ii) in the instant case the term of imprisonment in default of five months was reduced to four months.
- Order accordingly.

No cases referred to in judgment.

Judgment

Fuad J: This case was brought to the attention of this court by the chief magistrate of the area concerned. The accused person pleaded guilty to assault occasioning actual bodily harm, and was sentenced by a magistrate grade 3 to pay a fine of Shs. 250/- or to undergo five months’ imprisonment in

default.

The maximum periods for which a person can be sentenced to undergo imprisonment in default of paying a fine are set out in a scale in para. (d) of s. 302 of the Criminal Procedure Code Act (Cap. 107) revised edition, 1964, as follows:

<i>Amount</i>	<i>Maximum period</i>
Not exceeding Shs. 10/-	14 days
Exceeding Shs. 10/- but not exceeding Shs. 20/-	1 month
Exceeding Shs. 20/- but not exceeding Shs. 100/-	3 months
Exceeding Shs. 100/- but not exceeding Shs. 400/-	6 months

It will be seen, when the scale set out above is examined, that the trial magistrate was acting apparently within his powers by ordering a period of imprisonment in default which did not exceed six months, but unfortunately, it would seem that an error has crept into the printing of the Revised Edition of the Act. The scale contained in the Criminal Procedure Code (Cap. 24), revised edition, 1951, was as follows:

<i>Amount</i>	<i>Maximum Period</i>
Not exceeding Shs. 10/-	14 days
Exceeding Shs. 10/- but not exceeding Shs. 20/-	1 month
Exceeding Shs. 20/- but not exceeding Shs. 100/-	3 months
Exceeding Shs. 100/- but not exceeding Shs. 400/-	4 months
Exceeding Shs. 400/-	6 months

A comparison of the two scales shows what has gone wrong. In the latest Revised Edition the words “Exceeding Shs. 400/- 6 months” have been omitted and in the place of the expression “4 months” relevant to a fine which exceeds Shs. 100/- but which does not exceed Shs. 400/-, appears the expression “6 months”.

The Commissioner for the Revision of the Laws had, of course, no power under the Laws (Revised Edition) Act, 1965 (Act No. 15 of 1965), to make such an amendment to the substantive law. In general, I think it can be said that the effect of a Commissioner’s work is literary only. I say that there has been a printer’s error without any hesitation whatsoever, because the reprint of the Criminal Procedure Code Act in italics also set out in the Revised Edition for easy reference (made necessary because at the time of the revision, the Magistrates’ Courts Act had yet to be applied to every area in Uganda) sets out the previous and correct scale. It is to be noted that the Magistrates’ Courts Act did not amend s. 302 of the Code.

In these circumstances, therefore, I am not prepared to accept that the “new” scale is in fact the law to be applied in Uganda and, speaking for myself, I will apply the “old” scale in each case.

It is perhaps not surprising that the trial magistrate fell into error for the only copy of the law that he will have contains the error to which I have drawn attention.

The instant case is one of many where I have had to make revisional orders so that an accused person is not prejudiced by what I have found to be a printer’s error, and it is to be hoped that the appropriate authorities will see to it that an amendment to correct the error is made without delay. It may also be considered whether the opportunity afforded might be taken to make substantive amendments to the law to take into account the changes in the value of money since the scale was first drawn up. It has been in force for at least seventeen years.

In this case I reduce the sentence of imprisonment in default to a period of four months. The Director of Public Prosecutions did not wish to be heard.

Order accordingly.

Neither party appeared.

Division: High Court of Uganda at Kampala
Date of judgment: 13 April 1967
Case Number: 62/1966
Before: Sheridan J
Sourced by: LawAfrica

[1] *Master and Servant – Trade dispute – Meaning of words “shall be competent” in Trade Disputes (Arbitration and Settlement) Act (Cap. 200), s. 5 (U.) – Duty of Industrial Court.*

[2] *Master and Servant – Trade dispute – Reinstatement of employee – Ambiguous award by Industrial Court on reference by Minister under Trade Disputes (Arbitration and Settlement) Act (Cap. 200) (U.) – “Nil” award recommending disposal of issue by a different tribunal – Whether order of mandamus will issue.*

[3] *Mandamus – Uganda Industrial Court – Ambiguous award – “Nil” award recommending disposal of issue by a different tribunal – Issue as to reinstatement of employee – Whether mandamus will issue.*

Editor’s Summary

The Uganda Industrial Court, in determining a dispute referred to it by the Minister under s. 5 (a) of the Trade Disputes (Arbitration and Settlement) Act (U.), made an award which purported to be a nil award but also expressed the opinion that the issue, which was the reinstatement of an employee who had been summarily dismissed, should be dealt with by a magistrate’s court. The employee’s Union applied for an order of mandamus on the ground that this award was neither certain nor final.

Held –

- (i) the words “shall be competent” in s. 5 of the Act are compulsory and not merely permissive;
- (ii) no magistrate’s court could make an order for the employee’s reinstatement; and, even if the Industrial Court had power to do so, any such order could be frustrated by the employer giving the requisite notice;
- (iii) therefore, any order for mandamus would be ineffective; and, in the exercise of the court’s discretion, should be refused.

Application dismissed.

Cases referred to in judgment:

- (1) *National Union of Clerical, Commercial and Technical Employees v. Uganda Bookshop*, [1965] E.A. 533.
- (2) *F. G. Julius v. The Right Rev. The Lord Bishop of Oxford and Another* (1880), 3 App. Cas. 214.
- (3) *R. v. National Arbitration Tribunal*, [1947] 2 All E.R. 693.
- (4) *R. v. The Army Council, Ex parte Ravenscroft*, [1917] 2 K.B. 504.

Judgment

Sheridan J: This is an application by the National Union of Clerical, Commercial and Technical Employees, by Notice of Motion, for an Order of Mandamus.

General Notice No. 1144 of 1966, in the Uganda Gazette dated November 11, 1966, recited that one of the issues in dispute was the reinstatement of Mr. John Ochieng without loss of pay and his seniority rights. They claimed that he had been wrongfully dismissed whereas the second respondents, Uganda Distributive Merchant Traders' Association, claimed that he had been summarily dismissed for a gross misdemeanour.

The relevant part of the award states:

- “(a) Having heard the evidence of both sides and their written submissions the court has come to the opinion that the court is not prepared to order the reinstatement of Mr. Ochieng but feel strongly that this issue should be dealt with by a magistrate's court which has power to deal with it effectively, it therefore makes a nil award on this issue.”

It will be seen at once that this part of the award is ambiguous. It purports to make a decision of a nil award and, at the same time, expresses an opinion that the matter should be finally determined before a different tribunal.

Counsel for the applicants submits that the award is neither certain nor final. The first respondent, the President of the Industrial Court, was not competent to make it. He referred to *National Union of Clerical, Commercial and Technical Employees v. Uganda Bookshop* (1) where it was decided, inter alia, that an arbitrator, in lieu of deciding the question submitted to him, could not direct what seemed to him an equitable arrangement between the parties.

The functions of the Industrial Court are set out in s. 5 of the Trades Disputes (Arbitration and Settlement) Act (Cap. 200) which provides:

- “5. The Industrial Court shall be competent to hear and arbitrate, as authorized by the provisions of this Act, and subject thereto, any trade dispute:
- (a) referred to it by the Minister in pursuance of the provisions of this Act; and
 - (b) referred to it directly but jointly by all parties to the dispute:
- Provided that the Industrial Court shall not consider any trade dispute referred to it under paragraph (b) of this section:
- (i) . . . ; or
 - (ii) if other machinery or arrangement exist which, in the opinion of the Industrial Court, are appropriate for settlement by conciliation or arbitration of such dispute.”

Although General Notice No. 1144 of 1966 does not specify under which paragraph of s. 5 of the Act the reference was made, I am informed that it was a reference by the Minister under para. (a). It follows that the court could not have purported to invoke “other machinery” under the second proviso to para. (b) of the section.

Here I would dispose of the submission of counsel for the first respondent, that the words in s. 5 “shall be competent” give the court a permissive role. I think that this is one of those cases where enabling words, such as “it shall be lawful” are compulsory in that they are words to effectuate a legal right: *F. G. Julius v. The Right Rev. The Lord Bishop of Oxford and Another* (2).

I agree with the submissions (a) that the industrial court enjoys wider powers by way of conciliation and settlement than a civil court; and (b) that the award, if it was an award, would not conflict with s. 9 of the Act in that Mr. Ochieng's wages, hours of work or otherwise as to terms of employment were not regulated

by any written law – I say this because, in my view, the Contract Act (Cap. 75) which applies the English common law of contract to Uganda (s. 3) does not make the contract law a written law. If it were otherwise, the Judicature Act (Cap. 34), s. 2 (b) would make all in Uganda written law.

I also agree with the submission that this is not a case of referring the award back to the court for its interpretation under s. 11 of the Act. It bluntly states that it is a nil award. The fundamental flaw in it is that a magistrate's court would have no power to make an order for reinstatement – and I doubt if the industrial court could do so, except by consent. As was said by Lord Goddard, C.J., in *R. v. National Arbitration Tribunal* (3) ([1947] 2 All E.R. at p. 696):

“The next, and, to my mind, by far the more difficult and important, question is whether the tribunal have purported to award reinstatement, and, if so, whether they have jurisdiction so to do. It will be remembered that the first matter referred is the claim made by the workmen for ‘reinstatement from the date of dismissal of the workers dismissed.’ This means that the workmen claim to be reinstated in the service of the employers as from April 4, 1947, the date when the notices served expired. The tribunal state in their award that: ‘They find in favour of the claim set out in item (1) of Sched. 2 in para. 1 above, and award accordingly’. I can only read this as meaning that they award what the men claimed, namely, reinstatement as from the date that I have mentioned, and by the terms of the order an award is made binding on the employers. If my reading of the award be right, it can only mean that the tribunal direct the re-employment of, and the employers are obliged to re-employ, these men and pay them their wages from April 4. I can see no other way by which on August 8 a man could be reinstated in employment from the date of dismissal which occurred four months earlier. It may be assumed that the tribunal were of opinion that the real cause of dismissal was the trade dispute, that is to say, the claims made by the men which the employers were unwilling to grant. It must also be assumed that the tribunal were of opinion that the employers ought not on that account to have dismissed the men, but I find it impossible to read this award merely as an expression of opinion to that effect. I can only read it as a direction to the employers having the effect which I have already mentioned.

“There are no express words either in the regulation or in the Order which in terms give the tribunal any power to reinstate, but it is said that as they have power to deal with any question relating to employment or non-employment it follows that they must have the power to make an award of reinstatement. It seems to me a strong thing to say, looking at this regulation which alone gives force to the Order, that a power is thereby impliedly given to the tribunal to grant a remedy which no court of law or equity has ever considered they had power to grant. If an employer breaks his contract of service with his employees either by not giving notice to which the latter are entitled or by discharging them summarily for a reason which cannot be justified, the workmen's remedy is for damages only.”

At the most there could be a judgment for damages for wrongful dismissal. I suspect that this is what the industrial court intended. Any order for reinstatement could be frustrated by the employer giving the requisite notice, in this case one month, I believe. I do not see any purpose in referring the matter back to the court to make an adjudication on a matter which it has no power to entertain. It is of the essence of an order of mandamus, a discretionary matter, that

it will be effective: *R. v. Army Council, Ex parte Ravenscroft* (4). Mr. Ochieng will not benefit from any order that I might make. He can only benefit by a successful suit for damages for wrongful dismissal.

The application is misconceived. It is dismissed with costs.

Application dismissed.

For the applicant:

Abu Mayanja & Co., Kampala

A. V. Clerk (Union of Clerical, Commercial and Technical employees).

For the first respondent:

Attorney-General, Uganda

V. W. K. Nyakabwa (the President of the Industrial Court).

For the second respondents:

Mboijana & Co., Kampala

C. Mboijana (Uganda Distributive Merchant Traders' Association).

**The City Council of Dar-Es-Salaam v Twentsche Overseas Trading Co Ltd
and others**
[1967] 1 EA 224 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	19 July 1966
Case Number:	18/1965
Before:	Duff J
Sourced by:	LawAfrica

[1] *Highway – Street – Whether public or private – No presumption of dedication – No evidence of usual maintenance and repairs – Private Street Works Ordinance, s. 2, s. 3, s. 6 and s. 20A (Cap. 347) (T).*

[2] *Evidence – Onus on objectors under s. 6 of the Private Street Works Ordinance (Cap. 347) (T.) – Admissibility of documentary evidence.*

[3] *Statute – Construction – Interpretation of “public street” – Private Street Works Ordinance (Cap. 347), s. 2, s. 3, s. 6 and s. 20A (T).*

Editor's Summary

The Dar-es-Salaam City Council prepared a scheme under the provisions of s. 3 (1) of the Private Street Works Ordinance (Cap. 347) (T.). The street, which was in the city of Dar-es-Salaam, was an unnamed one and the frontagers were called upon to contribute to the cost of making up the road. Four of the frontagers objected to the proposed scheme and their objections were upheld in the lower court, the learned magistrate holding that the street in question was a public one and not subject to the provisions of the Ordinance. The City Council appealed on the grounds (i) that a telephone directory, a trading licence and title deed plans were wrongly admitted as evidence in the lower court and (ii) that even if those documents were correctly admitted, they were not evidence of the truth of the statements made therein. The documents in question and the evidence of one witness constituted the case for the objectors and the learned magistrate held that under s. 6 of the Private Street Works Ordinance (Cap. 347) the burden of proving that the street involved was a public one lay on the objectors. The documents all afforded evidence that the street in question was a continuation of Azikiwe Street, which was admitted by the city engineer to be a public street.

Held –

- (i) the telephone directory was admissible only to show that the street in question was listed in the directory as Azikiwe Street and nothing more; the trading licence referred to premises, the owners of which were not objectors or parties to the proceeding, and therefore it was inadmissible; the title deed plans were made for a different purpose and could not be accepted as evidence of whether the street was public or not;

- (ii) the onus of proving that the street in question was a public street lay on the objectors, and was not discharged;
- (iii) a presumption of dedication could not arise as, although it could be presumed on the evidence that the street was used by members of the public, the evidence of long and uninterrupted user was sparse, if not negligible.
- (iv) there was only evidence of isolated instances of maintenance and repair which could not be termed usual maintenance and repair and would be urgent repairs within the meaning of s. 20A of the Ordinance;
- (v) part of a street may be public while the remaining portion may be a private street subject to the provisions of s. 3 of the Private Street Works Ordinance (Cap. 347).

Appeal allowed.

Cases referred to in judgment:

- (1) *Huyton-with-Roby Urban District Council v. Hunter*, [1955] 2 All E.R. 398.
- (2) *Crease v. Barrett* (1835), 4 L.J. Ex. 297.
- (3) *Twickenham Urban District Council v. Munton*, [1899] 2 Ch. 603.

Judgment

Duff J: The Dar-es-Salaam City Council (hereinafter referred to as the Authority), prepared a scheme under the provisions of s. 3 (1) of the Private Street Works Ordinance (Cap. 347), the scheme being approved by the Minister in accordance with the provisions of s. 3 (2) of the Ordinance. The street concerned is one situate in the city of Dar-es-Salaam and said by the Authority to be an un-named one, linking Upanga Road and a street which is now known as Titi Street. The frontagers along this un-named street were called upon to contribute to the costs of making up the road, the Authority bearing the rest of the charges. Four of the frontagers objected to the proposed scheme and the learned senior resident magistrate at Dar-es-Salaam upheld their objections, he holding that the street in question was a public one and therefore not subject to the provisions of the Ordinance. From this decision the Authority has now appealed.

In s. 2 (1) of Cap. 347, “public street” is defined as follows:

“‘public street’ means, in relation to any authority, any street or land over which the public have a right of way –

- (a) (i) which has been set apart or appropriated by the Minister for use as a street, and is under the general control and care of the authority, or which has been conveyed to the authority and has been accepted by them and is used as a street;
- (ii) which is or has been usually repaired or maintained in whole or in part out of the public funds of the territory or of an authority; or
- (b) which has been declared by the authority under the provisions of ss. 17, 18 and 20A of this Ordinance to be a public street.”

From this definition it follows that there are at least three requirements which have to be satisfied before

it can be established that the street involved is a public one, and the learned magistrate held that the burden of proof lay upon the objectors. Section 6 of the Ordinance governs the procedure for hearing and determining objections and differs from s. 8 (1) of the English Act, the Private Street Works Act, 1862; under the latter section the onus is placed on the Authority to establish their allegations as if they were plaintiffs in civil proceedings while in this country the burden of proof lies on the objectors, a burden that

may be an onerous one. I am of the view that the learned magistrate was right in holding that the onus of proof was on the objectors (see *Huyton-with-Roby U.D.C. v. Hunter* (1), [1955] 2 All E.R. at p. 403).

The road in question has been described by the objectors as a continuation or part of Azikiwe Street, formerly known as Ingles Street and before that as Versailles Street. After hearing evidence and the submissions of the advocates for the parties, the learned magistrate concluded:

“The evidence of reputation of this piece of road is such as to satisfy me that it is a portion of Azikiwe Street and in view of the admission of the Executive Engineer of the Council that Azikiwe Street is a public street, I find this piece of road is a public street and not subject to Cap. 347 at all.”

It will be necessary to consider the evidence adduced which led the lower court to the above conclusions. Only one witness was called by the objectors and his evidence together with some documents constituted their case.

Counsel, on behalf of the appellant authority, urged that the objectors endeavoured to establish their case by the production of documents, some of which were wrongly admitted by the learned magistrate, and even if they were admissible that they were not evidence of the truth of the statements made therein. The documents concerned are (a) a telephone directory, (b) a trading licence and (c) title deed plans.

Dealing with the telephone directory and the trading licence, it was suggested that their admission offended the hearsay rule. When the telephone directory (Ex. H) was produced in the lower court, counsel for the Authority objected, but the learned magistrate admitted it on the basis that it afforded evidence that the street in these proceedings was listed in the directory as Azikiwe Street and nothing more. It would not appear from the ruling of the learned magistrate that he regarded this exhibit as evidence proving the truth of facts asserted therein, and in this event, I am satisfied that the directory was properly admitted. If, however, the learned magistrate considered the entries in Ex. H as affording “evidence of reputation of the piece of road”, then clearly he was wrong and I would agree with the contention of counsel for the appellant Authority that this evidence was hearsay and should have been rejected.

The trading licence of Messrs. Patel Stores (Ex. D) was produced in evidence by the objectors’ witness, Mr. Solanki, a civil engineer, and the purpose was to show that these stores were situated in a street known as Azikiwe Street. A remarkable feature is that this document refers to premises, the owners of which are not objectors or party to these proceedings. I cannot see how this trading licence could be admitted in the circumstances in which it was, in that it offended the hearsay rule and certainly the provisions of s. 32 of the Indian Evidence Act could not be invoked to support its admissibility.

The title deeds (Exs. B and C) of the third and second objectors were also produced by Mr. Solanki, and counsel for the appellant Authority submitted that the plans attached to the deeds only served to indicate plots and blocks of land with special reference to the plot in respect of which the lease or right of occupancy was granted. As may be gathered from s. 86 of the Land Registration Ordinance (Cap. 334), the index map, from which the plans attached to the deeds (Exs. B and C) are presumably taken, shows the boundaries of registered land, the blocks or area, each with a reference number, in which the Territory is divided and the parcels of land in each block numbered consecutively.

Examination of the plans and title deeds (Exs. B and C) shows that mention is made of property adjacent to Upanga Road in one document (Ex. B), while in the other reference is made to a property at the junction of Upanga Road and Ingles Street (now Azikiwe Street). I do not see what reliance can be placed on

these documents to show whether a street is a public one or not. Counsel for the respondent referred me to various sections of the Indian Evidence Act and argued that these documents are records made by public servants in the performance of their duties and that they are relevant. There can be no dispute about this, but these documents are admissible only for the purpose for which they were made, and it cannot be suggested that they were made to show rights of way or public or private streets. The plans were made for a different purpose, viz. to indicate blocks and parcels of land, and whilst they afford satisfactory evidence of these matters they cannot be accepted as evidence of whether a street is public or not.

It was suggested by the objectors' advocate that the telephone directory was genuine and with this there can be no quarrel, this also applying to the trading licence (Ex. D). What must be borne in mind, however, is that the information contained in those exhibits, and which is material to this case, is largely supplied by the objectors, or some of them, and others occupying premises in the area in dispute, without any reference to the City Council. If a street is unnamed it is only natural that one should seek to particularise its location, and the persons most interested in this would naturally be those occupying premises in the particular area. I cannot see, however, that the naming of a street by such persons can afford evidence that the City Council accepts such a street to be a public one.

The learned magistrate referred to survey plans produced by the respondents and appellants (Exs. A and I) which, he stated, showed the disputed road as being a full width one in conformity with Azikiwe Street, the street not actually being named. Section 18 of the Land Survey Ordinance, Cap. 390, provides that plans based on a general cadastral survey and approved as such by the City Surveyor are *prima facie* evidence of the correctness of the position of the boundaries shown thereon and a cadastral survey, as may be gathered from s. 2 of Cap. 390, is concerned with boundaries of lands. No evidence can be gleaned from these plans from which it could be inferred that the objectors' street was part and parcel of Azikiwe Street. Indeed on the plan (Ex. I) it is specifically stated that representation on the map of a road, track or footpath is no evidence of the existence of a right of way.

A plan of a scheme of road construction (Ex. E) produced by the appellant's executive engineer, Mr. Soppelsa, was referred to by the learned magistrate and emphasis was laid on the fact that the disputed street is shown as Ingles Street, the former name of Azikiwe Street. It would appear that the learned magistrate inferred from this that the City Council considered the street to be a public one. The plan (Ex. E) refers to a proposed construction of a road and the letter (Ex. F) which conveys the approval of the Minister of Local Government and Housing for the scheme, identifies the street as an unnamed one linking Upanga Road and Titi Street. It appears to me that it would be unreasonable to attach any significance to the fact that the disputed street was named in the plan (Ex. E) and if the learned magistrate did, although this is not quite clear, I would hold that he had erred.

In deciding whether a street is public or not, evidence of reputation is admissible and a court is bound to take into consideration any map, plan or other relevant document that is tendered in evidence and to give such weight to these as it considers justified in the circumstances. Certainly little weight would be attached to the documents, plans, etc., produced in the lower court to show that the street was public, and this is on the assumption that all the exhibits were admissible. Evidence of reputation was relied upon by the learned magistrate as satisfying him that as the street was a portion of Azikiwe Street it was a public street. The evidence of Mr. Solanki does not contribute a great deal to reputation of user,

he merely saying that anybody can go on this particular road. In *Crease v. Barrett* (2) (4 L.J.Ex. at p. 302) it was stated:

“Where the right is really public – a claim for a highway, for instance – in which all the King’s subjects are interested, it seems difficult to say that there ought to be any such limitation; and we are not aware that there is any case in which it has been laid down that such exists. In a matter in which all are concerned, reputation from anyone appears to be receivable; but of course it would be almost worthless, unless it came from persons who were shown to have some means of knowledge, as, by living in the neighbourhood, or frequently using the road in dispute. In the case of public rights, in the strict sense, the want of proof of the persons from whom the hearsay evidence is derived, being connected with the subject in question, appears to affect the value and not the admissibility of the evidence.”

It was not suggested how Mr. Solanki acquired his knowledge of the street and it is not known whether he lived in the area or frequently used the street in dispute. Whilst it may be presumed that the street was used by members of the public a presumption of dedication could not arise in this case as the evidence of long and uninterrupted user is sparse, if not negligible.

There was no mention made in the judgment of the lower court of whether or not the street had been usually repaired or maintained out of public funds, and this question had to be considered unless the street had been declared a public one by the Authority, in this case the City Council, under the provisions of ss. 17, 18 and 20A of Cap. 347. The only evidence as to maintenance or repairs of the disputed street was confined to the fact that Council employees filled in the potholes on the said street while palm trees situated on the road, which were considered dangerous, were cut down at the expense of the Council, the cost of the tree-felling being added to “Private Street Works”, as no funds were available for maintaining the street. Absence of any evidence that payment had been made by the Authority out of public funds is a strong point against the objectors. These isolated instances of maintenance and repair could not be termed usual repairs or maintenance and would, in fact, be urgent repairs within the meaning of s. 20A of Cap. 347, it being open to the Authority to recover the costs of such repairs as a simple contract debt, if they so desired.

Many authorities were cited to me in support of the arguments put forward on both sides which I have read and I do not think it necessary to refer to them further. I would, however, briefly refer to one authority cited by the Authority’s advocate, viz. *Twickenham Urban District Council v. Munton* (3). The learned magistrate concluded that as Azikiwe Street was a public street, and admitted to be so by the city engineer, the piece of road in dispute was part and parcel of Azikiwe Street and therefore a public street. It is clear from the English authority cited and from ss. 4 and 17 of Cap. 347, that part of a street may be public and repairable by inhabitants at large while the remaining portion may be a private street subject to the power of the Authority to prepare a scheme in respect thereof in accordance with the provisions of s. 3 of the Ordinance.

I agree with learned counsel for the respondents in his submissions as to the burden of proof shifting, but regrettably I must find from the evidence in the lower court that no question of the burden shifting from one party to the other arose as little or no evidence was adduced to support the objections while the case put forward by the appellant Authority amply supported the contention that the street was a private one and that the frontagers or objectors could properly be charged with making up the road, or rather contributing to the cost.

A second objection was raised, viz. that the proposed works were unreasonable as exceeding the requirements of a standard street. The learned magistrate did

not deal with this ground in view of his finding that the street was a public one and the advocates did not appear to be concerned with it before me. I am satisfied that the evidence adduced before the court on this aspect of the case was rather sparse also and that even if sufficient had been introduced to shift the burden the case was fully met and the arguments disposed of by the evidence of the city engineer.

For these reasons I must allow this appeal and hold that the street in question is a private one, the frontagers being liable for portion of the costs of the construction involved.

Appeal allowed with costs.

For the plaintiff:

Sayani Balsara and Velji, Dar-es-Salaam

J. Balsara, with *S. Hirji*

For the defendant:

R. C. Kesaria, Dar-es-Salaam

Ayo v Simeon
[1967] 1 EA 229 (HCT)

Division:	High Court of Tanzania at Arusha
Date of judgment:	15 March 1966
Case Number:	10/1965
Before:	Georges CJ and Bannerman J
Sourced by:	LawAfrica

[1] *Elections – Validity – Correct procedure in regard to counting of votes not observed – Ballot boxes not opened by returning officer in accordance with National Assembly (Elections) Act 1964, s. 56 (T).*

Editor's Summary

The unsuccessful candidate in the National Assembly elections in the Arusha Rural constituency asked the court to declare the election null and void on the grounds that the proper procedure in regard to the opening of sealed ballot boxes and the subsequent counting of votes had not been followed; a further ground was raised by the petitioner, viz., that of improper campaigning at the polling station by the person in charge of that station.

The returning officer was found by the court to be a man of integrity but inexperienced in election procedure. The seals of the ballot boxes were opened by schoolboy enumerators in the presence of one candidate and several other persons and not by the returning officer or his assistant as required by National Assembly (Elections) Act 1964, s. 56 (T.). The same section further requires that each box

should be checked separately and the numbers recorded, after which the votes from all boxes must be mixed together and counted again. The court found that no such procedure had been followed.

The returning officer was not satisfied that the forty schoolboy enumerators were properly carrying out their task and he himself undertook a scrutiny and re-count of the votes after dismissing the schoolboys. The results of the re-count were 19,975 votes for the petitioner, 20,056 for the respondent and 381 ballots spoiled; the returning officer, however, assigned two assistants to total the votes counted by the schoolboys and at that stage it was found that 40,738 ballot papers had been used, 76 of which were spoiled papers. The total ballot papers in the boxes were 40,412 instead of 40,662 from which it appeared that 250 papers were unaccounted for.

Held –

- (i) the failure to follow the proper procedure and the admitted confusion gave good ground for the deduction that there was opportunity to remove ballot papers from the room;
- (ii) there was no check to ensure that all ballot-papers were accounted for;
- (iii) with a majority of eighty-one votes, it was clear that the 240 votes unaccounted for might well have affected the result.

Petition allowed.

No cases referred to in judgment.

Judgment

Georges CJ, read the following judgment of the Court: In this petition the unsuccessful candidate for the Arusha Rural Constituency prays that the election be declared void for the reasons stated in paras. 3 (a)-(g):

- “(a) Contrary to s. 56 of the National Assembly (Elections) Act, No. 11 of 1964, the sealed ballot boxes were opened by enumerators in the absence of authorised officers.
- (b) Contrary to s. 64, sub-s. (2) of the said Act, the sealed packets containing the counterfoils of used ballot papers were opened under the authority of a mere supervisory delegate and an objection by your petitioner’s counting agent went unheeded.
- (c) Besides the appointed enumerators, other persons unauthorised interfered and took part in the counting of votes, thereby contravening s. 55 of the said Act which expressly provides for the exclusion of such other persons (except with the consent of the Returning Officer). The atmosphere surrounding the counting of votes was one of confusion as enumerators and others unauthorised taking part therein left the hall and re-entered as and when they pleased.
- (d) Section 59 of the said Act provides that the Returning Officer or an Assistant Returning Officer shall endorse the word ‘rejected’ or ‘rejection objected to’ (if so) on the ballot papers to be counted under s. 58, but no such endorsement was made by the Officers concerned in spite of your petitioner’s counting agent’s pointing this out.
- (e) On several occasions it was discovered that the one among the three supervisory delegates gave wrong results to the recorder after counting and in each case being blatantly prejudiced in favour of the opposing candidate. It is significant that on the first count your petitioner lost by about 500 votes and that on recount the figure was reduced to eighty-one.
- (f) One Nashaka Sanane in charge of Polling Station Usa River organised a campaign against your petitioner and persuaded voters at the Polling Station itself to vote in favour of your petitioner’s opponent, thereby abusing his official position.
- (g) Because of such flagrant disregard of the procedure prescribed to be adopted and lack of proper and adequate supervision one ballot paper box No. 115B remained unaccounted for until a recheck was made whereupon a total of 232 votes were recovered having been fraudulently misplaced and all being in favour of your petitioner. Five votes cast were not found but were assumed to be in favour of your petitioner’s opponent.”

Sub-paragraphs (a), (b), (c), (d), (e) and (g) all deal with matters occurring after the close of poll and allege irregularities in the counting procedure. Paragraph (f) raises an issue of campaigning contrary to National Assembly Elections (Amendment) Act, 1965, s. 39.

Some evidence was led in support of sub-para. (f), but in the event it was not necessary to investigate it fully. Suffice it to say that on the facts before us the charge had not yet been substantiated to the extent which would have been required to cast doubts on the fairness of the election.

It was otherwise with the remaining sub-paras. It was clear to us as the case developed that there was much to complain about in the procedure followed after the closing of the poll. The returning officer, Mr. Makwaia, impressed us as an officer of much intelligence, undoubted integrity and exceptional devotion to duty. He was, however, inexperienced in election procedure and did not adequately appreciate the need to follow literally the provisions laid down by the Act to ensure that things were properly done. There is not the slightest suspicion of corrupt motive and had the margin of victory been wide, one may have well found that the irregularities were not enough to vitiate the election. In this case, however, the majority was one of eighty-one votes and we are of the view that the irregularities were such as to affect the result of the election within the meaning of National Assembly Elections Act 1964, s. 99.

Paragraph 3 (a) of the petition alleges that the sealed ballot boxes were opened by enumerators in the absence of authorised officers. This was not proved and indeed we are satisfied that this was not so. But s. 56 required that the ballot boxes be opened by the returning officer himself or his assistant in the presence of the candidates. This was not done. The seals of the ballot boxes were opened by the enumerators. We find that at least one candidate, both counting agents, the supervisory delegates and the returning officer and his assistant were present when this was being done, but when it is remembered that some forty ballot boxes were being unsealed and opened separately by forty schoolboy enumerators, it is difficult to feel satisfied that there was no likelihood of some irregularity resulting either from negligence and inattention or from dishonesty.

There was yet another breach of s. 56. The section required that the boxes should be checked separately as soon as they were opened and the numbers recorded. The votes from all the boxes should then be mixed together and counted to ascertain how many had been cast for each candidate. The reason for this provision is no doubt to ensure that the total number of votes cast is known before the counting of votes for each candidate begins. This total number can then be verified against the ballot paper account submitted by each polling station. It also helps to preserve the secrecy of the ballot, particularly in a polling station where there is near unanimity in favour of one candidate as indeed in Box 115B where there were 232 votes for the petitioner and possibly only five for the respondent.

The ballots were not in fact mixed before they were counted and indeed there was no effort made to check the total number of votes against the ballot paper accounts. The result was confusion.

Counting began at 9.00 a.m. on September 27 with forty schoolboys. I believe Mr. Makwaia when he says that at the start supervision was quite thorough, but in the nature of things, with forty schoolboys, it could not have been thorough enough. The total number of votes was a little over 40,000, thus allowing an average of 1,000 per schoolboy. Yet by 1.00 p.m. only about half the votes had been counted. Mr. Makwaia himself was dissatisfied with the performance and reduced the staff to twenty after lunch, no doubt to ensure greater efficiency – a tacit admission that things were not being run well enough and could be improved.

About 6.00 p.m., some four hours after lunch, the returning officer had cause to think that the count was not going well. He suspected that a lad, Kennedy, was withholding the result of a box over which he had delayed some three hours. He established finally that the boy checked a ballot box and had slipped the ballot papers among those already checked without handing in the result. That box contained 237 votes.

With great determination the returning officer set about a scrutiny of the votes to discover the missing votes by tracing the counterfoil numbers on the ballots which had been cast. He discovered that there were 232 of the votes among the ballot papers already counted for the petitioner. The supervisory delegates thought that it would be too much to go through the respondent's ballot as well, and it was assumed that the five votes had been cast in his favour. These facts need only be stated to show how unsatisfactory the position was.

Before beginning this recount, the returning officer dismissed the schoolboy enumerators and a small group, consisting of himself, his assistant, the three supervisory delegates, his clerk, Mrs. Siyovelwa, Mr. Naiman, a member of the District Executive Committee, the candidates and their counting agents remained to do the job. It was a test of endurance – non-stop from 9.00 p.m. to 2 a.m. It would be asking much to expect the best from men who must so clearly have been pressing beyond the level of normal endurance.

After this count the result was announced as 19,975 votes for the petitioner and 20,056 for the respondent with 381 ballots spoilt.

The results of the first count by the schoolboys which was completed had never been totalled. It appears that later Mrs. Siyovelwa, who is a sister of the petitioner, totalled them and started a rumour that some five hundred votes had not been accounted for on the recount. The returning officer heard this rumour and asked one of his clerks, Pascal Swai, and a certain N. K. Simon, to check how many votes had been cast in the election.

It should be mentioned that there is some conflict on the point. Simon states that the returning officer asked him to check how many votes had been cast for Nyumba and how many for Jembe. The returning officer denies this. We accept the returning officer's version. We must express quite precisely our disapproval of the course followed by the returning officer in this instance. We appreciate that he wished to help get to the bottom of the matter, but he should have realised that it was well past his curing. He was surprised to discover that Simon and Pascal had opened the envelopes of sealed counterfoils which should never have been opened except on the order of the court. He says that he did not expect them to do it, that he expected them to work from the ballot paper accounts. He had himself, however, doubted their accuracy during the original count and had thought that little reliance should be placed on them. The possibility that the counterfoils would have been tampered with should have occurred to him.

Simon denied that he tampered with the counterfoil books. We find it difficult to accept his word on the point. The admitted result of his check is a grand total not divided into votes per candidate, which is what he says he was asked to do. This grand total is consistent with a check of the counterfoils. The returning officer committed an error of judgment in allowing Simon to have access to such documents. At the time he was serving a term as an extra-mural labourer. His offence was one involving dishonesty. Because he was educated, the returning officer in his role as administrative officer allowed him to work at the District Office. This seems to us undesirable.

The check made by Pascal and Simon did not, however, agree with the official count declared by the

returning officer. The court, therefore, decided that another check should be made of the counterfoils to discover the actual number of vote

cast. This check was conducted by Mr. Osman, the secretary of the Electoral Commission, and Mr. Bhatt, the Assistant Registrar of the Court. In the course of it some further inefficiency was revealed.

127 envelopes had been tendered by the returning officer as those containing the relevant counterfoils. This seemed surprising as there had been 126 polling stations and the ballots had been put up polling station by polling station. On examination it was found that one envelope contained ballot counterfoils for the 1962 presidential elections. This was put aside.

On the remaining 126, seven were found to contain ballot counterfoils for the presidential elections conducted the same day. A search among the envelopes supposed to contain presidential ballot counterfoils produced the seven missing envelopes of parliamentary election counterfoils.

Of the 126 envelopes, 123 could be assigned to specific ballot boxes. Three could not. There had been mistakes in labelling some of the envelopes and some bore no labels at all. Nevertheless the three to which no ballot boxes could be assigned were identified fortunately by the names of the polling stations on them. Mr. Osman, the secretary of the Electoral Commission, who gave the result of the check, was satisfied that all the counterfoils had been accounted for though clearly they had been opened and to some extent mixed after the poll.

He found that 40,738 ballot papers had been used. Seventy-six were spoilt ballot papers. There should therefore have been found in the boxes 40,662. The official result declared by the returning officer was as follows:

Petitioner	19,975
Respondent	20,056
Spoilt	381
	<hr/>
	40,412

It appeared, therefore, that 250 ballot papers were not accounted for.

Mr. Cassidy accepted the result of the check and in the circumstances could not argue that the result of the elections might not have been affected. It should be noted that apart from this total check, there was confirmatory evidence from the examination of a random ballot box in the Usa River T.A.N.U. Office polling station.

The ballot paper account showed five hundred papers received and ninety-eight returned. The number of votes in the box was stated to be 402. The count showed 141 votes for the petitioner and 258 for the respondent, a shortfall of three unaccounted for at the time of the counting and still unaccounted for.

In the circumstances, we are satisfied that the failure to follow the proper procedure and the admitted confusion in what may be called the first count, give good ground for the deduction that there was opportunity to remove ballots from the room or else to check them without including the amount in the grand total. There was no check to ensure that all ballots received were accounted for.

With a majority of eighty-one votes, it is clear that the 250 votes unaccounted for may well have affected the result, and accordingly we declare the election null and void.

The question of costs has much agitated our minds. The arguments of the respondent are persuasive, and we agree that his attitude has been sensible and co-operative and that he has not opposed for the sake

of opposing. We agree also that the election has been declared void for reasons over which he had no control. Costs are in our discretion. We think the normal rule that they should follow the event should be applied in this case unless there are special circumstances. We think the circumstances should be circumstances such as would justify depriving the petitioner of his costs, and there are none here. The petitioner

has set up a case which he has established. We think he should have his costs and order accordingly.

Petition allowed. Election declared null and void.

For the petitioner:

M. Behal with *R. K. Vohora*, Arusha

For the respondent:

D. Cassidy with *J. R. W. S. Mawalla*, Arusha

R. K. Vohora for the petitioner.

D. Cassidy for the respondent.

For the Republic:

M. Bomani (Attorney-General, Tanzania) and *F. B. Mahatane* (State Attorney, Tanzania)

Bura v Sarwatt
[1967] 1 EA 234 (HCT)

Division:	High Court of Tanzania at Arusha
Date of judgment:	16 March 1966
Case Number:	11/1965
Before:	Georges CJ and Bannerman J
Sourced by:	LawAfrica

[1] *Elections – Irregular practices – Consumption of alcohol by officers presiding at Polling Stations – Removal of voters to alternative Polling Station – Presiding Officer marking papers on behalf of voters – National Assembly (Elections) Act 1964, s. 47 (1) (T).*

[2] *Elections – Validity – Irregular practices – Specific irregularity affecting precise number of votes – Consequent reduction in majority but not reversal of result – Whether “affects the result of the election” – National Assembly (Elections) Act 1964, s. 99 (T).*

Editor’s Summary

The unsuccessful candidate in the Mbulu North constituency in the elections for the National Assembly asked the court to set aside the election on several grounds, three of which were subsequently abandoned. The main allegations proceeded on were (i) that at the Manyara polling station, there was an attempt to influence voters in favour of the respondent, (ii) that alcohol was consumed by officers on duty at Manyara polling station, (iii) that a lady assistant at Manyara polling station had been accommodated at

Lake Manyara Hotel at the expense of the respondent, (iv) that a duly appointed polling agent was excluded from the polling station by the presiding officer, (v) that voters were transferred and admitted to vote at polling stations other than those allotted to them in contravention of National Assembly (Elections) Act 1964, s. 47 (1), and (vi) that the presiding officer marked ballot papers himself on behalf of voters and in some instances, invalidated the ballot papers by marking both (“v”) and (“X”) on the same papers.

Held –

- (i) there was no evidence to support the allegation of attempts to influence voters at Manyara polling station;
- (ii) there was no provision in the law making the consumption of alcoholic beverages at polling stations an offence;
- (iii) there was no evidence that the respondent paid for the hotel accommodation of the lady assistant at Manyara polling station;
- (iv) the exclusion of the polling-agent from the polling station by the presiding officer was a non-compliance with the Act, but it was not substantial and there was no reason to think that it could in any way have affected the result;
- (v) the transfer of voters and their admission to vote at polling stations other than those allotted to them constituted a non-compliance with the Act but such non-compliance did not affect the result of the elections;
- (vi) as a result of the marking of ballot papers by the presiding officer with both a (“v”) and a (“X”), 480 votes were spoiled which would otherwise have gone to the petitioner;

- (vii) allowing that 480 spoiled votes would have properly been cast for the petitioner, the respondent would still have a majority of forty-six votes. The result of the election was not affected.

The court emphasised the undesirability of allowing persons who have no official business there to hang about polling stations and also of the undesirability of serving alcohol at polling stations.

Petition dismissed.

Cases referred to in judgment:

- (1) *Mbowe v. Eliufoo*, p. 240, post.

Judgment

Georges C J, read the following judgment of the Court: In this petition the unsuccessful candidate in the Mbulu North Constituency, Mr. George Bura, prays that the election be declared void for a number of reasons which have been set out in para. 3 thereof.

No evidence was led to substantiate three of the allegations made, and in his closing address the advocate for the petitioner said that he abandoned them. Accordingly we are no longer concerned with those sub-paras. – (b), (d) and (e) – which read as follows:

- “(b) At Mbulu, the counting station, the seals of six ballot paper boxes were found to have been tampered with while they were in transit to the above-mentioned place;
- (d) The ballot papers which, under the provisions of s. 48 were not to be counted were not endorsed by the requisite words, thus contravening s. 59 of the said Act;
- (e) Your petitioner was precluded from appointing a counting agent.”

Sub-paragraph (g) makes the following allegation:

- “(g) At Manyara polling station one Gale Lasseke, an employee of the Lake Manyara Hotel was caused or allowed to stand at the head of the queue of voters and instruct the voters to vote in favour of your petitioner’s opponent.”

It was established that Gale Lasseke was present throughout polling day at the Lake Manyara Polling Station. It was also proved that he stood near the door of the polling booth and was helping to usher voters into the station. There was no evidence, however, that he was in any way attempting to influence voters and such evidence as there was indicated that he did not do so. Certainly he did not try to influence David Samuel nor did Samuel hear him influence anyone else. Leonsi Tluway, who was at the Polling Station all day, did not hear Lasseke attempt to influence anyone. He was some twenty to twenty-five feet from him.

We think that it is undesirable that persons should be allowed to hang about polling stations who have no business there. Electors who have cast their votes should leave. The maintenance of order outside the booth should be in the hands of officials. This will certainly reduce the suspicion that persons who hang about the station are doing so for ulterior motives. In this case there is no evidence to support the allegation and accordingly it cannot affect the result of this petition.

Sub-paragraph (h) reads as follows:

- “(h) Alcohol was consumed by Officers on duty at the Manyara polling station procured or sent from the

Hotel in proximity thereof.”

This allegation has been established. Four bottles of beer were supplied by the Lake Manyara Hotel Ltd. to the polling station. The evidence is that it was consumed by the presiding officer, the polling assistant and the polling agent. Our attention has not been drawn to any provision in the law which makes it an offence to serve alcoholic beverages in or about polling stations. If this were allowed to develop into a practice, this would be quite undesirable and legislation may well be required to prohibit it. Tied to this allegation, though not specifically pleaded, was another that the polling assistant at the Manyara station, a lady called Makrina, had been accommodated at Lake Manyara Hotel on the eve of the election at the expense of the respondent. It was also alleged that the price of the beers supplied to the polling station was placed on Mr. Sarwatt's bill.

We accept the evidence of the witness Anton Raphael that Makrina turned up at the hotel with a letter which she said came from Mr. Sarwatt, that she was taken to the manager with the letter and that the manager thereupon assigned her to room 14. Clearly this is not enough evidence on which we can find that Mr. Sarwatt paid for Makrina's accommodation. It may well be that Makrina told Anton Raphael to put the cost of the beers on Sarwatt's bill and that Raphael told the barman to do so.

The letter which the manager read has not been produced. The manager himself has not been called as indeed he could have been to testify as to the arrangements made for meeting Makrina's bill. Makrina is a typist with the Native Treasury at Mbulu. It is unlikely that she could afford a night at the cost of Shs. 140/- at a high class tourist hotel. We cannot, however, act on suspicion. There is no evidence that the letter came from Mr. Sarwatt or that Makrina, who was not called and has not been cross-examined, was speaking the truth.

All that remains, therefore, is the fact that drink was served at the polling station which was not paid for by the workers there. Apart from the incident of refusing to allow the polling agent permission to stay inside the polling station, there is no evidence that irregularities were permitted at the station. Such evidence as there is from Raphael and Leonsi, who have no reason to be friendly, would indicate that they were not.

In the circumstances sub-para. (h) does not allege an illegal practice nor does it allege a breach of the Act. What it sought to do was to allege treating by the candidate and that the evidence has failed to establish.

There was a further sub-para. (f) which was not contained in the petition as published in the Gazette and did not appear on an original attached to the court file. It was, however, set out in the copy of the petition exhibited on the notice board of the court and in the copy served on the respondent, in compliance with the election directions. The Attorney-General stated that he had no official notice of it. Counsel for the petitioner asked that this paragraph should be regarded as having been included in all the copies of the petition. The error apparently arose through two originals having been typed, each with two carbons. In one copy sub-para. (f) was included and in the other it was omitted. Hence some copies in the court file did not include the sub-paragraph, while those sent to the respondent and put up on the notice board did.

We granted leave to have the record rectified by inserting the sub-paragraph and allowed evidence to be led on the point. The evidence established that Mr. Leonsi Tluway was duly appointed a polling agent to serve at the Lake Manyara Hotel polling station. He says, and there is no reason to doubt him, that the presiding officer knew of his appointment and indeed collected him at his home and took him to the polling station in his car. At the polling station he was allowed to cast his vote and then was asked by the

presiding officer to leave the station. He protested stating that he had a right to be present in the polling station itself. The presiding officer disagreed and said that no-one but himself and his polling

assistant had a right to be in the station and that he will produce a book as authority to establish that proposition. Mr. Tluway went outside and complained to the policeman and invited him in to be present at the production of the law on the matter. The presiding officer produced some book and said that Mr. Tluway's name was not in it and that Mr. Tluway should leave the polling station. This he did. He spent the day outside, except at lunch-time when he was asked in to partake of the refreshments which were provided in the circumstances already discussed above.

Clearly the presiding officer was wrong in excluding Mr. Tluway from the polling station. The polling agent is there to help ensure that there is no personation and that the person who presents a card is in fact the voter entitled to hold that card. This he could properly do if he is present in the station at the time the elector presents himself. Counsel for the petitioner said that there was a sinister motive in the exclusion of Mr. Tluway, but we see no justification for this on the evidence led before us. There was disagreement based no doubt on the presiding officer's faulty interpretation of the law. There was no hard feeling, as can be seen from the fact that Mr. Tluway was invited in to partake of the refreshments as a worker in the election. But he was also told that at the close of poll he would be invited inside to see that the documents were properly dealt with. His exclusion from the station was a non-compliance with the provisions of the Ordinance, but certainly it was not substantial and we have no reason to think that it could in any way have affected the result:

The two remaining sub-paras. (a) and (c) raise serious issues.

Sub-para. (a) reads as follows:

“(a) The voters were transferred and admitted to vote at polling stations other than those allotted to them in contravention of s. 47 (1) of the said Act.”

This allegation was established. Fifty voters at least were moved from the Karatu polling station to the Kambi ya Nyoka booth, both of which are in the Karatu polling district. The returning officer testified that this was the practice when there was heavy pressure on any one polling station.

The law on the matter is clear. The National Assembly (Elections) (Amendment) Act 1965, s. 35 (1) provides –

“35(1) Where there is a contested election, the returning officer shall, on or before the eighth day before election day, give notice in the constituency in such manner as he may think fit, as to the following matters:

- (a) the day or days and (subject to the provisions of sub-section (4)) the time or times of commencement and close of the poll;
- (b) the address of the polling station or stations;
- (c) in any district where there is more than one polling station, the voters assigned to each polling station; and
- (d) the full names, addresses, occupations and representative symbols of the candidates.”

There is thus a clear obligation to assign voters to polling stations where there is more than one in one polling district.

The National Assembly (Elections) Act 1964, s. 47 (1) provides:

“No person shall be admitted to vote at any polling station except at the one allotted to him.”

There is a proviso which is immaterial.

The Act seems to envisage that there will be at each polling station a list of electors, and that the voters' names will be checked against the list as they present themselves to vote. This system has distinct advantages. It is possible to know exactly how many people will be at each polling station and to provide a number of ballot papers which will be sufficient though not excessive. Greater security is thus provided for ballot papers. Secondly, it helps to make personation more difficult.

We were informed by the Attorney-General that the Speaker's Office issued instructions which undermined the whole scheme of the Act. Voters were to be allowed to vote at any polling station in their district. So there could be no question of assigning voters to polling stations and of refusing to admit them to a polling station to which they had not been assigned. Section 47 (1) becomes meaningless since voters are not assigned to polling stations.

The resulting administrative inconvenience was obvious. Voters all piled up at some voting stations and had to be moved. Ballot papers were exhausted and more had to be supplied.

It would appear that the scheme envisaged in the instructions did provide safeguards against double voting. Apart from finger staining, the voter's card was stamped. He could not vote unless he presented his card. Once he had voted at one polling station, it would be impossible for him to present himself at another polling station in the same district to cast his vote again.

We are of the opinion that in this respect there was non-compliance with the provisions of the Act and that the election was not conducted in accordance with the provisions of the Act. We do not think, however, that such non-compliance affected the result of the election. The conditions were the same for both candidates. There was no complaint of personation or double voting. It was suggested that there was an ulterior motive in the transfer of candidates from one polling station to another – the idea being that voters would be moved to stations where compliant officials would be guilty of malpractices.

There was no credible evidence to support this. In many ways Edmund Samuel, the witness called to prove this, was unsatisfactory. At first he said that the clerk at the Kambi ya Nyoka station – to which he had been transferred by bus – had placed a mark on the parliamentary ballot though he had not told the clerk the candidate for whom he wished to vote. Later he said that he had told the clerk the name of the candidate for whom he wished to vote. Though he had been given the ballot paper to place in the box and he was literate, he made no effort to unfold it to check how the vote had been cast. Eventually he said that he had not done so because the ballot paper had been pinned with something looking like a needle – senseless and obvious fabrication which sticks in the throat. We can place no reliance on his evidence. Even if we did, it is clear that he was picked at random to be moved to another polling station because of the pressure at Karatu.

There remain the allegations in sub-para. (c), which read as follows: –

- “(c) The Presiding Officer at the Oldeani polling station denied the electorate the elementary right to vote in secrecy in that the following irregularities occurred: –
 - (i) The Presiding Officer was always present where the voting took place.
 - (ii) In most cases the Presiding Officer marked the ballot papers himself on behalf of the voters.
 - (iii) The Presiding Officer recorded the votes on behalf of the voters by putting a mark (i.e. v) against the name of the candidate for whom the voter wished to vote and also by putting a mark (i.e. X) against the name of the candidate for whom the voter did not wish to vote, thereby recording more than one vote and thus invalidating the same.

- (iv) With a result that at the polling station above mentioned a total of 480 votes were rejected, most of which were in fact in favour of your Petitioner.
- (v) The same were not perforated or stamped with an official mark as required by Section 46 (b) (1) of the said Act.
- (vi) The number of votes cast at the Oldeani polling station was in fact higher than the figure declared by the Returning Officer.”

Sub-paragraphs (i), (v) and (vi) were abandoned, no evidence having been led in support of them. Sub-paragraph (ii) was established, but there was nothing to show that the presiding officer acted improperly. There was no evidence to show that he marked ballot papers for any electors other than those who could not mark their ballots themselves.

The presiding officer admitted that he double marked the ballots as alleged in (iii). We have seen the officer and we are satisfied that he acted stupidly but not corruptly. He explained that he did not doublemark presidential ballots because they contained either “Yes” or “No”, and having ticked “Yes”, there was no need to cross “No”. Where there were two candidates, he thought it necessary not only to tick the preferred, but to cross the rejected. He admitted that he had not been instructed to do so, but he saw no harm in it. From his evidence and that of the returning officer it can safely be deduced that 480 votes were spoilt which would otherwise have gone to the petitioner.

In this case the petitioner received 8,476 ballots and the respondent 9,002 – a majority of 526. Allowing that the 480 spoilt votes had been properly cast, the respondent would still have a majority of 46 or so.

The petitioner argued that the words “affect the result of the election” means affect the result totally, including a reduction in the majority of the winning candidate and that it did not mean affect the result only in the sense of reversing it. He quoted from the judgment in the earlier petition – *Mbowe v. Eliufoo* (1) in which it was stated that a result would be affected where what at first seemed a victory by a substantial majority turned out, when allowance was made for irregularities or illegal practices, to be possibly a very narrow victory. We do not wish to resile from that position, but it must be seen in the context of that petition where the allegations were of unlawful campaigning and undue influence. In such cases, once instances are proved to show that there was unlawful campaigning and a substantial number of votes obtained by undue influence, the court may well not need proof of the actual possibility of a reversal of the result if it can be shown that the instances proved reduce the majority to a very narrow one.

In this case, however, a specific irregularity has been proved and the number affected established with near precision. Once allowance has been made for that, the petitioner is compensated. Had the allegation of campaigning at the polling station by Gale Lasseke been established and had it been shown that some voters (though not 46 in number) has been affected, the court may well have said that having regard to the closeness of the contest, the proof of campaigning and the exercise of undue influence, then it could not be satisfied that the result had not been affected. But this is not the case here.

Accordingly the petition fails and is dismissed. The petitioner will pay the respondent’s taxed costs.

Petition dismissed.

For the petitioner:

M. Behal with R. K. Vohora, Arusha

For the respondent:

J. C. Patel, Arusha

For the Republic:

M. Bomani (Attorney-General, Tanzania) and *F. B. Mahatane* (State Attorney, Tanzania)

Mbowe v Eliufoo
[1967] 1 EA 240 (HCT)

Division:	High Court of Tanzania at Arusha
Date of judgment:	10 March 1966
Case Number:	12/1965
Before:	Georges CJ and Bannerman J
Sourced by:	LawAfrica

[1] *Elections – Validity – Onus on petitioner – Meaning of “affect the result” – Appointment of polling agents invalid – Non-providing of ballot papers – Allegations of threats – National Assembly (Elections) Act 1964, s. 99 (T.) – National Assembly (Elections) (Amendment) Act 1965, s. 6 (T.).*

[2] *Statute – Construction – “Proof to the satisfaction of the Court” – Meaning of “affect the result” – National Assembly (Elections) Act 1964, s. 99 (T.).*

[3] *Practice – Evidence – Onus of proof on the petitioner – National Assembly (Elections) Act 1964, s. 99 (T.).*

Editor’s Summary

The unsuccessful candidate in the Kilimanjaro West Hai constituency in the National Assembly elections petitioned for an order that the election was null and void. The grounds relied on included (i) that the polling agent was appointed by the working committee of the District Executive Committee and not by the District Executive Committee as provided by the National Assembly (Elections) (Amendment) Act 1965, s. 6; (ii) that voters who wished to vote for the petitioner were informed that the supply of ballot papers was exhausted; and (iii) that members of T.A.N.U. Youth League organized a campaign on behalf of the respondent and used threats to influence electors into voting on behalf of the respondent.

Held –

- (i) the term “proved to the satisfaction of the Court” as used in National Assembly (Elections) Act No. 11 of 1964, s. 99, meant that where a reasonable doubt existed, then it was impossible to say that one was satisfied, and the standard of proof in this case must be such that one had no reasonable doubt that one or more of the grounds set out in s. 99 had been established;
- (ii) “affected the result” means not only the result in the sense that a certain candidate won and another candidate lost. The result may be said to be affected if, after making adjustments for the effect of

proved irregularities the contest seems much closer than it appeared to be when first determined;

- (iii) the appointment of the polling agents was bad but the non-compliance with National Assembly (Elections) (Amendment) Act 1965, s. 6, was not substantial and did not affect the result of the election;
- (iv) consequent on the exhaustion of the supply of ballot papers, no voting could take place for three quarters of an hour but this was not a substantial non-compliance within the meaning of National Assembly (Elections) Act 1964 s. 99 (2) (b);
- (v) the allegations of threats to electors by members of the T.A.N.U. Youth League had not been established by the evidence;
- (vi) herefore, none of the grounds set out in National Assembly (Elections) Act 1964, s. 99 (2), had been proved.

Petition dismissed.

Cases referred to in judgment:

- (1) *Bater v. Bater*, [1950] 2 All E.R. 458.
- (2) *Re Kensington North Parliamentary Election Petition*, [1960] 2 All E.R. 150.

Judgment

Georges CJ, read the following judgment of the Court: This is a petition by Mr. Aikaeli Alphayo Mbowe, one of the unsuccessful contestants in the elections held in the constituency of Kilimanjaro West Hai on September 26, 1965. There were two candidates, the petitioner and the respondent. The number of voters in the list was 30,889; the respondent polled 20,213 and the petitioner 6,393; the majority was 13,820. As far as we are concerned here in Tanzania, the relevant section dealing with election petitions is National Assembly (Elections) Act, No. 11 of 1964, s. 99. The Act states four grounds and says that the “election of the candidate as a member shall be declared void on any of the following grounds which are proved to the satisfaction of the court”.

There has been much argument as to the meaning of the term “proved to the satisfaction of the court”. In my view, it is clear that the burden of proof must lie on the petitioner rather than on the respondent, because it is he who seeks to have this election declared void. And the standard of proof is one which involves proof “to the satisfaction of the court”. In my view, these words in fact mean the same as satisfying the court. There have been some authorities on this matter and in particular there is the case of *Bater v. Bater* (1). That case dealt not with election petitions, but with divorce, but the statutory provisions are similar, i.e. the court had to be satisfied that a matrimonial offence had been proved. In this case, in my view, that we have to be satisfied that one or more of the grounds set out in s. 99 (2) (a) has been established. There Denning, L.J., in his judgment took the view that one cannot be satisfied where one is in doubt. Where a reasonable doubt exists, then it is impossible to say that one is satisfied, and with that view I quite respectfully agree and say that the standard of proof in this case must be such that one has no reasonable doubt that one or more of the grounds set out in s. 99 have been established.

There is also the question of another statutory phrase, “affected the result of the election”, which occurs in s. 99 (b). The section reads as follows:

“Non-compliance with the provisions of this Act relating to elections, if it appears that the election was not conducted in accordance with the principles laid down in such provisions and that such non-compliance affected the result of the election.”

In this case there is an English provision which is substantially the same and which was discussed in the case of *Re Kensington North Parliamentary Election Petition* (2) The English provision is s. 16 (3) of the Representation of the People Act, 1949, and reads as follows:

“No parliamentary election shall be declared invalid by reason of any act or omission by the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the parliamentary elections rules if it appears to the tribunal having cognizance of the question that the election was so conducted as to be substantially in accordance with the law as to elections, and that the act or omission did not affect its result.”

There we have exactly the same phrase used, “affect the result”, in one case the act or omission, in this case non-compliance, and the election court, which was presided over by Streatfeild and Slade, JJ., took this point of view:

“Even if the burden rested on the respondent, I have come to the conclusion that the evidence is all one way. Here, out of a total voting electorate of

34,912 persons who recorded their votes, three, or possibly four, are shown by the evidence to have voted without having a mark placed against their names in the register and each of them voted only once. Even if one was to assume in favour of the petitioner that some proportion of the remainder of 111 persons, whom we have not seen, were in somewhat similar case, there does not seem to be a shred of evidence that there was any substantial non-compliance with the provision requiring a mark to be placed against voters' names in the register; and when the only evidence before the court is that of the only three, or possibly four, people who are affected in that they recorded their votes without having a mark placed against their names, each voted only once, one cannot possibly come to the conclusion that, although there was a breach of the statutory rules, the breach can have had any effect whatever on the result of the election. Even if all the 111 were similarly affected, it could not possibly have affected the result of this election; therefore, although there was a breach in regard to the matter set out in para. 3 (i) of the petition in the omission to place a mark against certain names in the register, I should be prepared to say that there was a substantial compliance with the law in this respect governing elections and that omission to place a mark against the names did not affect the result."

In my view in the phrase "affected the result", the word "result" means not only the result in the sense that a certain candidate won and another candidate lost. The result may be said to be affected if after making adjustments for the effect of proved irregularities the contest seems much closer than it appeared to be when first determined. But when the winning majority is so large that even a substantial reduction still leaves the successful candidate a wide margin, then it cannot be said that the result of the election would be affected by any particular non-compliance of the rules.

I turn now to the evidence in this particular case and the various grounds alleged in the petition. No evidence whatsoever has been led as regards ground (e), i.e. there is no evidence that the petitioner was not accorded equal and fair opportunity in the organisation and conduct of the election campaign by the members of the District Executive Committee of the party, as provided by the National Assembly (Elections) (Amendment) Act, 1965, s. 39 (1) (3). This ground does not, therefore, merit further consideration.

I will next deal with para. (c), that the polling agents were appointed by the area secretary and not by the District Executive Committee as provided by the National Assembly (Elections) (Amendment) Act, 1965, s. 6. It was not established that the polling agents were appointed by the area secretary, but it was in fact established that the polling agents were nominated by the working committee of the District Executive Committee. This is a different body from the District Executive Committee as can be seen from a study of para. C of Schedule I of the Interim Constitution of Tanzania. This is the constitution of T.A.N.U. It is quite clear also that the District Working Committee had no power to appoint these agents. The power was vested in the District Executive Committee and they had no authority to delegate that power to another body. In the circumstances, the appointment of the polling agents was bad. In fact, the polling agents did attend at the booths but were later removed. There are two versions as to why they were removed. Mr. Siyovelwa told us that they were removed because Mr. Aikaeli complained and he thought that it was better in the circumstances to remove them. The returning officer told us that he had removed them because the list had not been sent to him in time and he thought the appointment was irregular. With this view I cannot agree. If the polling agents had in fact been appointed by the District Executive Committee, the mere failure to inform the returning officer in time of the appointments could not have invalidated them. In this case, of course, the appointments were bad because they were made

by the Working Committee. In the event, however, the agents were removed possibly at the request of the petitioner himself. There is no allegation of personation. The agents are placed at the polling station to help detect personation. There is nothing to suggest that there was any personation. I would hold, therefore, that there was a non-compliance with the Act, in my view not substantial, and there is no evidence to show that such non-compliance affected the result of the election.

I will next deal with ground (b), "The voters who wished to vote for the petitioner or the 'Jembe sign' which represented your petitioner's sign, were informed that the ballot papers were exhausted." Two witnesses gave evidence on this point. The first one was P.W.6; he was quite unsatisfactory as a witness, and in one particular his evidence deserves to be disregarded. He says that Mr. Aikaeli arrived at about 6 o'clock at his polling station bringing some documents, apparently ballot papers. Mr. Aikaeli should, therefore, have been aware of the situation at that particular polling station. This would indeed have been an important matter, but Aikaeli in his evidence made no mention whatsoever of any such incident. That, I think, is more than enough reason for not relying upon the evidence of Ebrahim Muro as far as the non-providing of ballot papers at this particular polling station.

There is also the evidence of P.W.9, Omari Mohamed Ngora, who assisted the returning officer. He says that there was a complaint at Sanya Juu that there was a shortage of ballot papers, and that was rectified, he says, in three-quarters of an hour. I must say that I am quite unhappy at the way in which this particular incident was handled. There is no evidence that Mr. Ngora investigated the matter to find out why there should have been such a run on the ballot papers or why the station did not, in the first place, receive enough ballot papers to satisfy the number of people who were expected to vote there. In future it should be ensured that persons who go round on polling day to supervise stations should make notes and investigate immediately anything which appears to be irregular or in any way unusual.

Even accepting Mr. Ngora's evidence as it is, it would amount to no more than this, that for three-quarters of an hour voting could not take place because there were no ballot papers available, and this is not a substantial non-compliance as to fall within the spirit and meaning of s. 99 (2) (b).

We now come to allegations (a) and (d), which I shall deal with together, because they are closely related and they are the most serious allegations in the petition. Each of them would constitute an illegal practice contrary to the National Assembly (Elections) (Amendment) Act 1965, s. 99. In particular as far as (a) is concerned, had it been proved to our satisfaction it would have gone so deeply into the root of the whole election that it would be difficult, however large the majority might have been, to say that it did not affect the result of the election. Several witnesses came to give evidence on this point. Their evidence deserves some reasonably close analysis.

There is first of all George Naiman. He says he was a member of the T.A.N.U. Youth League and that Simbo Solomon spoke to him and five other people, whom he met coming from work on a particular day and told them that they should canvass voters to vote for Nyumba (House), his brother's symbol. He threatened deportation to Sumbawanga if they did not comply. It should be noted that of these six people only two belonged to that constituency and were registered electors. The other four were not known to George Naiman and apparently did not come from the district. The other person who came from the constituency, Obiro, who came to give evidence for the respondent has denied that any such incident took place. Of the two witnesses, Obiro impressed us as being much more reliable. In any event, Naiman testified that he spoke to only

nine people. He was very busy about his affairs, going to work early in the morning and returning late. He did not seem to have taken his instructions very seriously. It should also be noted that one of the persons to whom he is alleged to have spoken was P.W.11, Charles Kiatta. Charles Kiatta said that Naiman spoke to him, yet Naiman in his evidence never mentioned Kiatta as one of the persons to whom he spoke. This is a matter of some importance in a case of this sort as it is obviously desirable to cross-link witnesses in support of each other on any particular allegation. Kiatta was one of the least reliable witnesses in this case, as he had a clear motive for untruthfulness. He said that he hoped to take up appointment with the petitioner, Mr. Aikaeli, at the termination of this petition. Arrangements have been made for him to take up the job immediately. The discussions leading to the arrangements took up shortly before the case. We hold, therefore, that Naiman's evidence does not carry with it that degree of certainty which it should carry to enable us to act upon it. We prefer to accept the evidence of Obiro who seems the more reliable witness. His unreliability as a witness is confirmed by his failure to mention Kiatta as a person to whom he spoke though clearly he knew Kiatta was a witness in this case.

Next for consideration is P.W. 12, Eliaika Trofum, one of the more alert and intelligent witnesses who came to give evidence on behalf of the petitioner. His story is a strange one indeed, because he says that there was intimidation going on actually inside the polling station. This was much more than was alleged in the petition itself. It is a charge of such grave importance that it would in the normal course deserve in the pleadings a paragraph all by itself. Failure to set it out specifically in the petition raises much suspicion as to its truthfulness. Trofum's evidence stands uncorroborated. We hesitate to think that such conduct would have been tolerated by presiding officer, polling assistant and policeman without complaint. None of them has been called.

Then we have the evidence of P.W. 13, Salehe Mohamed. He is probably the most significant person, because he says he told some five to six hundred people on the election day that they should vote for Nyumba rather than for Jembe. He is a very difficult witness to accept because he appears completely unintelligent. He stated that he wished to vote for Jembe, not because it stood for any particular person, but because he liked the symbol Jembe anyhow. The fact that it stood for one candidate or the other did not matter. He would have voted for Jembe quite apart from what the symbols stood for. He admitted also that he knew that it was wrong to instruct the voters as he did, and yet he did it with such energy that in a single day he was able to canvass 500-600 people outside the polling booths. He could not remember the names of even one or two of the persons to whom he spoke though they must all have been persons from his district whom he knew. This is not the sort of evidence which has the ring of truth on which one can act with certainty.

Finally, there was Maleko, the last witness for the petitioner. He was interesting in two ways. Although he had been canvassed, he still voted for Jembe, and he says for his pains he was taken by the scruff of his neck by the policeman and ejected from the polling booth. On this point his evidence is contradicted by that of Rabieli. Maleko's evidence is also significant in that it shows that whatever intimidation took place, it cannot be assumed that it was generally successful.

Reviewing this evidence, it is crystal clear that no executive officer, no committee member of the T.A.N.U. Youth League took any part whatsoever either in canvassing or in issuing instructions that people should be canvassed. Therefore, to say that T.A.N.U. Youth League organised a campaign on behalf of the respondent, is, I think, more than a matter of error in the use of words. It is a misstatement of fact. That particular section in the petition has not been established. The petitioner has not led any evidence to establish that T.A.N.U. Youth

Leaguers organised a campaign on behalf of the respondent. He has led evidence to show that about nine T.A.N.U. Youth Leaguers at four particular stations on the instructions of Simbo Solomon, who is known to be a brother of the respondent and who might well have had an interest in furthering the respondent's success in the election, spoke to electors asking them to vote for Nyumba on threat of deportation. This cannot and does not amount to an organized campaign on the part of T.A.N.U. Youth League on behalf of Mr. Eliufoo, and this particular allegation fails for want of any evidence, even if we accepted the evidence in support of it, which we do not.

Finally, we come to Mr. Simbo Solomon, the man who is alleged to be the evil genius in this matter, the person who, it is alleged, has been responsible for all this trouble. The main argument against him is that by seeking to deny in his evidence the playing of any part whatsoever in the election, he clearly must be marked out as not speaking the truth. Of course, had he admitted taking part in the election, he would equally have been criticised for taking any part at all knowing that his brother was a candidate. Whatever the answer was, some criticism could be advanced. The evidence given by Mr. Siyovelwa largely explains the position. Mr. Siyovelwa says that Simbo Solomon, because he was the brother of Eliufoo, was specifically assigned to work in Vunjo area so that he would be kept away from the area of Kilimanjaro West Hai. This makes good sense; it is credible in every sense of the word. There again, the way in which ground (d) is phrased shows that I may call the tendency of the petitioner to exaggerate in his allegations. He speaks of Simbo Solomon undertaking door-to-door canvassing. There is not the slightest shred of evidence that Simbo Solomon undertook door-to-door canvassing. Indeed, the evidence which was led indicates that there was casual contact with people, not by appointment but by sheer chance. This shows one of two things, either that the complaints made to the petitioner directly after the elections were quite unfounded, or else that the persons who complained are now unwilling to come forward to substantiate their complaints. Either of these hypotheses throws a considerable doubt on the general bona fides of the petitioner's charge. Indeed, I find that such evidence as has been led about Simbo Solomon indicates no more than a casual contact with some persons, whom he may or may not have known, and a request by him that they should help his brother.

As regards the allegation that he backed the request with a threat of deportation, I tend to discount this. Deportation and arrest are two very different things indeed. Arrest is a comparatively simple thing, but detention and being hidden is a much more serious sort of threat. And if there had been a threat of deportation and arrest, it is my opinion that that would have found its way into the petition, because, as I have indicated, the tendency of the petitioner has not been to understate his case, but rather to overstate it, and when he understates it in a particular matter, it is of some significance in assessing the general truthfulness of his evidence on that particular point.

For all these reasons, therefore, I find that allegations (a) and (d) have not been established by the evidence. In these circumstances, it is not necessary for me to define exactly what the term "affected the result of the election" would mean in this particular case, and I would certainly refrain from doing so, as this is a matter of some difficulty. We would prefer to leave the matter open in the event that in another petition the facts proved raise this issue more precisely for determination.

I hold, therefore, I am not satisfied on the evidence that any of the grounds set out in s. 99 (2) have been proved. The petition stands dismissed, the petitioner to pay the respondent's costs.

Bannerman J: I agree with the judgment read by my learned brother, the Chief Justice, both as to law and the facts, and I have nothing to add. I agree that taking the evidence as a whole the petitioner has not satisfied the court that any irregularity or non-compliance of law in the election was such as to have affected the result of the election, and the petition must therefore be dismissed.

Petition dismissed.

For the petitioner:

S. S. Rao with R. M. Patel, Arusha

For the respondent:

J. R. W. S. Mawalla, Arusha

For the Republic:

M. Bomani (Attorney-General, Tanzania) and F. B. Mahatane (State Attorney, Tanzania)

Ali Islam v Republic
[1967] 1 EA 246 (HCT)

Division:	High Court of Tanzania at Dar-es-Salaam
Date of judgment:	19 January 1967
Case Number:	828/1966
Before:	Biron J
Sourced by:	LawAfrica

[1] *Criminal law – Aiding and abetting – Whether employee properly convicted of carrying on business in broadcast receivers without a licence on account of his aiding and abetting – Penal Code s. 22 (T.).*

[2] *Criminal law – Carrying on business in broadcast receivers without a licence – Whether employee of shop where receivers so sold properly convicted of this offence – Whether such employee can be convicted as principal on account of his aiding and abetting carrying on of such business – Broadcast Receiving Apparatus (Licensing) Act 1964, s. 5 (T.) – Penal Code s. 22 (T.).*

[3] *Criminal law – Employee – Whether employee properly convicted of carrying on business in broadcast receivers without a licence on account of his aiding and abetting – Penal Code s. 22 (T.).*

[4] *Criminal law – Sentence – Conviction of employee for carrying on business in broadcast receivers without a licence – What is proper sentence – Broadcast Receiving Apparatus (Licensing) Act 1964 s. 5 (1) (T.).*

Editor's Summary

The appellant was convicted of carrying on a business in broadcast receivers without there being in force an appropriate licence contrary to the Broadcast Receiving Apparatus (Licensing) Act, s. 5 (T.). Evidence was given before the trial magistrate that the appellant had acted suspiciously in hiding two radios from the local licensing officer. The appellant gave uncontradicted evidence that he was merely an employee of the proprietor of the shop concerned. He was sentenced to a fine of Shs. 3,000/- or six months' imprisonment in default, and appealed.

Held –

- (i) (applying *Lewis v. Graham* (1)): an employee cannot be regarded as a dealer or as “carrying on business” within the meaning of the Broadcast Receiving Apparatus (Licensing) Act, s. 5; but
- (ii) an employee can be convicted of an offence under that section as a principal on account of his aiding and abetting the carrying on of such business, provided he had the necessary mens rea; i.e. that he participated in the commission of the offence in the full knowledge that it was an offence;

- (iii) the evidence showed such mens rea on the part of the appellant and he was therefore properly convicted;
- (iv) taking into account the fee for the relevant licence (Shs.100/-) and the factor that the accused was only an employee, the sentence was excessive.

Appeal against conviction dismissed. Appeal against sentence allowed in part.

Cases referred to in judgment:

- (1) *Lewis v. Graham* (1888), 20 Q.B.D. 780.

Judgment

Biron J: The appellant was convicted of carrying on business in broadcast receivers without there being in force an appropriate licence in that behalf contrary to s. 5 (1) of the Broadcast Receiving Apparatus (Licensing) Act 1964 (hereinafter referred to as the Act), and he was sentenced to a fine of Shs. 3,000/- or imprisonment for six months in default. He is now appealing.

Evidence was given by the local licensing officer to the effect that on October 22 last year, whilst checking for licences in respect of broadcast receivers in Kivungu Village, Kilosa, he entered the shop wherein the appellant was serving. On approaching the shop he noticed three radios on a table in the shop. As he drew nearer he saw the appellant “signalling to a servant”, but when he entered the shop there were no radios in sight. He requested the appellant to produce the radios which he had seen being removed from the shop. The appellant thereupon ordered an employee to bring in a radio, and a Philips radio was produced. The witness asked for the others which he said he had seen. The appellant denied that there had been any other radios in the shop, stating that he had borrowed the one produced in order to listen to the news broadcasts when President Nasser was visiting Tanzania. Not surprisingly the licensing officer was not satisfied, and on further insistence the appellant permitted him to enter the residential part of the premises, where, in a bedroom under a bed, two more radios were discovered. The appellant, who had previously been unable to produce a licence, could give no explanation for these radios, except, to quote the witness, “to stand there shivering”. The appellant, who elected to give evidence on oath, stated in examination-in-chief that the radios had been brought to the shop by his elder brother for a purpose unknown to him. In cross-examination he is recorded as denying that he dealt with radios, and further stated that he was not even a partner in the business but only “a clerk of that shop”. He further stated that there was only one radio in the shop, which he was using for the reception of news, and the other two were inside the house and not displayed in the shop. The learned magistrate, not surprisingly, accepted the evidence of the the prosecution witness, which establishes beyond a peradventure that radios were being sold in the shop of which the appellant was in charge and in respect of which there was no appropriate licence as required by law. He accordingly convicted the appellant as charged.

In the petition of appeal drawn up by learned counsel, who appeared at the hearing of the appeal, it is averred that the learned magistrate erred in holding that the appellant was a dealer “within the meaning of the Broadcast Receiving Apparatus (Licensing) Act”, and it further goes on to assert that:

“The learned District Magistrate should have held that the appellant was a mere clerk employed with M/S Saidi Islam & Brothers in their shop at Kivungu Village, Kilosa and as such could not be charged with the

offence in question”

It was further submitted and canvassed that the magistrate erred in finding that the radios were kept in the shop for sale, which submission, as already indicated, has no substance. The only issue before this court, with which incidentally, the learned magistrate did not deal or even refer to, is whether the appellant, whose evidence that he was only an employee stands uncontradicted, could be convicted under the Act, as he was.

The section of the Act under which the appellant was charged and convicted, s. 5, reads:

- “5(1) No dealer shall carry on business unless he holds a licence to do so issued under this Act.
- (2) Any person who contravenes subsection (1) shall be guilty of an offence and shall be liable on conviction to a fine not exceeding ten thousand shillings or to imprisonment for a period not exceeding six months or to both such fine and imprisonment”.

“Dealer” is defined in s. 2 of the Act as:

“‘dealer’ means a person who, by way of trade or business, buys, sells, lets on hire or otherwise deals in broadcast receivers”;

and “sell” is defined in the same section as:

“‘sell’ in relation to a broadcast receiver includes letting on hire”.

Even without any authority to the point, I would be quite prepared to, and in fact do so hold, that an employee cannot be regarded as a dealer or as “carrying on business” within the meaning of the Act. It would, to my mind, be iniquitous to so hold an employee liable for the sins of his employer. There is also, however, authority to the point. In *Lewis v. Graham* (1), it was held, quoting the headnote (20 Q.B.D. at p. 780):

“A clerk employed by a solicitor at offices in the city of London does not ‘carry on business’ there within the meaning of the Mayor’s Court Extension Act 1857 (20 & 21 Vict. c. clvii), s 12, so as to be subject to the jurisdiction of the Mayor’s Court”.

In his judgment Lord Coleridge, C.J. stated (*ibid.*, at p. 782):

“In a certain sense the defendant was carrying on business, because he was employed in the City, and if the words ‘carry on business’ must be held to extend to every kind of employment the argument of his learned counsel is wrong. But that is not a fair interpretation of the words. The business must be some business in which he has control, or acts as one of the partners engaged in carrying it on. A particular clerk or workman who is engaged about the business, but has no control over it whatever, cannot be said to be carrying on business in the City”.

With respect, I fully agree with that dictum of the learned judge, and as indicated I consider that an employee does not constitute a dealer within the meaning of the Act, nor can he be said to carry on business within the meaning of s. 5 of the Act. The matter does not however rest there.

By s. 22 of the Penal Code:

“When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say –

- (a) every person who actually does the act or makes the omission which constitutes the offence;

- (b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
- (c) every person who aids or abets another person in committing the offence;
- (d) any person who counsels or procures any other person to commit the offence.

In the last mentioned case he may be charged either with committing the offence or with counselling or procuring its commission,

A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.

Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part, is guilty of an offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission; and he may be charged with the act or making the omission”.

Although, as indicated, the appellant as an employee could not be held to be a dealer as defined in s. 2 of the Act, nor could he be said to be carrying on business within the meaning of s. 5 of the Act, he could be so convicted as a principal of carrying on business in broadcast receivers without there being in force an appropriate licence in that behalf on account of his aiding and abetting the carrying on of such business, provided, and I cannot stress this factor too forcibly, he had the necessary mens rea; that is, that he participated in the commission of the offence in the full knowledge that it was an offence. In this instant case, in view of the appellant's conduct in hiding the radios when he saw the licensing officer approaching. it establishes beyond a peradventure that the appellant knew full well that there was no licence in respect of the sale of broadcast receivers and that it was an offence to sell such receivers without an appropriate licence. He aided and abetted the commission of the offence in the full knowledge that it was an offence. He was therefore properly convicted as a principal and the conviction is sustained.

With regard to sentence, learned counsel for the appellant submitted that it was excessive in the extreme and he stated from the Bar that there were in the same court on the very same day the appellant was convicted, many convictions for similar offences, and the fines imposed ranged from Shs. 40/- upwards but did not exceed Shs. 150/-. And learned counsel requested the court to examine the trial court's return of criminal cases. I have duly perused the relevant return and it does show a large number of cases wherein persons were convicted for offences in respect of broadcast receivers. There was obviously a raid on houses and shops in the area, checking for licences. The return shows that a large number of persons were convicted of being in possession of broadcast receivers without an appropriate licence, and none was in fact fined more than Shs. 150/-. There were also two convictions for selling unlicensed broadcast receivers, wherein the convicted accused were fined respectively Shs. 100/- and Shs.200/-. These offences obviously cannot be equated with that of dealing in broadcast receivers without an appropriate licence, which offence is much more serious, and there are shown in the return two cases similar to this instant one wherein the accused were convicted of dealing in broadcast receivers without an appropriate licence and as in this case, they were each sentenced to a fine of Shs. 3,000/- or imprisonment for six months in default. Even so, as conceded by learned State Attorney, the sentence is grossly excessive, firstly because the fee for a licence, which is valid for twelve months, is, as set out in the Schedule to the

Act, Shs. 100/-, and secondly, which is still more material, is the factor that the accused was an employee and not the proprietor of the shop, which aspect as noted, was never dealt with, or considered by, the learned magistrate.

Accordingly the sentence imposed is set aside and there is substituted therefore a sentence of a fine of Shs. 200/- or distress in default. To the extent indicated, that is, the reduction of the sentence, the appeal is allowed, and in all other respects is dismissed.

It should hardly be necessary to add that the proprietor of the shop could still be proceeded against in respect of the very same offence.

Appeal against sentence allowed in part. Sentence reduced. Appeal against conviction dismissed.

For the appellant:

Harjit Singh, Dar-es-Salaam

For the respondent:

The Attorney-General, Tanzania

K. R. K. Tampi (State Attorney, Tanzania)

Liquidator, Mazinde Estate (1961) Ltd v Commissioner of Income Tax [1967] 1 EA 250 HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	5 January 1967
Case Number:	5/1966
Before:	Biron J
Sourced by:	LawAfrica

[1] Income tax – Severance allowance – Whether severance allowance paid to employees under the Severance Allowance Act 1962 (T.) is a deductible expense under the E.A. Income Tax (Management) Act 1958, s. 14 (1) – Whether severance allowance paid to employees under the Severance Allowance Act 1962 (T.) is deductible as contingent liability.

Editor's Summary

A vendor company sold an estate to a purchaser company, the date of completion being January 15, 1964, and by a clause in the agreement for sale the vendor company agreed to pay a sum of £12,500 to the purchaser company in consideration of which the purchaser company agreed to accept full and complete liability in respect of all claims arising upon or after January 15, 1964 in respect of severance allowance or claims made by any African employee under or by virtue of any ordinance or regulation or otherwise

and to fully indemnify the vendor company in respect thereof. After the sale the vendor company went into liquidation. The Commissioner of Income Tax assessed the vendor company (in liquidation) for the year of income 1963 and refused to allow the said sum of £12,500 as a deductible allowance under s. 14 (1) of the East African Income Tax (Management) Act, 1958 as expenditure wholly and exclusively incurred in the production of the company's income for the year of income 1963. The liquidator of the vendor company appealed, claiming that the said sum should have allowed as a deductible expense because: (1) the sum was expenditure wholly and exclusively incurred in the production of the vendor company's income for 1963 and (2) the sum represented (*a*) payment of deferred remuneration and/or other statutory allowances to employees; (*b*) payment referable to obligations necessarily contracted and incurred in the earning of the vendor company's income;

and in accordance with accepted principles of accounting was a deductible expense.

Held –

- (i) severance allowance introduced by the Severance Allowance Act 1962, is in principle a deductible expense under s. 14 (1) of the Act;
- (ii) severance allowance is an expense deductible from tax whether paid out or as a contingent liability accruing for year to year;
- (iii) severance allowance may include sums accrued over previous years and is deductible in respect of a single year of assessment although not actually “incurred in such year of income” in the words of s. 14 (1) of the Act;
- (iv) the vendor company was by virtue of the Severance Allowance Act 1962, not liable for the severance allowance over the years to the date of sale but by contract the vendor company validly assumed such a liability;
- (v) the sum in dispute was not proved by the vendor company to truly reflect the contingent liability for severance allowance up to the year of assessment 1963.

Appeal dismissed.

Cases referred to in judgment:

- (1) *Southern Railway of Peru Ltd. v. Owen*, [1956] 2 All E.R. 728; [1957] A.C. 334; 36 T.C. 634, H.L., affirming 36 T.C. 616, C.A. affirming 36 T.C. 602
- (2) *Commissioner of Income Tax v. Buhemba Mines Ltd.*, [1959] 2 E.A.T.C. 333.
- (3) *Sun Insurance Office v. Clark*, [1912] A.C. 443; 6 T.C. 59.
- (4) *Vallambrosa Rubber Co. Ltd. v. Farmer (Surveyor of Taxes)*, 5 T.C. 529.
- (5) *Godden (H.M. Inspector of Taxes) v. A. Wilson’s Stores (Holdings) Ltd.* (1959), 40 T.C. 161.
- (6) *Levy, Re, ex parte Walton* (1881), 17 Ch.D. 746; 50 L.J. Ch. 657.

Judgment

Biron J: This is an appeal brought by the liquidator (hereinafter referred to as the appellant) of Mazinde Estate (1961) Limited (hereinafter referred to as the company) against the assessment of income tax by the Commissioner of Income Tax (hereinafter referred to as the Commissioner) on an item set out in the company’s statement of account as:

“Severance Pay –

.....

Paid to

the Purchaser of Estates Shs. 250,000/-”

The facts are briefly that the company sold three estates for the sum of £850,000 to Ralli Estates Limited to take effect as from January 15, 1964. Immediately after the sale, in fact on the day following its

completion, the company went into liquidation, as it had sold off all its assets, and Mr. Nelson Fraser Collis, a chartered accountant, who incidentally gave evidence at the hearing of the appeal – he was the only witness – was appointed liquidator.

The Statement of Facts filed by the Commissioner reads as follows:

“Respondent’s Statement of Facts

1. The appellant appeals to this Honourable Court against Assessment No. 24/1770 for the year of income 1963, in respect of which the respondent refused an objection by the appellant that the appellant was entitled to a deduction for the said year of income in the sum of Shs. 250,000.
2. On or about January 15, 1964 (which date falls for the appellant within the year of income 1963) the appellant sold certain assets of Mazinde Estates

(1961) Limited to Ralli Estates Limited and by the agreement of sale agreed to pay to the purchaser the sum of £12,500 with respect to the accrued statutory liability towards African employees for severance allowances and other allowances, which by operation of law became thenceforth the liability of the purchaser and was no longer the liability of the appellant.

3. The appellant objected that he is entitled to a deduction in the said sum of £12,500 in accordance with the provisions of Section 14 (1) of the East African Income Tax (Management) Act 1958, claiming that the said sum was expenditure wholly and exclusively incurred in the production of the company's income for the year of income 1963.
4. The respondent does not accept that the appellant is entitled to such deduction and contends that the alleged payment was not expenditure wholly and exclusively incurred in the production of the company's income.
5. Save as is herein admitted or agreed, the respondent does not accept the statement of facts of the appellant and will at the hearing put the appellant to proof thereof.
6. The respondent will at the hearing rely on oral and documentary evidence in support of the foregoing."

The appellant's Statement of Facts reads:

"Statement of Facts

1. The Appellant herein is the Liquidator of Mazinde Estate (1961) Limited, a Company incorporated in Tanzania.
2. On January 15, 1964, Mazinde Estate (1961) Limited, as Vendor, and Ralli Estates Limited, as Purchaser, entered into an Agreement for Sale covering the acquisition by the Purchaser of the properties and assets belonging to the Vendor, specified in the Schedule to the said Agreement for Sale upon the terms and conditions contained in the said Agreement for Sale, which will be produced in evidence at the hearing of this Appeal.
3.
 - (a) The Gross consideration for the sale, in so far as herein material, was £850,000.
 - (b) The completion date was to be January 15, 1964 and as from that date the outgoings of the Estate became the liability of the Purchaser.
4. By Clause 8 of the said Agreement for Sale it was provided as follows: –
"The vendor will pay to the Purchaser the sum of Pounds Twelve thousand five hundred in consideration of which the Purchaser will accept full and complete liability in respect of all claims arising upon or after the completion date in respect of severance allowance or any other allowance or claim made by any African employee under or by virtue of any Ordinance or Regulation or otherwise and shall fully indemnify the Vendor in respect thereof".
5. The appellant will contend that the amount of £12,500 paid by him to the Purchaser in pursuance of Clause 8 above is in respect of severance and other statutory allowances due to African employees in respect of periods prior in point of time to the completion date – i.e., January 15, 1964, during which time the Estate was earning income.
6. At the hearing hereof oral and documentary evidence will be called in support of the foregoing Statement of Facts".

And his memorandum of appeal reads:

"The Appellant above-named, being aggrieved by Notice dated May 3, 1966, in relation to Assessment No. 24/1770 for the Year of Income 1963,

issued by the Respondent upon the Appellant under the provisions of Section 110 (3) of the East African Income Tax (Management) Act, 1958, appeals to this Honourable Court against the said Assessment under the provisions of Section 111 (1) (b) (ii) of the said Act, upon the following grounds: –

The said Assessment is wrong in law in that:

- (1) It purports to charge to tax an amount of £12,500 which the Appellant contends is expenditure wholly and exclusively incurred in the production of the Appellant's income for 1963;
- (2) The said sum of £12,500 represents the payment of deferred remuneration and/or other statutory allowances to employees and is by accepted principles of Accounting a deductible allowance for the Year of Income 1963;
- (3) The said sum of £12,500 is a payment on Revenue Account which is referable to obligations necessarily contracted and incurred in the earning of the Appellant's income and is therefore by accepted principles of Accounting a deductible allowance for the Year of Income 1963.

Pursuant to Rule 5 of the Income Tax (Appeal to the High Court) Rules, 1959 (Tanganyika), the Appellant attaches: –

- (a) A copy of the said Notice dated May 3, 1966 (Marked 'A');
- (b) A copy of the Notice of Appeal (Marked 'B');
- (c) A Statement of Facts (Marked 'C').

REASONS WHEREFORE the Appellant prays that the said Assessment may be annulled or varied in such manner as to this Honourable Court seems just and reasonable, and for the costs of this Appeal”.

The broad substantive issue is whether the item of £12,500 constitutes deductible expenditure for the year of income 1963 within the provisions of s. 14 (1) of the East African Income Tax (Management) Act, 1958 (hereinafter referred to as the Act), which reads:

“For the purpose of ascertaining the total income of any person for any year of income there shall be deducted all expenditure incurred in such year of income which is expenditure wholly and exclusively incurred by him in the production of such income and which is not expenditure in respect of which no deduction shall be allowed under section 15; and where under section 28 any income of an accounting period ending on some day other than the last day of such year of income is, for the purpose of ascertaining total income for any year of income, taken to be income for any year of income, then such expenditure incurred during such period shall be treated as having been incurred during such year of income”.

Although the substantive issue would appear to be a simple one, its determination depends upon the determination – far from simple – of a number of subordinate issues, and I propose to deal with them from the general to the particular.

Although in the statements of facts and the memorandum of appeal reference is made to statutory allowances other than severance allowance, no allowance other than severance was canvassed or even referred to at the hearing of this appeal. The first issue is therefore whether severance allowance as such is deductible expenditure, i.e. whether in the words of the section set out it is “wholly and exclusively incurred in the production of income”, it being contended by Mr. Denny, who appeared for the Commissioner, that it is not, but is capital.

And according to Mr. Bechgaard, who appeared for the appellant, severance allowance constitutes deferred remuneration of an employee and is as much a deductible expenditure as is actual remuneration.

By the Severance Allowance Act 1962, which came into force in that year, an employer is liable to pay severance allowance calculated at the rate of fifteen days' pay for each year of service on the termination of an employee's employment in the circumstances provided for in the Act. Not surprisingly, as the Act is so recent and it is doubtful whether there is as yet corresponding legislation in the neighbouring territories of Kenya and Uganda, which are subject to the same Income Tax as this country, there are no cases to the point.

One may be tempted to argue, as I think indeed was argued by counsel for the respondent, that in view of the special provision in sub-para. (b) of s. 14 (2) of the Act, making deductible as expenditure:

“any sum contributed in such year of income by an employer to an approved pension scheme in respect of employees who were members of such scheme on December 31, 1958, any employer's deductible pension contribution, any employer's deductible provident fund contribution and any employee's deductible contribution paid in such year of income”,

on the principle of “expression unius est exclusio alterius”, severance allowance is not deductible as expenditure. Such argument can, and, I think, should, be countered by the fact that at the time the Act was drafted and passed severance allowance was not in existence and therefore could not possibly have been in the contemplation of the legislature or of the draftsman. The issue thus falls to be determined on the application of first principles.

A case which bears remarkable affinities to the one before us, and on which counsel for the appellant strongly relies, is that of *Southern Railway of Peru Ltd.* (1), which went through all the formal channels to the House of Lords. The facts of the case and the history of its trials and tribulations are briefly set out in the headnote, which reads:

“Income Tax, Schedule D – Leaving payments under foreign law – Basis on which payments deductible.

Under Peruvian law the respondent company was bound to pay its employees in Peru prescribed compensation payments upon the termination of their services with the company, subject to the fulfilment by the employee of certain conditions. The amount to be paid depended on (a) length of service and (b) rate of pay at the end of the period of service, except that a reduction in pay would not affect the amount to which an employee was entitled by reference to the period of service already performed.

On appeal against assessments to Income Tax on the company made under Case I of Schedule D for the years 1947-48 to 1951-52 inclusive, it was contended on behalf of the company that upon proper principles of commercial accountancy amounts of compensation calculated to have accrued due to each employee from year to year as deferred remuneration should be allowed as a deduction. The Special Commissioners held that it was a matter of correct accountancy practice to make provision in the accounts for the sums in question, and allowed the appeal.

The Chancery Division held that the deferred payments must be brought into account for Income Tax purposes at the time when they became payable, and not before. The Court of Appeal affirmed this decision.

In the House of Lords (Earl Jowitt and Lords Oaksey, Radcliffe, Tucker and MacDermott) judgment was given in favour of the Crown. Earl Jowitt and Lords Radcliffe and Tucker were of opinion that, where a number of

similar contingent obligations arise from trading, there is no rule of law which prevents the deduction of a provision for them in ascertaining annual profits if a sufficiently accurate estimate can be made; but that the provision claimed by the Company throughout the proceedings was not permissible by reason of the absence of discount and other factors. Lord Oaksey agreed with the judgments in the Court of Appeal.

Lord Macdermott, dissenting, favoured a remit to the Special Commissioners to ascertain whether it would be practicable to arrive at satisfactory deductions”.

Although under Peruvian law, that is, its social legislation, these payments of compensation on termination of employment, which correspond to our severance allowance, are expressly termed and held to be deferred remuneration and there is no such corresponding provision in our legislation, I see no reason why in principle the same considerations and treatment should not apply, particularly as it was held to be deductible expenditure under English law. In this respect it is pertinent to deal with the submission of counsel for the respondent, made in respect of other issues as well, that the law under our Act is narrower and more restrictive in respect of what constitutes deductible expenditure than the corresponding English law. The authority for this proposition is the ruling of the Court of Appeal for Eastern Africa in the case of *Commissioner of Income Tax v. Buhemba Mines Ltd.* (2) wherefrom it is sufficient to quote but two passages from the judgment. Forbes, J.A., who delivered the ruling judgment, stated ([1959] 2 E.A.T.C. at p. 347):

“At first sight, and although one is framed in the negative and the other in the positive, the New Zealand and East African provisions appear substantially the same, and appear more restrictive than the English and Indian provisions. The appellant concedes that if the English provision applied the costs which are the subject of this appeal would be deductible, but his contention is that the East African provision is in fact more restrictive than the English provision and that, to fall within it, an expense must be shown to have been incurred directly for the purpose of producing profits; and it is argued that the costs of resisting a winding-up petition, though no doubt expended for the purpose of saving the company from extinction and thereby preserving its profit-earning capacity, are not an expense directly incurred for the purpose of producing profit”.

And he went on to find (*ibid.*, at p. 349) that:

“It is sufficiently clear from the passages I have cited that it has been held by the Judicial Committee and confirmed by the House of Lords that the words of the New Zealand Act ‘not exclusively incurred in the production of the assessable income’ bear a meaning different from and narrower than the words of the English rule ‘not . . . wholly and exclusively laid out or expended for the purposes of trade’. As I have already pointed out, the words of the East African Act are strikingly similar to the words of the New Zealand Act, and unless it can be shown that in the East African Act a different and wider meaning must be attached to the words used, I consider that the decision in the *Ward* case would be binding and would conclude the matter”.

That case is easily distinguishable from this on the facts in that it concerned expenses incurred in resisting a winding-up petition and it was held that such expenses were not incurred for the direct purpose of producing income. It cannot be gainsaid that salaries paid to employees, particularly as in this instant case, agricultural employees, are expenditure incurred in the production of income. Likewise if, as I consider and have held, severance allowance constitutes remuneration, such expenditure is, to my mind, to be equated with salaries.

Therefore, unless constrained by authority, I would be and am prepared to hold that severance allowance as such is deductible expenditure coming within the provisions of s. 14 (1) of the Act. As no express authority to the contrary has been cited, nor am I aware of any, I am quite prepared to find, and do so find as a fact, that severance allowance is remuneration and therefore as deductible an expenditure as are salaries. In this respect it is extremely pertinent to note that in the company's accounts for 1963, the year with which we are dealing, the item in respect of severance allowance is divided into two distinct sub-items and fully set out reads as follows:

"Severance Pay – Paid to Labourers	Shs. 94,405.07	
Paid to the Purchaser of Estates	250,000.00	344,405.07"

Although the Commissioner has challenged the latter sub-item of Sh. 250,000/- he allowed that of Sh. 94,405/07 as deductible expenditure. When I pointed this out to counsel for the respondent, he submitted that the Commissioner was not thereby estopped from now setting up that severance allowance is not in fact deductible expenditure. Whilst, with respect, I agree that the Commissioner is not now so estopped, the fact that the first sub-item was in fact allowed is not, I think, without significance.

The next issue is whether severance allowance is deductible expenditure only when actually paid out, or whether it can be deducted as a contingent liability accruing from year to year, as was the issue in the *Peruvian Railway* case (1). In that case it was contended by the Crown that, and I quote:

"... for purposes of Income Tax assessment it is necessary to ascertain the profit of the Company for each individual year of account and that the only permissible deductions which may be made from the gross profits for that year are those which can fairly be regarded as expenditure which has been incurred for the purpose of earning that year's profits; that the deductions made by the company in each year with reference to the deferred remuneration were not necessary in order to earn the profits which were earned in that year; that the deferred remuneration is only contingently payable and if and when paid is referable to the whole period of the employees' service and cannot be divided up and allocated to the different years which together constitute that period; and that therefore the proper method to adopt, and the only one which truly reflects the taxable annual profit of the Company, is to wait until compensation becomes actually payable and then charge the whole amount of it against the profits for the year in which it is paid".

The House of Lords, however, held, as stated in the headnote above set out, that the compensation payable, which, as indicated, corresponds in my judgment to our severance allowance, can be deducted as a contingent liability, and it is sufficient, I think, to quote but briefly from some of the judgments of the noble Lords. Lord Macdermott stated (36 T.C. at p. 636):

"The question, as I see it, on this branch of the case was not whether, in a given year, the Appellant's liability to pay this employee or that was contingent: it was whether the Appellant's liability to make some payment in respect of the lump sums accruing for the benefit of all its employees in that year was in any relevant sense contingent. If that is the right view, I think the Crown's contention on this point must fail. It is clear from the accounts that the Appellant's employees during the material years were numerous and the chances of all, or even a substantial proportion of them, acting so as to forfeit their lump sum rights seem to me to be much too distant and improbable to merit significance. Here the case bears a close resemblance to the state of affairs with which this House had to deal in *Sun Insurance*

Office v. Clark (3). There the taxpayer, a fire insurance company, was held entitled, in determining its taxable profits, to deduct from its premium income for the year an allowance for unexpired risks on policies outstanding at the end of the year. Forty per cent of the premium income was accepted as a fair and reasonable estimate of such risks, and the deduction was allowed as a proper method of ascertaining the true gains for the year in which the premiums were paid. Liability on each outstanding policy was, of course, highly contingent. But that there would be a loss on the collective risk was a matter of commercial certainty. On the facts, the situation in this appeal appears to me to be essentially the same. However one may describe the appellant's liability as respects the lump sum which may become payable to a single employee, its liability to make some payment at a future date on foot of the body of presently accruing lump sum rights cannot well be regarded as contingent within the world of ordinary business affairs. Whether this future liability can be quantified for the purposes of taxation is another matter: but in the degree of its certainty it is not, in my opinion, to be distinguished in any material respect from the future liability which was taken into account in the *Sun Insurance Office* case. It was said that that decision related only to insurance business and had no application to the facts of this appeal. I see no reason for confining the scope of the decision in this way. Its *ratio* is much wider than that, and is in my view applicable to cases producing the same sort of problem, whether they relate to contracts of insurance or not".

And (*ibid.*, at p. 639):

"For these reasons I consider that the Crown has failed in both the submissions discussed and, accordingly, I would hold that the appellant was right in contending that in principle it was entitled to make a deduction each year in respect of its prospective lump sum liabilities, provided such deduction can be fairly estimated or otherwise satisfactorily assessed".

Lord Radcliffe stated (*ibid.*, at p. 641):

"What the appellant claims the right to do is to charge against each year's receipts the cost of making provision for the retirement payments that will ultimately be thrown upon it by virtue of the fact that it has had the benefit of its employees' services during that year. As a corollary it will not make any charge to cover the actual payments made in the year in respect of retirement benefits. Only by such a method, it is said, can it bring against the receipts of the year the true cost of the services that it has used to earn those receipts. Generally speaking, this must, I think, be true. For whereas it is possible that any one of its many employees may forfeit his benefit and so never require a payment, the substantial facts of the situation are that when the company has paid every salary and wage that is due for current remuneration of the year it has not by any means wholly discharged itself of the pecuniary burden which falls upon it in respect of the year's employment. This is a long-term application of the practice by which provision for holidays with pay in the coming year is charged in part against the receipts of the previous year".

He further stated (*ibid.*, at p. 642):

"But there is no difficulty if we accept the main argument of the Crown. That argument is that, quite simply, there is a rule of law which forbids the introduction of any provision for future payments in or payments out, if the right to receive them or the liability to make them is in legal terms contingent at the closing of the relevant year. The rule, it seems, is absolute and must be

adhered to whatever the current principles or practices of commercial accountancy may require as a method of ascertaining the year's profits. And this is the argument which hitherto has prevailed in the High Court and the Court of Appeal. Now, in my opinion, there is no such rule of law governing the ascertainment of annual profits. Where does it come from? Not from anything to be found in the Income Tax Acts, which, indeed, by the well-known rule limiting the exclusion of debts, show a different and, as I think, a more realistic approach to the problem. Not from any decided authority which is binding on your Lordships. On the contrary, there are two decisions of this House which negative the existence of any such rule of law".

The learned Lord then went on to consider whether any distinction should be made between such contingent liability and that in insurance cases, and held (*ibid.*, at p. 643):

"I am satisfied by these decisions that there is no such rule of law as is suggested. The answer to the question what can or cannot be admitted into the annual account is not provided by any exact analysis of the legal form of the relevant obligation. In this case, as in the *Sun Insurance* case (3), you get into a world of unreality if you try to solve your problem in that way, because, where you are dealing with a number of similar obligations that rise from trading, although it may be true to say of each separate one that it may never mature, it is the sum of the obligations that matters to the trader, and experience may show that, while each remains uncertain, the aggregate can be fixed with some precision. For the trader the practical question is always the same in these cases: How much more shall I have to pay out or shall I be able to get in than my current accounts of the year are recording? Legal analysis of the obligation may present it in a variety of different forms. There is the deferred payment which is subject to nothing more than the practical contingency that it may not be received. That is dealt with, as we know, by bringing it in at its face value, subject to allowance, or, in some cases, at a valuation. There is the future payment for work done which is only legally exigible if the whole work is completed. A large part of this particular aspect must be covered by such items of receipt as work-in-progress, but I do not know enough of the methods of valuing or allowing for this to speak with any confidence about it. And, lastly, there is the contingent obligation to make a future payment, which is our present case. But, whatever the legal analysis, I think that, for liabilities as for debts, their proper treatment in annual statements of profit depends not upon the legal form but upon the trader's answers to two separate questions. The first is: Have I adequately stated my profits for the year if I do not include some figure in respect of these obligations? The second is: Do the circumstances of the case, which include the techniques of established accounting practice, make it possible to supply a figure reliable enough for the purpose"?

To pause here, I would hold that severance allowance, whether actually paid out or as an accrued contingent liability for the year of income, if it could be calculated with sufficient degree of accuracy, and if, I would add, it was good accountancy practice or in accordance with proper principles of commercial accountancy, is deductible expenditure.

Before leaving this issue it is necessary to consider an incidental issue; that is, whether, although as stated I would be prepared to hold that the severance allowance even as a contingent liability is deductible expenditure, for an expenditure to be deductible in any year of income it must, in the words of s. 14 (1) of the Act above set out, have been "incurred in such year of income". In this case the item in dispute actually covers eleven years and it could be argued that

it is not therefore deductible. The position is, according to counsel for the appellant, saved by the application of what he termed the Vallambrosa principle. In that case, *Vallambrosa Rubber Co. Ltd. v. Farmer (Surveyor of Taxes)* (4), it was held by the Court of Session (Scotland), quoting from the headnote:

“Income Tax, Schedule D., First and Second Cases, Rule 1 – Deduction for expenses. – A Rubber Company have an estate, of which in the year under review one-seventh only produces rubber, the other six-sevenths being in process of cultivation for the production of rubber. (Rubber trees do not yield rubber until they are about six years old.) Expenditure for superintendence, weeding, etc., is incurred by the company in respect of the whole estate.

Held, that in arriving at their assessable profits the company are entitled to deduct the expenditure for superintendence, weeding, etc., on the whole estate and not one-seventh of such expenditure only”.

It is also pertinent to set out a passage from the judgment of the learned Lord President (5 T.C. at p. 534):

“The junior counsel for the Crown, encouraged by certain expressions which he found used by various learned judges who had given judgments in Tax Cases, wished your Lordships to accept this proposition, that nothing ever could be deducted as an expense unless that expense was purely and solely referable to a profit which was reaped within the year. I think that proposition has only to be stated to be defeated by its own absurdity. It is quite true that in some of the cases there are expressions to a certain effect”, etc.

The learned Lord then went on to consider these cases and concluded with (*ibid.*, at p. 535):

“I think the proposition only needs to be stated to be upset by its own absurdity. Because what does it come to? It would mean this, that if your business is connected with a fruit which is not always ready precisely within the year of assessment you would never be allowed to deduct the necessary expenses without which you could not raise that fruit. This very case, which deals with a class of thing that takes six years to mature before you pluck or tap it, is a very good illustration, but of course without any ingenuity one could multiply cases by the score. Supposing a man conducted a milk business, it really comes to the limits of absurdity to suppose that he would not be allowed to charge for the keep of one of his cows because at a particular time of the year, towards the end of the year of assessment, that cow was not in milk, and therefore the profit which he was going to get from the cow would be outside the year of assessment. As I say, it is easy to multiply instances, but the real truth is that it is just one of those mistakes which are made by fixing your eyes too tightly upon the words of Rules and Cases which are given in the Act of 1842. These, after all, are only guides, because the real point is, what are the profits and gains of the business? Now, it is quite true that in arriving at the profits or gains of a business you are not entitled, simply because – for what are likely quite prudent reasons – you either consolidate your business by not paying the profit away or enter into new speculations or increase your plant and so on – you are not entitled on that account to say that what was a profit is a profit no more. The most obvious illustration of that is a sum carried to a reserve fund. It would be a perfectly prudent thing to do, but none the less if that sum is carried to a reserve fund out of profit it is still profit, and on that Income Tax must be paid. But when you come to think of the expense in this particular case that

is incurred for instance in the weeding which is necessary in order that a particular tree should bear rubber, how can it possibly be said that that is not a necessary expense for the rearing of the tree from which alone the profit eventually comes? And the Crown will not really be prejudiced by this, because when the tree comes to bear the whole produce will go to the credit side of the profit and loss account. When the year comes when the tree produces the only deduction will be the amount which has been spent on the tree in that year; they will not be allowed to deduct what has been deducted before”.

Apart from the application of this Vallambrosa principle, the Severance Allowance Act by its very nature and effective date makes it imperative that in computing the severance allowance payable account must be taken of previous years; that is, years prior to the particular year of income in which the deduction is made. The Act came into force in 1962, retrospective to 1952. Therefore, whenever any deduction is made for severance allowance, that is, for the first time, it must of necessity include sums accrued over the previous years. In fact, even when severance allowance is actually paid out, which, as noted, was in fact allowed by the income tax authorities in the year under review, 1963, such figure is of necessity made up of the amounts accrued over the previous years, and not attributable to that particular year of income. I, therefore, have no hesitation in holding that the factor canvassed, that severance allowance, whether in fact actually paid, or only as a contingent liability, should not be allowed on account of it not being attributable to the specific year of income it is taken into account, would not be fatal to its constituting a deductible expenditure, if otherwise it were so.

The next issue is, even if severance allowance is a deductible expenditure, could the company claim it here, as firstly, according to counsel for the respondent, the payment for contingent liability is in respect of a period after the company had ceased to carry on business, and secondly, such liability is not in law that of the company, but that of the purchaser of the estates. With regard to the first proposition counsel for the respondent relied on the case of *Godden (H.M. Inspector of Taxes) v. A. Wilson's Stores (Holdings) Ltd.* (5). The facts of that case as set out in the headnote were:

“The respondent company carried on the trade of rubber planters. The manager of the company's estates was employed under a contract terminable by six months' notice to be given on March 31 or September 30 in any year. On March 15, 1958, the company entered into an agreement to sell its estates, and the sale was completed on March 31, 1958, on which date the trade of the company was discontinued. The manager was given notice of the termination of his employment, and on March 28, 1958, was paid the sum of £1,900, representing the salary due to him for the six months to September 30, 1958, and the estimated commission which he would have earned in that period.

On appeal against an assessment to Income Tax under Schedule D for the year 1957-58, the Special Commissioners held that the sum of £1,900 was incurred on revenue account, for the purposes of the company's trade, to break a trading obligation, and was an allowable expense in computing its profits for that year. They accordingly allowed the appeal.

Held, that the payment of £1,900 was not made for the purpose of enabling a person to carry on and earn profits in the trade and was not, therefore, an allowable deduction in computing the company's profits for Income Tax purposes”.

That case is easily distinguishable from this in that there, as expressly stated by Lord Evershed, M.R., in his judgment (40 T.C. at p. 175):

“... the conclusion at which I arrive is that the payment must be regarded as one made in respect of that six months’ service, or that six-month period when Mr. Paton would have served, from March 31 to September 30 – a period after the company had in fact ceased trading altogether”.

In this case liability for severance allowance is one accruing from year to year and the disputed item is claimed as severance allowance, liability for which had accrued over the past years when the company was in business.

The second submission is based on s. 8A of the Severance Allowance Act, the relevant parts of which are and read:

“8A (1) Notwithstanding the foregoing provisions of this Act, an employee shall not be entitled to a severance allowance where, after this section comes into operation –

...

(d) he is employed in the business of his employer and his employment by that employer ceases on the disposal by that employer of the goodwill, or of the whole or a substantial part, of that business, or of that part of the business in which he is employed, if either he enters the employment of the person who acquires the same forthwith after such disposal, or he is offered employment on the prescribed terms by such person,

nor shall the employer first named in the relevant paragraph be liable to pay the allowance in any such circumstances.

(2) Where any employee, to whom an offer on the prescribed terms is made in any of the circumstances described in subsection (1), accepts such offer, he shall be deemed to enter the employment of the person by whom the offer is made forthwith upon the cessation of his employment with the employer first named in the relevant paragraph of that subsection.

(3) Where an employee ceases to be in the employment of one employer and enters or is deemed to enter the employment of another in any of the circumstances described in subsections (1) and (2) –

(a) the employment of the employee by such first named employer and such second named employer (and by any other employer, employment by whom is, under any of the provisions of this section, deemed to be continuous with employment by such first named employer) shall be deemed to be continuous employment by one employer: and

(b) if such continuous employment ceases thereafter in circumstances in which the severance allowance is payable under the provisions of this Act, the employer in whose service the employee was employed immediately before such cessation shall be deemed to be the employer during the whole of the period which is, in accordance with paragraph (a) of this subsection, deemed to be a period of continuous employment by one employer, and shall be liable to pay the severance allowance accordingly”.

Thus, submits counsel for the respondent, as the company is not liable for the severance allowance which it contends is represented by the item of £12,500, it is therefore not entitled to deduct it as expenditure for the year 1963. Although counsel for the appellant has submitted, and quite forcibly argued, that the transference of the liability to the second employer is a legal fiction and should

be limited to the Severance Allowance Act, and not extended to income tax liability, quoting in aid a passage from the judgment of James, L.J., in *Re Levy, ex parte Walton* (5) 17 Ch.D. at p. 756) that:

“When a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to. Now, the bankruptcy law is a special law, having for its object the distribution of an insolvent’s assets equitably amongst his creditors and persons to whom he is under liability, and, upon this *cessio bonorum*, to release him under certain conditions from future liability in respect of his debts and obligations. That being the sole object of the statute, it appears to me to be legitimate to say, that, when the statute says that a lease, which was never surrendered in fact (a true surrender requiring the consent of both parties, the one giving up and the other taking), is to be deemed to have been surrendered, it must be understood as saying so with the following qualification, which is absolutely necessary to prevent the most grievous injustice, and the most revolting absurdity, ‘shall, as between the lessor on the one hand, and the bankrupt, his trustee and estate, on the other hand, be deemed to have been surrendered’,”

with respect, I do not agree that the liability of the second employer is in respect of the Severance Allowance Act only. The Act fairly and squarely lays the liability on the second employer, and in my judgment he would be so liable whether for the purposes of the Severance Allowance Act or for any other purpose, including that of income tax. That, however, does not conclude the matter, for although the company may not be, as I consider it is not, liable in law, I can see no reason why it should not be able to contract out of its non-liability. The Severance Allowance Act is for the benefit of the employee. Whether as between vendor and purchaser they make some arrangement as to who should bear the liability for a particular year, the employee cannot lose. He is protected and can recover from the second employer, in this case the purchaser, who would have a right of indemnity from the vendor in accordance with their contract if the vendor resiled on his agreement and failed to pay. I would therefore hold that on so assuming liability, the company would be entitled to rank it as expenditure for tax purposes if in fact such item is in respect of severance allowance, and I think it should be added, is in accordance with correct accountancy practice. I propose to deal with this last aspect first, as I must concede that I do not there feel on very firm ground.

In the Peruvian case great stress was laid on the fact that to make allowances in each year’s accounts for compensation accruing in such year was in accordance with correct accountancy practice in England, and the Special Commissioners before whom the first appeal came, expressly so found as a fact; in fact, that unless such provision was made auditors would not certify the accounts. In this instant case, Mr. Collis in his evidence stated that in so far as he was aware, it is not accountancy practice, at least in the sisal industry, and that is what we are concerned with, to provide for the contingent liability for severance allowance in yearly accounts. It is only set down as an expenditure as and when paid out. If it were a condition precedent that an item claimed as a contingent liability would only be allowable as deductible expenditure if it was in accordance with the proper principles of commercial accountancy and correct accountancy practice, that in itself would dispose of the appellant’s case in view of Mr. Collis’s evidence. However, as already indicated, I do not feel on firm ground on this aspect and prefer to leave it at large.

As indicated, if the court was satisfied that this item of £12,500 represents the contingent liability for severance allowance, I would be prepared to hold that it is

deductible expenditure within the meaning of s. 14 (1) of the Act. But the question immediately poses itself, has it been established that this item is in fact truly attributable to the liability for severance allowance? Counsel for the respondent contends, and very strenuously so, that it has not, and as he himself stated, this is his strongest point in this case. Its force cannot be denied, particularly as by s. 113 (c) of the Act: "The onus of proving that the assessment objected to is excessive shall be on the person assessed". In the Peruvian case, to which so much reference has been made, the House of Lords, although holding that provision for compensation payable in the future is allowable as deductible expenditure, nevertheless dismissed the appeal on the grounds that the sum claimed to represent this contingent liability did not truly reflect such liability in that allowance had not been made for discount and other matters, such as, I think, the possibility of some employees currently working becoming disentitled to compensation, etc. In this instant case, there is not a shred of direct evidence as to how this figure of £12,500 was arrived at. Mr. Collis in the witness box stated that this was the figure agreed to by the vendor and purchaser, both laymen, and that he was not consulted. In cross-examination he assumed that the parties must have taken discount into account, although he himself had indicated, unless I misunderstood his evidence, that it was, if not impossible, next to impossible to quantify an accurate figure. It should, I think, be added that in the Peruvian case many judges doubted whether it was possible to calculate a proper figure for that contingent liability accruing from year to year. However, I would be quite prepared to hold that it may be actuarially possible to calculate and ascertain such figure in view of modern developments in actuarial accountancy. But the question still poses itself, is this figure of £12,500 a proper figure in respect of liability for severance allowance? As noted, there is not a shred of evidence to indicate how this figure was arrived at. Mr. Collis surmised that the parties had taken discount into consideration when arriving at the figure of £12,500. He also testified that during the previous year, that is 1962, he worked out, together with the managing director, that the figure then accrued for severance allowance was £12,000, and this is shown in the 1962 accounts as a "contingent liability in respect of severance pay which is estimated at approximately £12,000". He further stated that in his opinion this figure would be increased by about £2,000 during the year 1963. Even so, there is still no evidence as to how the parties themselves arrived at this figure of £12,500. Not only was Mr. Collis not consulted but as he himself stated, he was not even present when such figure was agreed to between the company and the purchaser. Although counsel for the respondent has intimated that he is not imputing fraud to the parties, he submitted, not without reason, that in arriving at such figure the parties themselves had nothing to lose in fixing whatever figure they liked. It must also be added that, however termed or in whatever guise, this item of £12,500 is reflected in the purchase price of the estates in that it reduces the purchase price by that amount. Not only is there, as demonstrated, no direct evidence to support this figure of £12,500 as being a proper figure in respect of the contingent liability for severance allowance, but it is, I think, noteworthy, and possibly not without significance, that Mr. Collis, who, before he was appointed liquidator of the company was, or rather his company was, the company's accountants and auditors, yet he was not consulted with regard to the computation of the sum in respect of severance allowance, which the parties agreed between themselves to be £12,500, and he was not even present when this figure was adopted.

As indicated, I would be prepared to hold that it may be possible to calculate and establish by actuarial accounting, with sufficient degree of accuracy, the proper figure in respect of the liability for severance allowance accrued over the current and preceding years, and if it were in accordance with the proper principles of commercial accountancy to make provision for such contingent

liability, that such provision would be deductible expenditure, but the appellant has not discharged the onus, which is on him, of establishing that the assessment by the Commissioner is wrong; that is, that the item claimed for really and truly reflects and represents the accrued liability for severance allowance.

To recapitulate, for the reasons I have attempted to set out, I have no hesitation in holding that severance allowance payment as such is deductible expenditure, that is, if and when actually paid. I would be further prepared to hold that if the yearly accruing liability could be quantified with sufficient degree of accuracy and was proper accounting practice, I would see no reason, on the application of the Peruvian case, for not holding that it would also be deductible expenditure as a contingent liability. Further, although as in this case, the company was in law not liable for the severance allowance accrued over the years previous to the sale of the estates, it could by contract have assumed such liability, as it has done in this case. But in respect of the final and crucial issue as to whether this item of £12,500 does in fact constitute severance allowance, the onus of establishing which is on the appellant, I am very far from persuaded or satisfied that the appellant has discharged such onus. In fact, I would go further and say that on the evidence before the court, he has not come within even a Pisgah view of discharging such onus.

The appeal must therefore be, and accordingly is, dismissed with costs to the respondent.

Appeal dismissed.

For the appellant:

Morrison & Co., Tanga

K. Bechgaard, Q.C. and I. Peera

For the respondent:

Legal Secretary, E.A.C.S.O.

R. J. Denny (Assistant Legal Secretary, E.A.C.S.O.)

Italian Construction Co Ltd v Pancioli [1967] 1 EA 264 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	22 July 1966
Case Number:	60/1965
Before:	Biron J
Sourced by:	LawAfrica

[1] *Company – Winding-up – Appointment of liquidators – Whether more than one liquidator can be appointed in a Creditors' Voluntary Winding-up – Companies Ordinance (Cap. 212), s. 228 (1) and s. 235 (T.) – Companies Winding-up Rules 1929, r. 223 (2).*

[2] Company – Winding-up – Notices of appointment of liquidators wrongly headed – Effect – Companies Winding-up Rules 1929, r. 223 (1).

[3] Limitation – Mutual open and current account between traders – Last two invoices of a series issued within limitation period – Whether suit time barred – Indian Limitation Act 1908, art. 85.

[4] Limitation – Mutual open and current account – What constitutes – India Limitation Act 1908, art. 85.

[5] Limitation – Mutual open and current account – “Close of year” – How reckoned – Whether British calendar year to be used – Indian Limitation Act 1908, art. 85.

Editor’s Summary

The action was brought on September 11, 1965, by the liquidators of the plaintiff company against the defendant to recover a balance allegedly outstanding in favour of the plaintiff company on a mutual open and current account between the two parties. The director of the plaintiff company and the

defendant were compatriots and friends and the defendant was given sub-contracting work by the plaintiff company. It was common ground that advances of money were made to the defendant and he was also supplied with materials by the plaintiff company. The court found that the director of the plaintiff company, being more affluent, materially assisted his compatriot and friend the defendant and not only did he supply to him and purchase on his behalf materials used in the execution of the actual work, but he remitted money to Italy on the defendant's behalf and paid the defendant's wife's fare to Italy. The payments made on behalf of and the advances to the defendant could not be regarded as advance assessments or estimates of payment for work to be done by the defendant. At the hearing, the case was limited to three issues: (i) were the liquidators duly authorised to institute the suit; (ii) was there a mutual open and current account between the parties at the material time and (iii) if so, was the suit barred by art. 85 of the Indian Limitation Act 1908? The defendant argued on the first point that the notices of appointment of the liquidators in the Gazette and "Tanganyika Standard" were headed "Members' Voluntary Winding-up" instead of "Creditors' Voluntary Winding-up" which error, in his submission, was to the prejudice of creditors in that they would be misled into believing that the company was solvent when in fact it was not, and that the appointment of two liquidators under s. 235 of the Companies Ordinance (Cap. 212) (T.) was void ab initio as the section authorised the appointment of only one liquidator. On the second point the defendant contended that there was no reciprocity of dealings between the parties so as to make their dealings a mutual open and current account within the meaning of art. 85 of the Indian Limitation Act, 1908. On the third point the defendant submitted that two invoices were within the limitation period if there was a mutual open and current account and that, of those two, the first dated September 15, 1962 was a rectification of a sum for paint debited to him on May 10 and 13, 1961 and that the second invoice now dated October 5, 1962 originally bore the date May 31, 1962. Finally, the defendant contended that he had ceased to carry on business on and as from April 30, 1962.

Held –

- (i) the wording of the notice in no way affected the propriety of the appointment of the liquidators and neither did the fact that two liquidators were appointed vitiate the filing of the plaint by the liquidators;
- (ii) there were mutual and reciprocal obligations created by each party against the other and therefore their transactions constituted a mutual open and current account within the meaning of art. 85 of the Indian Limitation Act, 1908;
- (iii) the defendant was still carrying on business on April 30, 1962, and the fact that a unilateral balance was struck on September 30, 1962, did not have the effect of closing the mutual open and current account between the parties;
- (iv) the invoice dated September 15, 1962 constituted an item in the mutual open and current account between the parties and as the British calendar year should be taken as determining the close of the year within the meaning of art. 85 of the Indian Limitation Act, 1908, the close of the year in the instant case would be December 31, 1962.

Judgment for the plaintiff.

Cases referred to in judgment:

- (1) *Motirao v. Gambhirprasad*, [1925] A.I.R. Nag. 295.
- (2) *Subramaniam & Chettiar v. N.P.L.A.R. Firm*, [1927] A.I.R. Mad. 819.
- (3) *Tea Financing Syndicate Ltd. v. Chandrakamal Bezbaruah*, [1931] I.L.R. 58 Cal. 649.
- (4) *H. J. Stanley & Sons Ltd. v. Said Nasoor Zahor*, [1963] E.A. 564
- (5) *H. J. Stanley & Sons Ltd. v. Gulamhussein Ramji & Co.* (1962), Tanganyika High Court Civil Case No. 125 of 1962 (unreported).

- (6) *Abdalla Ladha Jivraj v. Ali Kassam Virani Ltd.*, [1960] E.A. 842.
- (7) *Firm Gumdas Ramkaturam v. Bhagwan Das and Others* (1922), A.I.R. Lah. 182.
- (8) *Firm Bhagwan Das-Kanhaya Lal v. Firm Nand Singh-Hari Singh* (1927), A.I.R. Lah. 848.
- (9) *Karsondas Dhunjibhoy v. Surajbhan Ramrijpal and Others* (1933), A.I.R. Bom. 450
- (10) *Tea Financing Syndicate Ltd. v. Chandrakamal Bezbaruah* (1931), 58 Cal. 649.

Judgment

Biron J: The plaintiff company (hereinafter referred to as the company) described in the plaint as “a limited liability company incorporated in Tanzania with its registered office at Dar-es-Salaam and is bringing this suit through its liquidators Daniel S. Houghton and Joseph S. O’Neill”, is claiming from the defendant, described in the plaint as “Mario Panciroli, carrying on business in the name and style of Italian Flooring Roofing and Decorating”, quoting from the plaint:

“the sum of Shs. 49,861/53 being the balance outstanding in favour of the plaintiff on a mutual open and current account between the defendant and the said Italian Construction Company as set out in the statement hereto annexed and marked ‘A’, to which the plaintiff craves leave to refer as part of this plaint. The said balance is in respect of agreed and/or reasonable price of goods sold and delivered and services rendered mutually by the parties hereto and in respect of transport supplied, moneys lent and advanced by the plaintiff to the defendant, sums expended at the request of and to the use of the defendant during the years 1961 and 1962”.

The plaint goes on to aver that:

“6. The claim is not barred by the law of limitation as the last two items admitted and entered in the account are dated 15.9.62 and 8.1.63”.

The last two items mentioned in annexure ‘A’ are:

“15.9.62 By your invoice No. 544 5,540.00.

8.1.63 By your invoice No. 554 10,450.00”.

At the hearing leave was granted to amend para. 6 of the plaint by adding another item, that immediately preceding these last two, which reads:

“5.10.62 By your invoice No. 543 700.00”.

By his written statement of defence the defendant avers, inter alia:

“2. For the following among other reasons, the defendant says that there was no mutual open and current account between the parties at the material time.

- (a) The defendant ceased to carry on business under the name and style of ‘Italian Flooring Roofing and Decorating’ on and from April 30, 1962. Nor did the defendant thereafter carry on the same or a like business under any other trade name or in his own name.
- (b) As from the date aforesaid no further mutual dealings were, or could be, contemplated between the parties for mutual account or otherwise.
- (c) There were in fact no dealings between the parties for mutual open and current account or at all after the said date.
- (d) This suit was filed on September 11, 1965.

The suit is accordingly barred by the law of limitation.

3. The defendant says further that in any event the last two items of the account in annexure 'A', dated September 15, 1962, and January 8, 1963, respectively relied on by the plaintiff in para. 6 of the plaint as saving the limitation, cannot avail for the purpose aforesaid for the reason that the said items of account do not refer to separate dealings or work performed but are merely corrections or adjustments of previous items of account credited to the defendant in respect of earlier items of account shown in annexure 'A'.

With reference to the first of such items, viz., invoice No. 544 dated September 15, 1962, for Shs. 5,540/-, this was the sum belatedly credited to the defendant for surplus paint removed by the company on completion of the work in or about April, 1962, and it is in rectification of the sum debited to him for the whole of the paint supplied under debit notes dated May 10, 1961, and May 13, 1961.

With reference to the second of the said items, viz., invoice No. 554 dated January 8, 1963, for Shs. 10,450/-, this is a correction of a previous under-payment, by invoice No. 526 dated December 31, 1961, for painting steel structures at Kilombero".

The defendant then goes on to dispute individual items, with which the court is not concerned at this stage. It is, however, pertinent to quote from para. 7 which relates to the item added by amendment to the plaint to bring the claim within the period of limitation, that:

- "7. Referring to invoice No. 543 in annexure 'A', the defendant says that the relevant date shown therein, viz., October 5, 1962, is incorrect, the actual date of the said invoice being May 31, 1962."

The written statement of defence concludes with:

- "8. With reference to para. 7 of the plaint, the defendant denies that any part of the cause of action arose within the prescribed period of limitation prior to the filing of this suit".

The company, in reply to the written statement of defence, generally joins issue with the defendant and particularly avers, inter alia:

- "2. As regards para. 2 (a) of the defence the plaintiff denies that the defendant ceased to carry on business under the name and style of Italian Flooring Roofing & Decorating on and from April 30, 1962, as alleged, or at all, and puts the defendant to the strict proof of such his contention.

Alternatively and without prejudice to the foregoing the plaintiff states that even if the defendant ceased to carry on business as alleged (which is not admitted) the plaintiff was at all material times unaware of such cessation of business by the defendant.

In the premises the plaintiff will contend that the defendant is estopped from raising the contents of para. 2 (a) of the written statement of defence as a defence to this suit.

The plaintiff denies the contents of para. 2 (b) & (c) of the defence and puts the defendant to the strict proof thereof.

- 3 (a). The plaintiff denies each and every allegation in para. 3 of the defence in so far as the same concerns the penultimate item in annexure 'A' to the plaint, namely the defendants' invoice No. 544 of September 15, 1962, for Shs. 5,540/- and puts the defendant to the strict proof thereof.
- 3 (b). As regards the last item in annexure 'A' to the plaint, namely the defendant's invoice No. 554 of January 8, 1963, the plaintiff admits that it is an adjustment but not of any under payment as alleged.

The said adjustment was in respect of extra work done by the defendant in excess of the bills of quantity at Kilombero”.

At the hearing it was agreed to limit the trial at this stage to three agreed preliminary issues framed as follows:

1. Were the signatories to the plaint as liquidators of the defendant company in creditors’ voluntary liquidation duly authorised at the material time to institute the suit or to sign and verify the plaint?
- 2 (a). Was there a mutual open and current account between the parties at the material time?
- 2 (b). If so, is the suit barred by art. 85 of the Indian Limitation Act, 1908 or is it saved by virtue of the last two items entered in the account dated September 15, 1962, and January 8, 1963?

To the two items in the last issue was added invoice No. 543 dated October 5, 1962, brought in by amendment to the plaint.

On the first issue the evidence was limited to that of Mr. Daniel Stephen Houghton, a chartered accountant and a partner in the firm of Cooper Bros. & Co., one of the two liquidators appointed, as set out in the plaint. He gave evidence and produced the relevant minutes of meetings of the company. His evidence was to the effect that on June 12, 1965 it was proposed that the company go into voluntary liquidation and it was decided to call an extraordinary general meeting for June 22. At the extraordinary general meeting on June 22 it was resolved that the company be voluntarily wound up, and Messrs. Daniel S. Houghton and Joseph S. O’Neill of Cooper Bros. & Co. were appointed “joint and several liquidators for the purposes of the winding-up of the company”. On the same day, June 22, a meeting of the creditors of the company was held when it was resolved inter alia, that Messrs. Houghton and O’Neill be appointed joint and several liquidators of the company. And a committee of inspection was also appointed. In compliance with prescribed procedure Mr. Houghton duly filed with the Registrar of Companies a notice of appointment of the liquidators in the statutory form prescribed under the Companies Ordinance (Cap. 212) (hereinafter referred to as the Ordinance). Mr. Houghton further, again in accordance with procedure, forwarded a notice for publication in the Official Gazette in respect of the appointment, and likewise to the same effect had an advertisement inserted in the “Tanganyika Standard”.

Before dealing with the contention of counsel who appeared for the defendant, that the appointment of the liquidators was per se invalid, it is necessary to deal with a further point raised by counsel for the defendant, that the notices in the Gazette and the “Tanganyika Standard” with reference to the winding-up of the company and the appointment of the liquidators were misleading and improper, and therefore vitiated the appointment of the liquidators. The notice in the Gazette is General Notice No. 2226 dated June, 28, 1965 (produced as Ex. F). It is not necessary to set it out in full. It is sufficient to note that it is headed “Members’ Voluntary Winding-up”. The notice in the “Tanganyika Standard” is similarly worded as that in the Gazette except that the heading “Members’ Vountary Winding-up” does not appear.

As agreed by both learned counsel at the hearing, the wording in the body of the notices is equally consistent with that of a members’ voluntary winding-up as with that of a creditors’ voluntary winding-up. The notice in the Gazette headed “Members’ Voluntary Winding-up” is definitely wrong and misleading and counsel for the defendant submitted that it was to the prejudice of creditors in that they would be misled into believing that the company was solvent when in fact it was not. Counsel, who appeared for the company, submitted that the error in the notice has not occasioned any prejudice in general, and in particular, the defendant was certainly not prejudiced, as there was correspondence

between

the parties, in which counsel for the defendant had a hand, wherefrom it is obvious that the defendant was aware of the true position. It should in fairness be added that Mr. Houghton, on discovering the mistake in the Gazette notice, incidentally, not due to any fault on his part, as the notice he sent to the Gazette did not contain the offending heading, wrote to the editor of the Gazette pointing out the error and requesting that it be corrected in the next issue with a statement that the notice should have been headed "Creditors' Voluntary Winding-up" and not "Members' Voluntary Winding-up". This request however was never complied with.

As conceded by both parties, there is no prescribed form for such notices. The only prescribed form is that for the notice to the Registrar of Companies, which, as noted, was made in proper form.

By s. 348 (1) of the Companies Ordinance:

"Unless and until the High Court shall make rules under the powers conferred by s. 285 of this Ordinance, the Companies (Winding-up) Rules, 1929, made pursuant to the Companies Act 1929 (Imperial), dated August 29, 1929, are declared to be in force in the Territory and shall be read with and considered part of this Ordinance".

No rules have in fact been made by the High Court. Therefore the Companies Winding-Up Rules, 1929 are still applicable. By r. 223 (1):

"No proceedings under the Act or the Rules shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceedings is of opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of that court".

Not only is there no evidence of any injustice, let alone substantial injustice, having been caused by the misleading notices in the Gazette and the "Standard", but there is no reason to suspect that such notices caused any injustice. In the circumstances I have not the slightest hesitation in holding that the propriety of the appointment of the liquidators is in no way affected by the irregularity in the wording of the notices. And it must be said at once that even counsel for the defendant has not stressed this particular factor. The main ground on which his submission is based is s. 235 of the Ordinance, which reads:

"The creditors and the company at their respective meetings mentioned in the last foregoing section of this Ordinance may nominate a person to be liquidator for the purpose of winding-up the affairs and distributing the assets of the company, and if the creditors and the company nominate different persons, the person nominated by the creditors shall be liquidator, and if no person is nominated by the creditors the person, if any, nominated by the company shall be liquidator:

Provided that in the case of different persons being nominated, any director, member or creditor of the company may, within seven days after the date on which the nomination was made by the creditors, apply to the court for an order either directing that the person nominated as liquidator by the company shall be liquidator instead of or jointly with the person nominated by the creditors, or appointing some other person to be liquidator instead of the person appointed by the creditors".

In the submission of counsel for the defendant only one liquidator may be appointed in a creditors' voluntary winding-up. In this case, as two liquidators were appointed, the appointment is void ab initio. Were this section to be construed in isolation the issue, to my mind, would present no difficulty at all, as by s. 2 of the Interpretation and General Clauses Ordinance (Cap. 1-Supp. 60)

“words in the singular include the plural, and words in the plural include the singular”. The position is, however, somewhat bedevilled by the wording of s. 228 (1) of the Ordinance, which deals with a members’ voluntary winding-up and which reads:

“The company in general meeting shall appoint one or more liquidators for the purpose of winding-up the affairs and distributing the assets of the company, and may fix the remuneration to be paid to him or them”.

In view of the express differences in wording, it is the submission of counsel for the defendant that the Ordinance has deliberately gone out of its way to state that, whereas in a members’ voluntary winding-up one or more liquidators may be appointed, in a creditors’ voluntary winding-up only one liquidator may be appointed. Counsel for the defendant further submits that the reason for such distinction would be that, as the payment of the liquidator would have to come from the creditors, the Ordinance has postulated that only one may be appointed, so as to preserve the assets for the benefit of the creditors. With respect, I find little substance in this argument as I do not consider that the fees payable would in the least be affected by the number appointed. And Mr. Houghton pointed out that the reason two liquidators were appointed was that it is the practice in this country where it is usual to appoint qualified accountants recruited in a large measure from expatriates, in order to obviate delays occasioned by the absence of a liquidator on vacation leave, to appoint two to act jointly and severally; though in actual practice, as was the case here, only one in fact usually acts. However widespread and longstanding such practice may be, it cannot affect the position in law, and the court must accordingly rule on the propriety of such practice now that it has been challenged. As already indicated, were s. 235 considered in isolation, I would have no difficulty in holding, on the application of the Interpretation and General Clauses Act, that it is perfectly proper to appoint more than one liquidator in a creditors’ voluntary winding-up. Apart from the fact that words and expressions used in different sections of a statute need not necessarily have the same meaning – that is, I think, trite law and I need quote no authorities in support – in this instant case, the differences in terminology between the sections on which so much stress is laid by counsel for the defendant, is easily explicable and attributable to the different contexts. Section 228 deals with the appointment of one or more liquidators in a members’ voluntary winding-up. Section 235 is concerned with the nomination of persons to act as liquidators by the company and the creditors and the position where there is a conflict in nominations between the members and the creditors. It would be clumsy in the extreme for the section to read, say, “Where the members appoint a person or persons to be a liquidator or liquidators and the creditors appoint a person or persons to be a liquidator or liquidators”, etc. Unless it were specifically necessary so to word the section there is no reason for such clumsy, tautologous language. In the circumstances I am very far from persuaded that s. 235 should not be construed according to the ordinary rules of interpretation as expressly provided for by the Interpretation and General Clauses Act above quoted, that “words in the singular include the plural, and words in the plural include the singular”. Even if I were wrong in so holding, and with all due modesty I do not for one moment think I am, I would not have the slightest hesitation in applying sub-r. (2) of r. 223 of the Companies Winding-Up Rules already referred to, that:

“No defect or irregularity in the appointment or election of an Official Receiver, Liquidator, or member of a Committee of Inspection shall vitiate any act done by him in good faith”.

I therefore hold that the plaint as filed by the liquidators of the company is not vitiated by any irregularity, and on the first issue I accordingly rule in the plaintiff's favour that the plaint is in order.

The evidence in respect of the relationship between the parties as to whether, as framed in the second issue:

“Was there a mutual open and current account between the parties at the material time”?,

is confined to that of Mr. Corrado Tognetti, a director of the company, and that of Mr. Mario Panciroli, the defendant. They are compatriots and at the material time were friends, the former being the more affluent. Mr. Tognetti's firm, as it then was, before it was turned into a limited company, had obtained contracts for construction work on the Kilombero sugar scheme and also at Minaki and in Dar-es-Salaam. The defendant was given subcontracting work consisting in the main of roofing, flooring and decorating the buildings constructed by the company. It is common ground that advances in money were made to the defendant, who was also supplied with materials by the plaintiff. It is the defendant's case, as submitted and argued by counsel, that there was no reciprocity of dealings between the parties so as to constitute their transactions a mutual open and current account within the meaning of art. 85 of the Indian Limitation Act 1908 (hereinafter referred to as the Act), but the company merely made advances of payment and supplied materials for the work to be done by the defendant. For the plaintiff it is submitted that the transactions and obligations between the parties were mutual and reciprocal, thus constituting a mutual open and current account.

The Indian authorities as to what constitutes a mutual open and current account within the meaning of the Act are as extensive and diverse as is the sub-continent itself. As remarked by counsel for the defendant, Rustomji, in his commentary on the Act, “tries to explain them, whilst Chitaley and Rao just put them all and let you take your choice”. I do not think it necessary or even desirable to refer to many cases. It is not, however, irrelevant to note that even according to the contention of counsel for the defendant that the payments made to and on behalf of the defendant were advances for work to be done, and the materials were supplied for such work, there is a case that even payments in advance against salary would constitute a mutual open and current account. This is the case of *Motirao v. Gambhirprasad* (1). It is sufficient to set out the headnote, which reads:

“The defendant was in the employment of the plaintiff and drew advance against his salary from time to time. His salary was fixed by the year. The plaintiff sued to recover the excess drawn by the defendant over the salary due to him.

Held: that art. 85 applied and limitation began to run from the end of the year in which the last item is entered in the accounts”.

It is however only fair to note that there is a case directly to the contrary, that of *Subramaniam Chettiar v. N.P.L.A.R. Firm* (2). Again it is sufficient to quote the headnote, which reads:

“In order that accounts might be mutual there must be transactions on each side creating independent obligations on the other and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations . . .

The defendant was in the employment of the plaintiff. A ledger account was kept in his house in which were debited against him certain sums he drew periodically in advance, credit being given to him periodically on account of the salary due to him.

Held: that such account cannot be called a mutual account”.

Counsel for the defendant relies very strongly on the case of *Tea Financing Syndicate Ltd. v. Chandrakamal Bezbaruah* (3). I propose to set out the very passage in the judgment of Rankin, C.J. on which counsel for the defendant lays so much stress for his submissions, and wherein the facts are sufficiently set out. The learned Chief Justice stated ([1931] I.L.R. 58 Cal. at p. 667, para. 2):

“It appears to me to be reasonably plain that the type of case suggested by Vice-Chancellor Turner in *Phillips v. Phillips*, namely, where each party has received and paid on account of the other, is by no means the only type of case coming within art. 85. Perhaps the simplest and commonest case of all is that of two merchants each supplying goods to the other. But the cases already referred to show that the cross-claims may be rent and wages, rent and liquor supplied, money lent and proceeds of sale of goods. The conditions of the applicability of art. 85 are not, I think, obscure. There must be cross-claims arising out of a course of dealing, which evidences or is referable to an intention of set-off. The phrase ‘reciprocal demands’ does not import that either party has made an actual demand in fact. In the present case, there is no difficulty in holding, upon the face of the hypothecation deed of February 3, 1920, that the parties embarked upon a course of dealing, under which advances were to be made from time to time and tea was to be sent for sale from time to time when and so soon as it should be manufactured and in a fit state for transmission. Nor is there any difficulty in holding that the making of the advances and the consignment of the tea were to be brought together into one account as items, which would produce a balance. The objection seems to be that there were to be no cross-claims or, as the learned judge has put it, ‘there was never a time when the defendant was in a position to say to the plaintiffs “I have an account against you”.’ There can, I think, be no doubt that the requirement of reciprocal demands involves, as all the Indian cases have decided following *Holloway, Ag. C.J.*, transactions on each side creating independent obligations on the other and not merely transactions which create obligations on one side, those on the other being merely complete or partial discharges of such obligations. It is further clear that goods as well as money may be sent by way of payment. We have, therefore, to see whether under the deed the tea, sent by the defendant to the plaintiff for sale, was sent merely by way of discharge of the defendant’s debt or whether it was sent in the course of dealings designed to create a credit to the defendant as the owner of the tea sold, which credit when brought into the account would operate by way of set-off to reduce the the defendant’s liability. In my judgment, the present case cannot rationally be distinguished in this respect from *Watson’s* case, where Messrs. Currie & Co. were empowered, out of the money to be received of the proceeds of sale, to take and pay themselves such sum or sums of money as might from time to time become due to them. The case is not taken out of art. 85 by reason that the mutual dealings are carefully arranged and designed so as to afford security to one party or the other. Whether the security is arranged for, as in the present case, by taking a charge upon all the tea in the garden or by the somewhat different machinery adopted in *Watson’s case* can make no difference. In my opinion, plaintiffs’ liability to account to the defendant for the proceeds of the tea sold by them was an independent obligation and the circumstance, that they were expected and intended to apply such sums as would be necessary, in liquidation of their advances, does not mean that this was an account in which the obligations were all on one side, as distinct from an account in which there are cross-claims or reciprocal demands. With great respect to the learned trial judge and to the learned judges, who decided in *Shivi Gowda v. Fernandes* that the sales of coffee there gave rise

to no independent obligation, I think that art. 85 must be applied to the facts of this case”.

In this instant case, without going into detailed examination and consideration of the evidence, it is, to my mind, abundantly clear that as remarked, Mr. Tognetti being the more affluent, he materially assisted his compatriot and friend the defendant, and not only did he supply to him and purchase on his behalf materials used in the execution of the actual work, and these covered a very wide range including petrol and oil, but he also remitted on the defendant’s behalf money to Italy, even paying the fare of the defendant’s wife to Italy. There passed between the parties in their reciprocal dealings invoices and credit notes. It is not irrelevant to note that the defendant’s invoices were not only for work done but for materials supplied. In particular there is an invoice, produced amongst a bundle of invoices as Ex.J., numbered 544 and dated September 15, 1962, from the defendant to the company, which reads:

“To supply 10 drums of 5 galls. each Robbialac	
Azure Blue enamel.	Shs. 2,870/-
To supply 15 X 375 Green B. colorcrete	<u>2,670/-</u>
	5,540/-”

The invoice is headed “Cash Sale”. On the surface at least, it would indicate a sale of material by the defendant to the company. This invoice is however disputed, the defendant maintaining that it was merely a return of part of the paint supplied to him by the company, with which he was debiting the company. As I am deferring consideration of this invoice and its effect until subsequently in this judgment, I do not propose to take it into account in deciding the instant issue as to whether there was a mutual open and current account between the parties. Even disregarding the material supplied by the company to the defendant, which according to the invoices would appear to be sales, the advances made to, and payments made on behalf of, the defendant cannot, to my mind, by any stretch be regarded as advance assessments or estimates of payment for the work to be done by the defendant, as submitted by counsel for the defendant. Taking into consideration these payments and advances and the materials supplied by the company and the defendant’s invoices for work done and material supplied, even apart from the last disputed invoice referred to, to my mind, the only reasonable conclusion to be drawn is that there were mutual and reciprocal obligations created by each party against the other. Their transactions, therefore, I find, constitute a mutual open and current account within the meaning of art. 85 of the Act, which reads:

<i>“Description of suit</i>	<i>Period of limitation</i>	<i>Time from which period begins to run</i>
For the balance due on a mutual open and current account, where there have been reciprocal demands between the parties.	Three years	The close of the year in which the last item admitted or proved is entered in the account; such year to be computed as in the account”.

And this brings us to the third and last issue, which is:

“If so (i.e. if there was a mutual open and current account at the material time) is the suit barred by art. 85 of the Indian Limitation Act, 1908, or is it saved by virtue of the last two items entered in the account dated September 15, 1962, and January 8, 1963?” (as amended by the addition of the third invoice).

The last two items in the account, annexure 'A' to the plaint, are respectively invoice No. 544 dated September 15, 1962, for Shs. 5,540/- and invoice No. 554 dated January 8, 1963, for Shs. 10,450/-. The third invoice, added by the amendment, is No. 543 dated October 5, 1962, for Shs. 700/-. In his written statement of defence the defendant avers that:

"With reference to the second of the said items, viz., Invoice No. 554 dated January 8, 1963, for Shs. 10,450/-, this is a correction of a previous under-payment, by invoice No. 526 dated December 31, 1961, for painting steel structures at Kilombero".

In the reply to the written statement of defence the company admits that it was an adjustment but not of any under-payment as alleged. And at the hearing counsel for the plaintiff agreed, as conceded in the reply, that this invoice was an adjustment of a previous one, and he stated that he was not relying on, or any longer submitting that, this invoice saved the account from being time-barred. There therefore remain only two invoices to consider, both of which are disputed, No. 544 as to its purport, as already indicated and No. 543 as to its date. In his written statement of defence with regard to the first, the defendant avers:

"With reference to the first of such items, viz., invoice No. 544 dated September 15, 1962, for Shs. 5,540/- this was the sum belatedly credited to the defendant for surplus paint removed by the company on completion of the work in or about April, 1962, and is in rectification of the sum debited to him for the whole of the paint supplied under debit notes dated May 10, 1961, and May 13, 1961".

With regard to the second, No. 543, the date is disputed. It is abundantly clear from even the most cursory examination of this invoice, produced as part of the bundle of invoices Ex. J., that it originally bore the date May 31, 1962, and this is the date still extant on its carbon duplicate in the invoice book produced as Ex. D.6. It is equally clear that the original date has been altered to read October 5, 1962.

Before considering the genuineness, purport and effect of these invoices, it is necessary to deal with a further defence as raised in the written statement of defence, that:

"The defendant ceased to carry on business under the name and style of 'Italian Flooring Roofing and Decorating' on and from April 30, 1962. Nor did the defendant thereafter carry on the same or like business under any other trade name or in his own name".

In arguing this defence counsel submitted that even if there was a mutual open and current account between the parties such account had ceased as from, at latest May 31, 1962.

In support of this defence there was produced a letter dated June 15, 1962, from which the defendant, Ex. M, addressed to the company, which reads:

"With reference my letter informing you of the taken over of B. Gandini Ltd. by myself and Mr. P. V. Pampuro.

Would you close the account of Italian Flooring Roofing & Decorating on May 31, 1962 and advise me of the balance which will be settled by me".

To this the company replied by letter dated September 20, 1962, Ex. N, which reads:

"We refer to your letter dated June 15, 1962.

According to our books there is an amount outstanding in our favour of Shs. 56,068/48 and we would be grateful if you would make arrangements for this amount to be cleared”.

A further letter from the company dated October 4, was produced as Ex. O. This reads:

“With reference to your letter dated September 22, 1962, we enclose a Statement of your account which ceased operation on May 31, 1962. You will observe that some entries have been passed after that date for items which since came to light. We have also included a statement of an account which stands in the name of Mr. Panciroli.

The balance now showing to your debit is Shs. 50,528/48 and you are earnestly requested to make arrangements for the account to be settled as soon as possible”.

(The letter dated September 22 referred to does not appear to have been exhibited.)

I propose to deal first and briefly with the averment that the defendant ceased to carry on business under the name and style of Italian Flooring Roofing and Decorating on and as from April 30, 1962 etc., as it can easily and readily be disposed of. As noted, in Ex.M the defendant informed the company that he and a Mr. Pampuro had taken over the business of B. Gandini Ltd., requested that the account of Italian Flooring Roofing and Decorating be closed as from May 31, and asked to be advised of the balance outstanding. However, he admitted in evidence that although he had registered the firm with the Registrar-General in February, 1958, he did not give notice of cessation of such firm until September 5, 1964, explaining the delay by his ignorance of such requirement; and that it was only brought to his notice when another company wished to register a name similar to the one he had been trading under and could not do so until he had given notice of cessation. Be that as it may, in answer to the court the defendant stated that he had had printed the requisite and usual stationery in respect of the company B. Gandini Ltd. Yet in all his correspondence and communications with the company, including letters and invoices, he used the stationery of Italian Flooring Roofing and Decorating and expressly so signed under such name and style. Mr. Tognetti, in his evidence, stated that his business relations with the defendant, which go back as far as 1956, were conducted on a personal basis, and in so far as this instant case is concerned the defendant himself stated that he commenced his sub-contractual work at the beginning of February, 1961. When invoices and correspondence started coming in to the company under the name and style of Italian Flooring Roofing and Decorating, Mr. Tognetti, so he stated, was approached by his accounts department, and in consequence the position was clarified and normalised by a confirmatory letter from the defendant, Ex.L., which reads:

“This is to confirm that the name of my business is Italian Flooring, Roofing and Decorating and that I agree to accept responsibility for any debts under that name.

(Sgd.) M. Panciroli”

This letter, I consider, supports Mr. Tognetti’s case that his relations with the defendant were on a personal basis and that they so continued although the defendant carried on his business under the name and style of Italian Flooring Roofing and Decorating right to the very end. As already noted, even after the defendant had taken over the business of B. Gandini Ltd. in conjunction with a partner, in the acquisition of which incidentally, Mr. Tognetti stated he had assisted the defendant, the defendant continued his relations with the company under

the name and style of Italian Flooring Roofing and Decorating. This case is concerned only with the relations between the company and the defendant, and whatever other activities the defendant may have indulged in and under whatever name, in so far as his dealings with the company were concerned they were continued until the very last, even as late as March 26, 1963 (Ex.Q), under the name and style of Italian Flooring Roofing and Decorating. All this is, I think, sufficient to dispose of the averment as to the defendant ceasing to carry on business under the name and style of Italian Flooring Roofing and Decorating, at least in so far as this case is concerned.

It is clear from the correspondence between the parties that a balance in the accounts was struck, at least by the company, on September 20, 1962, as per the letter Ex.N, the balance being in favour of the company, to the tune of Shs. 56,068/48. Although, as already indicated, the defendant's letter dated September 22, 1962 referred to by the company in Ex. O does not appear to have been exhibited, it is equally clear that the balance struck was never agreed to. In fact, it has not even been agreed to date. Hence this case.

Counsel for the plaintiff submitted first of all that the account could not be closed by a unilateral striking of a balance, and secondly, even if it was closed, it was re-opened by the defendant himself in the sale of paint by him to the company, as evidenced by invoice No. 544 dated September 15, 1962. However, as the import and purport of this invoice is in dispute, the defendant's case being that it was in effect no more than a debit for the return to the company of surplus paint which he had obtained from the company, of surplus paint which he had obtained from the company, I do not propose to rule on this invoice at this stage but will confine myself to the issue as to whether a unilateral striking of a balance can effect the closure of a mutual open and current account, as submitted and canvassed by counsel for the defendant. The Indian authorities are as usual conflicting and no useful purpose would, I think, be served in referring to them as there are cases of this court and of the Court of Appeal for Eastern Africa wherein, incidentally, the Indian authorities were reviewed. Counsel for the defendant, in his submission, relies on the case of *H. J. Stanley and Sons Ltd. v. Said Nasoor Zahor* (4), a case of this court, wherein it would appear from the judgment of Reide, J., that once a balance is struck, even unilaterally and not mutually agreed, it constitutes a closure of the account. Counsel for the defendant further referred to a case of my own, *H. J. Stanley and Sons Ltd. v. Gulamhussein Ramji and Co.* (5), wherein I am recorded as stating:

"It is the essence of a mutual open and current account that it is open. Once a balance has been struck it is no longer open".

The passage quoted is certainly not unequivocal and is equally consistent with a balance having been struck unilaterally as with an agreed balance. Likewise the ruling of Reide, J., referred to, although it would appear from the context that it was a balance struck unilaterally and subsequently disputed, such ruling is, I think, really obiter. In any event, although this case is of persuasive authority, there is a case of the Court of Appeal for Eastern Africa which is binding on this court, to the contrary, and which incidentally, does not appear to have been brought to the attention of the learned judge in the *H. J. Stanley and Sons Ltd. v. Said Nasoor Zahor* (4) case. In *Abdalla Ladha Jivraj, v. Ali Kassam Virani Ltd.* (6), a case emanating from this court, it is stated in the leading judgment of Sir Alastair Forbes, V.-P. ([1960] E.A. at. p. 847):

"Mr. Master's final point, namely that the account was closed by the letter from the respondent company's advocates of November 3, 1955, and that therefore the account was not an open account when the suit was filed, is one of some difficulty owing to the conflict of authority in the Indian courts.

Mr. Master drew attention to *The Firm Gumdass Ramkaturam v. Bhagwan Das and others* (7); *Firm Bhagwan Das-Kanhaya Lal v. Frim Nand Singh-Hari Singh*(8); and *Karsondas Dhunjibhoy v. Surajbham Ramriipal and Others*(9). These cases are considered by the learned author of Rustomji's Law Of Limitation (5th Edn.) at pp. 825 and 826. The relevant part of the decision in the last mentioned case is summarised at p. 826 of Rustomji as follows:

'In a recent Bombay case the learned judges held that in order to apply art. 85 the account must be *open* down to the date of the suit. If at the date when the plaintiff brings the suit there is in fact no open account (i.e. when the account was closed prior to the suit), the suit cannot be said to be for the balance of an *open* and current account. In the course of his judgment in the Bombay case last cited Rangnekar, J., observed: "If a person says to another, 'From today I shall not have any business dealing with you; I have made up my account which according to me is correct, and if you do not accept it, do what you like'." If after this nothing further happens between the parties, the account must be said to have been closed *whether the other party accepts the correctness of the account or not*. The test is, not whether the account which has been sent to the party is correct or not, but whether one party closes the account to the knowledge of the other'.

However, the learned author continues as follows:

'It is submitted, however, that where an account between two parties has throughout been an open and current account it is not competent for one of them to arbitrarily close that account so as to deprive the other from availing himself of the benefit of art. 85. The fact that on the date of the suit there was no running account does not necessarily affect art. 85. An account is open when the balance is not struck, or, though struck, *is not accepted or acknowledged to be correct by the parties concerned*'.

Of the cases referred to by the learned author of Rustomji in support of this latter proposition, I will only refer to *Tea Financing Syndicate Ltd. v. Chandrakamal Bezbaruah*. Ghose, J., says (58 Cal. at p. 678) in relation to art. 85:

'An account is open when the balance is not struck or, though struck is not accepted or acknowledged to be correct by the parties concerned; and an account is current when it has been going on as a continuous account between two the parties. A running or continued account between two or more parties is an account current. A shifting balance may be a test of mutuality, but its absence is not a conclusive proof against mutuality'.

I have considered carefully the conflicting propositions which emerge from the Indian cases and have reached the conclusion that I prefer the decision of Ghose, J., in the *Tea Financing Syndicate* case (10). If the Bombay case is to be taken literally, it would seem that a suit could hardly ever be brought to which art. 85 would apply; since a suit would normally be preceded by a demand for payment of a balance alleged to be due on the account in question, and that, as I read the decision, would result in the closing of the account so that art. 85 would not be applicable.

Following the decision in *Tea Financing Syndicate Ltd. v. Chandrakamal Bezbaruah* (10), it is clear that the account in this case was not closed, since the respective balances struck by the parties were never accepted or acknowledged to be correct by the other party.

If I am right as to this, the period of limitation of three years under art. 85 applies, and runs from December 31, 1955, that is, the close of the year in which the last item admitted is entered in the account; and the respondent company's counterclaim is accordingly not barred by limitation".

Counsel for the defendant, whilst conceding that this case is against him, nevertheless submitted that it should not be followed in view of the Indian decisions on which he placed so great reliance. Even if I were not in agreement with the Court of Appeal ruling, and with respect, I am far from persuaded that I should not be, it is nonetheless binding on this court. I therefore find as a fact that the mutual open and current account between the parties was not in fact closed by the unilateral striking of a balance. The issue of limitation therefore falls to be determined by and is dependent on the last item in the mutual open and current account.

It is now necessary to deal with the last two items pleaded in the plaint (as amended) as saving the claim from being time-barred, although it may well prove an academic and unrewarding exercise. The first is the disputed invoice No. 543, which reads:

"For stop leaking all the houses Type C
6 galls. of paint Shs. 700/-"

According to Mr. Tognetti the company's work on these houses was completed some time in March, 1962. There then followed a maintenance period of six months. During this period leakages in the roofs were discovered and the defendant's work, covered by this invoice, was in respect of repairs to the roofs. He could not of his own knowledge state exactly when the work was done, but was of the opinion that it would be at or about the end of the maintenance period. However, there is more specific evidence as to when the work of the company was completed and the maintenance period ran, from Mr. Johan Frederikz, who described himself as a consulting engineer of Messrs. Bish and Partners Ltd., Consulting Engineers, and who issued the completion certificate. This certificate is dated November 3, and according to the witness this shows that the maintenance period expired at or about the end of October, which would indicate that the work by the company was completed at or about the end of April. The defendant's case, however, is that this work was done by him in about March or April and he made out the invoice for the work, No. 543, on May 31, 1962, as shown on the duplicate carbon copy in Ex.D.6. As noted earlier in this judgment, it is abundantly clear that the date on the invoice itself has been altered to read October 5, 1962. The invoice bears a rubber stamp date, October 10, 1962, which is that of the company. The invoice also bears a written number, 219, which Mr. Musa Fazal Suleman, who at the material time was employed as a bookkeeper by the plaintiff company, stated was in his writing and was the reference number given to the invoice in respect of its entry in the purchase daybook. He could not, not surprisingly, recollect having himself rubber stamped the date, or having noted the alteration in the date when he dealt with the invoice. The defendant categorically denied that he had himself altered the date and asserted that the invoice was personally delivered by him at the offices of the company soon after it was made out; that would be in early June. The issue as to when the work was actually done and the invoice in respect of it made out is far from easy to determine. The only direct evidence as to that is that of the defendant, who stated that he did the work some time in March or April. Although I agree with the submission that maintenance work is usually left as late as possible, it is equally true that an emergency job such as leaking roofs could not be left to the end of the maintenance period but must be executed immediately. According to the defendant the work was done during the rainy season, and the company's own witness, Mr. Frederikz, stated that there are

heavy rains in March, April, May. No inference can therefore be drawn from any extraneous circumstances, as distinct from the direct evidence. I had at first thought that the sequence of invoices in the defendant's invoice book, which obviously has not been tampered with, would indicate when the work was done, as the invoice could certainly not precede the work. However, as invoices previous to the one under review show later dates nothing conclusive can be established from the sequence. Had the company's purchase daybook been produced, showing the entry of the invoice in its proper sequence, it would, I think, have been conclusive. This book however has not been produced. Its non-production could reflect adversely on the plaintiff's case, but according to counsel for the plaintiff, a search was made for this book but proved fruitless. In considering this issue, in view of the fact that according to the defendant the alteration in the date on the part of the plaintiff is a forgery, it may be argued that different standards of proof are required from the respective sides, forgery being a criminal offence; and there are authorities to the effect that even in a civil case an allegation of a criminal act must be proved to the standard required in a criminal case. There are, however, cases to the contrary, though as remarked by Denning L.J. (as he then was):

"The difference of opinion which has been evoked about the standard of proof in these cases may well turn out to be more a matter of words than anything else".

However, I consider that in this instant case the issue falls to be determined in accordance with where the burden of proof lies. It is a general principle, and I think axiomatic, that the onus is on the party who asserts. In this case the company is setting up the invoice as saving the claim from being time-barred. It is therefore on the company to establish the date canvassed by it. On due consideration of all the evidence, I am not persuaded that the company has succeeded in establishing the authenticity of the altered date on the invoice.

I now turn to the last item, that in respect of invoice No. 544 dated September 15, 1962. This is worded:

"To supply 10 drums of 5 galls. each Robbialac Azure Blue enamel.	Shs. 2,870/-
To supply 15 × 375 Green B. colorcrete	<u>2,670/-</u>
	5,540/-"

It is also headed, in writing, "Cash Sale". Mr. Tognetti testified that at the completion of the defendant's work on the Kilombero site, as the defendant had neither transport nor storage space in Dar-es-Salaam, the company transported the defendant's materials and equipment to Dar-es-Salaam and stored them for the defendant in its godown. Amongst such materials was this Robbialac paint and colorcrete which was purchased from the defendant. It is common ground that these materials, the colorcrete and paint, had originally been supplied by the company to the defendant, and it is the defendant's case that as they proved surplus to requirement they were returned to the company, and he accordingly debited the company in respect of such return. Apart from the fact that it is common ground that the company refused to take delivery (to use an innocuous expression) of other surplus materials on the defendant's hands which he wanted the company (again to use an innocuous expression) to relieve him of, making all due allowance for English not being the defendant's mother tongue, the wording of the invoice, to my mind, cannot be reconciled with a return of materials supplied and found surplus to requirement. And the defendant himself is recorded as stating, in examination-in-chief, it should be noted:

“How did you come to have paint to sell to Italian Construction? – They asked me sometimes. I sold it back to Italian Construction”.

I accordingly find that the transaction constituted a resale and so constitutes an item in the mutual open and current account between the parties.

According to art. 85 of the Limitation Act above set out, on a mutual open and current account time begins to run from the close of the year in which the last item admitted or proved is entered in the account; such year to be computed as in the account. It is submitted by counsel for the plaintiff that the close of the year in this instant case is December 31, 1962. This certainly would let in a number, in fact a large number, of other items set out in the account, saving the claim from being time-barred. There are three items in the annexure to the plaint the authenticity and import of which are not in dispute. Although the plaint specifically pleads only two items, as limitation is a question of law the court would certainly not be debarred from taking these into account if relevant, although not pleaded. As to how the closure of the year is reckoned within the meaning of art. 85, Rustomji states, at p. 838:

“*‘Year’ as Reckoned in Account:* The word ‘year’ in art. 85 does not necessarily refer to the English or the Bengali, Sambat, Mahajani or Fasli year, but it may mean something quite different. It is to be the year *as reckoned in the account*. If the accounts are made up to the particular date on which the books are closed, the three years are computed from the close of such conventional year. When an account is kept according to the *native* year, time under art. 85 runs from the close of such *native* year. *Thus* when an account was kept according to the Sambat year, and the last admitted item was in Assin Sudi 1931 S. (corresponding to October 25, 1874) and the close of the year 1931 S. was April 20, 1875, *held* that a suit brought on December 6, 1877 (i.e. within three years of the close of the Sambat year 1931 S.) was well in time. Parties having a mutual open account current may stipulate for a time of closing it either expressly or by implication, and the statute of limitation would run on the balance from that day”.

And Rivaz, in his commentary on the Act, 6th Edition, has this to say (at p. 239):

“*Close of the year:* In a case under the Act of 1859, the Calcutta High Court discussed the question as to what was to be considered the ‘close of the year’ within the meaning of the Act. Norman, J., observed: ‘I can only conclude that the year is not necessarily to be the English year, or the Bengali, Sambat, Mahajani, or Fasli year, but may be something different. It is to be the year as reckoned in the accounts. If the accounts are made to the particular date on which the books are closed, I think the parties are allowed three years from the end of such conventional year. In the present case the plaintiff’s books are regularly made up year by year to June 30. The suit, therefore, having been brought within three years from June 30, 1867, appears to me to be within time’. This decision was confirmed on appeal by Couch, C.J., and Phear, J. The learned Chief Justice, in dealing with this part of the case remarked: ‘The legislature would seem to have contemplated that the accounts would be yearly accounts and the balance would be struck yearly; and, I think, when we look at the reason of that provision, it must mean that the year was intended to reckon from the time when the balance was struck. The object seems to me to be this, that if there were accounts between the parties, in many cases there would be no right to sue at all until a balance is struck, and, in other cases, even if there were a right to sue, the merchant would not sue without a balance being struck. It was intended that the year should reckon from the period when he might be

expected to sue on the balance, and he is to have three years from that time as in ordinary cases”.

There is nothing in the proceedings to indicate that it was the practice of the the parties to balance their books at year’s end, and as already held, following the East African Court of Appeal case, *Aballa Ladha Jivraj v. Ali Kassam Virani* (6) (supra), no agreed balance was struck so as to close the account. All the correspondence between the parties, including letters and invoices, bear British calendar dates. There is therefore no reason why – in fact, every reason to the contrary – for the purpose of determining the close of the year within the meaning of art. 85 of the Act, the British calendar year should not be taken and the Interpretation and General Clauses Act applied, “‘year’ and ‘month’ means respectively a year or a month reckoned according to the British calendar”. I am fortified in such finding by the East African Court of Appeal case already applied, wherein the last paragraph of the passage quoted from the judgment reads:

“If I am right as to this, the period of limitation of three years under art. 85 applies, and runs from December 31, 1955, that is, the close of the year in which the last item admitted is entered in the account; and the respondent company’s counterclaim is accordingly not barred by limitation”.

Counsel for the defendant, however, has sought to distinguish that case in that there it was expressly averred in the plaint that the mutual accounts between the parties were kept according to ‘the English or Christian calendar year’, and in this instant case no such averment has been made. However, the failure to make such express averment does not preclude the court from considering all the available evidence and applying the Interpretation and General Clauses Ordinance on the issue of limitation, which is one of law.

To recapitulate, on the three agreed issues as framed, I find that the plaint as filed is competent, that there was a mutual open and current account between the parties, and that the suit is not barred by limitation.

Judgment for the plaintiff

For the plaintiff:

Donaldson & Wood, Dar-es-Salaam

H. Udvardia

For the defendant:

A. C. Beynon, Dar-es-Salaam

Harjit Singh

Kohli v Maghar Singh and others [1967] 1 EA 282 (HCK)

Division: High Court of Kenya at Kisumu

Date of judgment: 19 December 1966

Case Number: 130/1960

Before: Madan J

[1] Execution – Attachment and sale of land – Delay by decree-holder – Application by judgment-debtor to dismiss application for execution and to raise prohibitory order – Duties of decree-holder – Proper order to be made – Civil Procedure (Revised) Rules, 1948, O. 21 rr. 7, 9, 49, 52 and 61 (K.).

Editor's Summary

The first defendant as registered proprietor charged certain land to the plaintiff in May, 1958 to secure repayment of a loan of Shs. 40,000/- and interest. In July, 1958 the first defendant transferred a half share in the land to the second and third defendants; and on the same day he also charged the land to the second and third defendants to secure repayment of a loan of Shs. 17,000/- and interest. This transfer and the further charge were made subject to the charge to the plaintiff. In October, 1960 the plaintiff sued all three defendants for recovery of the loan due to him under his charge, but that charge was declared a nullity and his suit was dismissed insofar as it was based on that charge; although he did get judgment against the first defendant only on an alternative claim for money paid for the use and on behalf of and at the request of the first defendant. The plaintiff then applied in December, 1962 to execute his decree against the first defendant by attachment and sale of the right title and interest of the first defendant in the land, and in January, 1963 the court issued a prohibitory order in the usual form. After a lull of nearly three years the plaintiff, in November, 1965, applied by chamber summons to settle the conditions of sale, but this application was withdrawn by consent in June, 1966. The plaintiff did nothing further. In September, 1966 the defendants had the matter mentioned before the District Registrar, who made an order leaving the prohibitory order in force and standing the matter over generally. The defendants thereupon brought the present application, asking that this order of the District Registrar be discharged and for orders dismissing the December, 1960 application for execution, terminating the attachment and raising the prohibitory order, on the ground (in effect) of the plaintiff's default. The plaintiff submitted at the hearing (inter alia) that once a decree-holder has applied for execution by attachment and sale there is no obligation upon him to do anything further, it then being for the court to proceed with the application.

Held –

- (i) a decree-holder who is interested in pursuing his remedy by way of attachment and sale of immovable property must comply with O. 21, rr. 7 and 9 and must also provide the material necessary under O. 21, r. 61 (2) and (3) to enable the court to proceed with the execution to the point of sale by public auction;
- (ii) on a footing of equities, and without trying to decide the exact effect of O. 21, r. 52, the interests of justice would best be served by ordering that, if the first defendant's interest in the land had not been sold by a fixed date pursuant to all necessary steps to be taken by the plaintiff, the plaintiff's application for execution be dismissed and the prohibitory order cancelled.

Order accordingly. Costs of application to defendants.

No cases referred to in judgment.

Judgment

Madan J: This is an application by the three defendants in the suit for an order that the order made by the Senior District Registrar, Kisumu, dated September 30, 1966, be discharged and it be substituted by orders:

- (1) dismissing the application for execution dated December 20, 1960,
- (2) terminating the attachment levied thereunder against the right, title and interest of the first defendant in Plot Number 1148/48/LXIII, Kisumu (hereafter referred to as the suit property), and
- (3) raising the Prohibitory Order issued thereby, either forthwith or after the expiration of a named period, if by then the first defendant's equity of redemption in a moiety of the property, subject to the prior charge in favour of the second and third defendants to secure a sum of Shs. 45,000/- now due (inclusive of interest) is not brought to sale.

The order which the learned Senior District Registrar made on September 30, 1966 reads as follows:

"I do not feel that the decree holder should be deprived of his right to prevent, by the prohibitory order, the judgment debtor from disposing of his right, title and interest over this property whilst the decree remains unsatisfied and whilst, apparently, the judgment debtor is neither present nor, apparently, willing to take any steps to satisfy the decree. The order is expressed to run 'until further order of the court' and this court is not prepared in the circumstances to make such further order. The prohibitory order therefore is not raised and remains in force and the case is stood over generally. The costs of today's application to the decree holder."

According to the amended plaint the first defendant, who was registered as the proprietor of the suit property, on May 19, 1958, charged it in favour of the plaintiff to secure repayment of Shs. 40,000/- lent and advanced to him by the plaintiff with interest thereon. On July 7, 1958 the first defendant executed a transfer whereby he transferred his one-half share in the suit property to the second and third defendants. On the same date the first defendant executed a further charge whereby he charged the suit property (his own undivided half share and interest?) in favour of the second and third defendants to secure unto them repayment of Shs. 17,000/- lent and advanced by them to the first defendant together with interest thereon. Both the transfer and the further charge in favour of the second and third defendants were made subject to the charge in favour of the plaintiff.

On October 15, 1960, the plaintiff instituted this suit against all three defendants for recovery of Shs. 52,540/85 being the total of the principal loan and interest thereon due to him under the charge in his favour. In due course the suit came on for trial and as I read the judgment of the court, the charge in the plaintiff's favour was declared a nullity. The plaintiff however obtained judgment against the first defendant for Shs. 32,500/- on his alternative claim as money paid for the use and on behalf of and at the request of the first defendant. All that part of the claim which was based upon the instrument of charge was dismissed.

The plaintiff sought to enforce the decree by an application for execution dated December 20, 1962 inter alia by attachment and sale of the right, title and interest of the first defendant as judgment debtor in the suit property. The court issued a prohibitory order dated January 3, 1963, in the usual form prohibiting and restraining the first defendant and all other persons from dealing in the property.

There was a lull in the proceeding until November 19, 1965 when the plaintiff took out a chamber summons returnable on December 2, 1965 to settle conditions

of sale in accordance with a draft of the conditions attached to this application, which by consent on December 2, 1965 was stood over generally. No further action would seem to have been taken in regard to this application until June 23, 1966, when the parties filed a consent letter asking the court to mark it withdrawn with no order as to costs.

The plaintiff did not move in the matter again. On September 2, 1966 the defendants' advocates wrote a letter to the court in the following terms:

"We refer to the attachment of property herein in execution of the decree and to the decree-holder's default, and lack of progress of the execution, and would request you to have the application dismissed in terms of O. 21, r. 52".

The District Registrar fixed the matter for mention on September 30, 1966 when he made the order which I have already set out.

With respect, the application has been argued before me unnecessarily lengthily. When shorn of the several irrelevant matters referred to and points raised the issue to be decided is whether, in view of the provisions of O. 21, r. 52 of the Civil Procedure (Revised) Rules, 1948, the plaintiff's application for execution made on December 20, 1960 should be dismissed and the prohibitory order issued pursuant thereto recalled as, it is submitted, the court is unable to proceed further with the application for execution by reason of the decree-holder's (plaintiff's) default.

Order 21, r. 52, reads as follows:

"52. Where any property has been attached in execution of a decree, but by reason of the decree-holder's default the court is unable to proceed further with the application for execution, it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a future date. Upon the dismissal of such application the attachment shall cease."

It is submitted that after the issue of the prohibitory order on January 3, 1963, the plaintiff was in default for nearly three years in not bringing the sale to a head and that it is obligatory for the court to dismiss the application for execution there not being any sufficient reason, also none has been shown or explained upon the hearing of this application, to adjourn the proceedings to a future date, which in any event means adjourning the proceedings to a fixed date in the future. There is no power, it is further argued, to stand over the matter generally; therefore, the order made on September 30, 1966 is wrong.

Counsel for the plaintiff, after he said that it is not mandatory for the court to dismiss the application and that adjournment of the proceedings to a future date includes the power to adjourn generally, made the somewhat startling submission that once a decree-holder makes an application for execution of the decree by attachment and sale of immovable property there is no obligation upon him to do anything further in the matter. It is then for the court to proceed with the application. Counsel for the plaintiff further said that there is also no obligation upon a decree-holder to settle conditions of sale.

The court can do no wrong. This desperate attempt to throw the blame upon the court provides no answer to the criticism of the plaintiff's conduct that as a result of determined inactivity on his part no sale has taken place for nearly three years.

The execution of a decree by attachment and sale of property is set in motion by a written application stating, as required under O. 21, r. 7 (2) (j) (ii), the mode in which the assistance of the court is required, one of such modes being by attachment and sale of property. An application for attachment of any

immovable property must contain certain particulars as required by r. 9. Under r. 49, where the property to be attached is immovable, the attachment is made by the issue of a prohibitory order. Then we pass on to r. 61 which provides that where any property is ordered to be sold by public auction in execution of a decree, the court shall cause public notice and advertisement of the intended sale to be given in such manner as the court may direct. Such public notice shall be drawn up after notice to the decree-holder and the judgment debtor, and shall state the time and place of sale, and also specify the matters set out in sub-r. (2). One of the matters to be specified under sub-r. (2) is any incumbrance to which the property is liable. Under sub-r. (3) every application for an order for sale under r. 61 shall be accompanied by a statement signed in the same manner as prescribed in the Rules for the signing of pleadings and containing, so far as they are known to or can be ascertained by the person so signing, the matters required by sub-r. (2) to be specified.

Clearly then, a decree-holder who is interested in pursuing his remedy by way of attachment and sale of immovable property must, quite apart from the question of payment of the court fee and charges for advertising without which the court would not move, comply with the requirements of rr. 7 and 9 without which the application for execution may be rejected under r. 13 (1). He must also provide the material necessary under sub-rr. (2) and (3) of r. 61 to enable the court to proceed with the execution to the point of sale by public auction.

It would be correct to say, but not in the same sense as submitted by counsel for the plaintiff, that there is no obligation upon a decree-holder to take any steps or any further steps after the filing of an application for execution if he is not interested in doing so. The court will not goad him into action to realise the fruits of his decree. When a decree-holder fails to pursue his remedy fully after initiating attachment of property a situation like the present one arises.

Counsel for the plaintiff also argued that, not being a formal order, the order of September 30, 1966, is a nullity being outside the scope of O. 48, r. 3. In other words the learned District Registrar had no power to make the order which he did. There being no order the present application does not lie. I do not find it necessary to rule upon this submission. The court would discharge an order on being satisfied that it is a nullity upon an application made for that purpose and also otherwise. With respect, it seems to me a storm is being raised about an order which was merely a gloss upon the status quo when it was made. The effect of the order was to leave matters as they were. Both the application for execution and the prohibitory order would have remained alive as they continue to do if the order was not made. If anyone has cause for complaint it is the applicants, who were refused the order they were asking for.

Finally counsel for the plaintiff submitted that there must be exceptionally weighty reasons to deprive a decree-holder of his rights under a decree. He conceded however that, as the court is now seized of the matter, the appropriate order could be made.

Therefore, approaching the matter, in the words of counsel for the plaintiff, “de novo”, the parties, this time in the words of counsel for the defendants, “come on to a clean slate”, i.e. they are thrown back to their respective positions held by them on December 20, 1962 when the application for execution was made and the prohibitory order issued.

This being the position, is the application for execution, the defendants’ learned counsel asked, to be allowed to stand till eternity? Not till then, not even half so long, I am able to assure him. Learned counsel emphasised that the plaintiff took no action until November 19, 1965 when the chamber summons to settle the conditions of sale was issued. It too was withdrawn on June 23, 1966.

Thereafter the plaintiff took no further action. The appearance before the learned District Registrar on September 30, 1966 was at the behest of the defendants.

What more forceful reason is required additionally than the plaintiff's own indifferent and uninterested conduct so far to make an order now for dismissal of the application for execution? Would such an order be tantamount to depriving the plaintiff of his rights under the decree? I think not. He would still be free to execute the decree in the most rewarding manner open to him. It must be remembered that if the plaintiff is entitled to realise his decree, the second and third defendants, as chargees who moved to the fore when the plaintiff's charge was removed from the register of titles, are also entitled to realise their security. They may not do so until the prohibitory order has been raised.

The defendants also have waited a long time before they moved. It may be that it is realisation of this fact which induced them in para. (3) of their application to ask for an order raising the prohibitory order either forthwith or after the expiration of a named period.

It would be best, I think, to proceed on a footing of equities without trying to decide the exact effect of the provisions of O. 21, r. 52.

On the one hand the first defendant undoubtedly owes quite a large sum of money to the plaintiff under the decree of the court. On the other hand the second and third defendants are also entitled to enforce their remedies as chargees. In a matter of this kind I think the interests of justice would be served in relation to both sides by making an order, which I do now make, that if such right, title and interest as the first defendant holds in the suit property has not been sold by public auction by May 31, 1967, pursuant to all steps which may be necessary to bring about such a sale to be taken by the plaintiff, the application for execution filed by the plaintiff on December 20, 1962 shall stand dismissed and be of no effect and the prohibitory order issued thereunder or pursuant thereto shall be raised, recalled and cancelled.

I give costs of the application to the defendants.

Order accordingly.

For the plaintiff:

Satish Gautama, Nairobi

For the defendants:

Khanna & Co., Nairobi

D. N. Khanna

Hussein Janmohamed & Sons v Twentsche Overseas Trading Co Ltd
[1967] 1 EA 287 (HCT)

Division: High Court of Tanzania at Dar-Es-Salaam

Date of judgment: 4 October 1966

Case Number: 12/1965

Before: Biron J
Sourced by: LawAfrica

[1] Costs – Successful party deprived of costs by order of magistrate – Evidence of alleged payment demanded but not produced before action – Whether discretion properly exercised – Indian Civil Procedure Code, s. 35 (T.).

Editor's Summary

The respondent company claimed Shs. 1,800/- from the appellant. The appellant by letter alleged that it had paid that amount to a garage at Shinyanga on behalf of and at the request of the respondent company. The respondent company asked for documentary evidence of this payment and eventually, having received none, sued. The appellant in its defence admitted the claim, but set-off a sum of Shs. 1,950/- and counter-claimed the balance of Shs. 150/-, as money paid by the appellant on behalf of the respondent company at its request to the garage for repairs and ancillary charges in respect of a motor vehicle. Some seven (or nine) days before the hearing the appellant's advocate showed the respondent's advocate a certificate from the garage that the charges had been paid by the appellant, and the respondent agreed to accept this as evidence of payment, but (as found by the court below) "due to the appellant's advocate's absence from Dar-es-Salaam and the failure of the respondent's advocate to inform the appellant's advocate's office" certain witnesses from Shinyanga could not be stopped from attending at court. At the hearing the respondent admitted that payment had been made to the garage on its behalf; and the only issue was costs and witness expenses. The trial magistrate awarded costs to the respondent and disallowed the appellant's witness expenses, finding that the respondent was justified in filing suit. The appellant appealed.

Held –

- (i) the general rule is that costs should follow the event and the successful party should not be deprived of them except for good cause;
- (ii) it was incumbent upon the unsuccessful respondent to show good cause;
- (iii) there were no proper grounds for the exercise of the court's discretion in depriving the successful appellant of his costs and the order made was arbitrary and perverse.

Appeal allowed. Costs and witness expenses awarded to the appellant.

Cases referred to in judgment:

- (1) *Fazal Dhirani v. Mohamed Ibrahim* (1946), 13 E.A.C.A. 69.
- (2) *Sheikh Jama v. Dubat Farah*, [1959] E.A. 789.
- (3) *Charles Rodney Huxley v. The West London Extension Railway Co.* (1889), 14 A.C. 26.
- (4) *Mangilal Sitaram Agarwal v. Durgabai w/o Shantiprasad* (1947), A.I.R. 34 Nag. 124.
- (5) *Brown v. New Empress Saloons Ltd.*, [1937] 2 All E.R. 133; (1936), 53 T.L.R. 457.
- (6) *N. H. Moos v. Gulamali Tyabali Soni*, [1930] A.I.R. Bom. 152.

Judgment

Biron J: This is an appeal from the judgment and order of the Dar-es-Salaam District Court awarding the unsuccessful plaintiff company

(hereinafter referred to as the company), whose registered office is in Dar-es-Salaam, costs on its claim against the successful defendant firm trading in Shinyanga (hereinafter referred to as the defendant).

The material facts of the suit as such are not in dispute and can briefly be summarised as follows. The parties, as so averred in the pleadings, carried on business on a current, mutual and open account. By its plaint filed on December 16, 1964 the company claimed from the defendant the sum of Shs. 1,800/- being the balance of account due for goods sold and delivered. By his written statement of defence the defendant admitted that there was a balance of Shs. 1,800/- due for goods received by him from the company, but set off against such claim a sum of Shs. 1,950/- paid out by him on behalf of the company at its request to Messrs. Service Garage of Shinyanga for repairs and ancillary charges in respect of a motor vehicle, and counter-claimed for the balance of Shs. 150/-. The company's reply to the written statement of defence is somewhat incomprehensible; so cannot be summarised but must be set out in full. Fortunately it is short.

"The plaintiff states: –

1. With reference to para one and two of the written statement of defence the plaintiff joins issues with the defendant save where it consists of admissions.
2. The allegations in para three and four of the defence are admitted.
3. With reference to para five of the defence the plaintiff states: –
 - (a) there was a current mutual and open account between the parties;
 - (b) the claim of the plaintiff for Shs. 100/- being re-possession charges and Shs. 50/- disbursement charges are admitted.
 - (c) the claim of the defendant for Shs. 1,800/- being storage and repairing charges paid by the defendant to Service Garage Shinyanga is denied. On several occasions the plaintiff had requested the defendant to forward the invoices of the said service garage and a receipt for the said sum of Shs. 1,800/- from the said service garage. The plaintiff therefore states that this action was brought due to defendant's negligence (sic).

The plaintiff therefore puts the defendant to a very strict proof of his claim.

The plaintiff therefore prays for judgment as prayed and that defendant's counter-claim be dismissed".

On the date set down for the hearing in the district court Mr. Kesaria, who appeared for the company, as he has done at this appeal, is recorded as saying:

"1,800/- paid. Claim for 150/- admitted. There must be judgment for Shs. 150/- to the defendant. Question is of costs only".

For the company a Mr. Hope, who described himself as the manager of its auto department, produced a series of letters wherein the company claimed the balance of Shs. 1,800/- from the firm, to which letters he stated no reply had been received. He admitted in cross-examination that, and I quote:

"I imagine Shinyanga Garage would not release vehicle without getting paid. Vehicle released in August 1964 and no doubt bill was paid."

Mr. Lakha, who appeared for the defendant, as he has done at this appeal, then announced that he was calling no evidence, and in claiming costs also claimed expenses for witnesses brought down from Shinyanga. It was disclosed at the hearing that some days before the hearing, according to Mr. Lakha nine days and

according to Mr. Kesaria seven days, the former had exhibited to the latter a certificate from the Shinyanga Garage to the effect that the charges in respect of the vehicle had been paid by the defendant.

As indicated, the issue was confined to costs. In his judgment the learned magistrate set out the position in the following terms:

“The defendant’s case over costs is that this suit should never have been instituted since the defendant informed the plaintiff in writing by a letter dated June 26, 1964 that the 1,800/- had been paid by them to Shinyanga Service Garage. The suit was filed in December, 1964.

The plaintiff’s position is that it was unable to accept, from a book-keeping point of view, a mere letter stating payment had been made, unsupported by any documents proving payment. The correspondence produced clearly shows the plaintiff’s attitude in this respect although the plaintiff did not in so many words ask the defendant to produce documents proving the payment. Again the plaintiff’s representative in court admitted that fact that Shinyanga Service Garage had released the vehicle in respect of which the 1,800/- account had been incurred was enough for him to presume payment had been made although it would not satisfy an auditor. After this hearing date had been fixed, counsel for the plaintiff and the defendant have informed the court, that on or about May 8, 1965 Mr. Lakha for the plaintiff handed to Mr. Kesaria for the defendant a document signed by Shinyanga Service Garage acknowledging payment by the defendant of 1,800/-. It is dated April 14, 1965 and does not state when payment was made. The plaintiff agreed to accept this as evidence of payment by the defendant but due to Mr. Lakha’s absence from Dar-es-Salaam and the failure of Mr. Kesaria to inform Mr. Lakha’s office, the witnesses from Sinyanga could not be stopped and they have incurred witnesses’ expenses in the sum of 520/- in attending court. I propose to deal with this matter in two parts:

- (1) the witnesses’ expenses
- (2) the balance of the costs”.

The learned magistrate then went on to find (stating inter alia:

“Looking at the behaviour of the defendant as a whole, I am far from convinced that the 1,800/- has in fact been paid, whether the plaintiff is satisfied on the point or not”)

that the company was in his view fully justified in filing the suit for Shs. 1,800/- and accordingly awarded it the costs, and he also disallowed the defendant’s witnesses’ expenses. It is from this order that this appeal has been brought.

As expressly provided for in s. 35 of the Indian Civil Procedure Code, costs are at the discretion of the court, though it is pertinent to set out sub-s. (2), that:

“Where the court directs that any costs shall not follow the event, the court shall state its reasons in writing”.

This last is obviously in accordance with the rule as stated in Mulla (12th Edn.), p. 150, the relevant passage beginning with:

“The following are the leading rules on the subject:

1. *Costs shall follow the event.*

The general rule is that costs shall follow the event unless the court, for good reason, otherwise orders. This means that the successful party is entitled to costs unless he is guilty of misconduct or there is some other good cause for not awarding costs to him. The court may not only consider

the conduct of the party in the *actual* litigation, but the matters which *led up* to the litigation”.

It is trite to observe that an appellant tribunal will not lightly interfere with the exercise of discretion by a trial court. In his submissions counsel for the respondent company relied on, amongst others, the case of *Fazal Dhirani v. Mohamed Ibrahim* (1), wherein it was stated in the judgment ((1946), 13 E.A.C.A. at p. 70):

“It is well established that an appellate court will not interfere with a discretion so exercised unless the magistrate proceeded on some wrong principle. All that the learned judge said in his judgment appealed from was after shortly referring to the facts ‘I consider in the circumstances set out that the discretion of the subordinate judge as to costs was not exercised judicially’. He does not say in what way it was not exercised judicially and with respect I am unable to agree with him. In my opinion the magistrate gave the point most careful consideration and had good grounds for exercising his discretion in the way he did”.

He also cited the case of *Sheikh Jama v. Dubat Farah* (2), wherein it was stated in the judgment ([1959] E.A. at p. 792):

“Where a trial court has exercised its discretion, an appellate court should not interfere unless the discretion has been exercised unjudicially or on wrong principles”.

He further quoted from the headnote to *Charles Rodney Huxley v. The West London Extension Railway Co.* (3):

“The concluding words of Order LXV. r. 1 of the Rules of the Supreme Court 1883 which give the judge or court a discretion as to costs ‘for good cause’ in trials with a jury, embrace everything for which the party is responsible, connected with the institution or conduct of the suit, and calculated to occasion unnecessary litigation and expense. So long as the judge or court deal with considerations of that kind, the sufficiency or insufficiency of these considerations as affording a reason for disallowing costs are matters of which they are constituted sole arbiters; they are acting within their jurisdiction and their decisions are final and conclusive”.

He also cited an Indian case, that of *Mangilal Sitaram Agarwal v. Durgabai w/o Shantiprasad* (4), wherein it was stated that:

“The discretion to pass an order for security for costs vested in the trial court under O. 25, r. 1 is unqualified and unfettered and cannot be interfered with except in very exceptional circumstances amounting either to no exercise of discretion or to the exercise which is manifestly contrary to express provision of law or is otherwise arbitrary or perverse. A mere mistake in the exercise of discretion which it is within the jurisdiction of the court to exercise would be no ground to interfere in revision”.

With respect, I agree with all the authorities cited by counsel for the respondent company – deliberately quoted in extenso – and propose to consider the issues in the light of such authorities.

As, with respect, very rightly submitted by counsel for the appellant, the learned magistrate would appear to have thrown the onus of establishing his entitlement to costs on the successful defendant; the opposite of which is the case, for, as remarked, the general rule is that the costs should follow the event and the successful party should not be deprived of them except for good cause. It was therefore incumbent on the unsuccessful company to show good cause. In the passage from the judgment quoted the learned magistrate stated:

“The plaintiff’s position is that it was unable to accept, from a book-keeping point of view, a mere letter stating payment had been made, unsupported by any documents proving payment”.

Again, as very rightly submitted by counsel for the appellant, not only is there not a scintilla of evidence in support of such statement but it was not even suggested by counsel for the respondent company in his address to the court. And even if, for argument’s sake, the company’s auditors would insist on a receipt or some other documentary evidence, would that idiosyncrasy entitle the company to its costs on account of the defendant’s failure to provide one? Further, with regard to disallowing the defendant’s witnesses’ expenses, again referring to the passage quoted from the judgment, the learned magistrate would appear to hold the defendant responsible for the failure of counsel for the respondent company to notify the office of counsel for the appellant that he accepted the certificate emanating from the Shinyanga Garage shown to him by counsel for the appellant and was no longer pursuing the claim. It is absolute nonsense to suggest that because counsel for the appellant was away this information could not be imparted to his office in ample time to stop the witnesses from coming to Dar-es-Salaam from Shinyanga. On this aspect the learned magistrate held it against the defendant that he called no evidence.

What need of evidence was there, and what evidence was there for him to call in view of the fact that the company had admitted everything, including even the counter-claim?

As already observed, I agree with all the authorities cited by counsel for the respondent company and propose to follow them in determining this appeal. It is also not irrelevant to quote from the judgment of Slesser, L.J., in *Brown v. New Empress Saloons Ltd.* (5) ((1936), 53 T.L.R., at p. 458) that:

“The discretion must be judically exercised, and therefore there must be some grounds for its exercise, for a discretion exercised on no grounds cannot be judicial. If, however, there be any grounds, the question of whether they are sufficient is entirely for the judge at the trial”.

Counsel for the appellant also relied on the authorities cited by counsel for the respondent company. Thus, on the very first one he submitted that the learned magistrate had no “good grounds for exercising his discretion in the way he did”. With regard to the second case cited he submitted that the discretion in this case “has been exercised unjudicially and on wrong principles”. And with regard to the third case cited by counsel for the respondent company, that of *Charles Rodney Huxley v. The West London Extension Railway Co.* (3), he continued quoting from the headnote where counsel for the respondent company had left off, which states:

“On the other hand, if they give effect to considerations which do not constitute ‘good cause’ within the meaning of the Rule, they exceed the limits of their jurisdiction: and on that ground their decisions are not protected from review”.

With regard to the adverse view taken by the learned magistrate of the defendant’s failure to supply the company with a receipt in respect of its payment to the garage, it is most relevant to cite the case of *N. H. Moos v. Gulamali Tyabali Soni* (6), wherefrom it is sufficient to quote the headnote:

“P a receiver to an estate demanded from D a sum as due by D to the said estate. D replied that sum had been paid with interest and that he had got back the receipt which he had passed for the amount. P from time to time called upon D to let him know as to whom D had paid the amount and to produce the receipt for inspection. NO reply was sent by D. P filed the

present suit to enforce the demand. After the suit was filed D gave inspection of the receipt. P informed D that he would not proceed with the suit except to ask for costs.

Held: that D was under no obligation to disclose to P the evidence by which he proposed to substantiate the defence he had set out in his reply and P's suit was liable to be dismissed".

This instant case is even stronger, in that as emphasised by counsel for the appellant, there never was at any time a demand or request for a receipt.

To my mind, not only were there no proper grounds for the exercise of the court's discretion in depriving the successful defendant of his costs, which as noted would constitute an unjudicial exercise of the discretion, but the purported grounds were, as indicated, not supported by any evidence; in fact, imported into the case by the learned magistrate himself, as it were out of the blue. And adapting the dictum in the case of *Charles Rodney Huxley v. The West London Extension Railway Co.* (3) above quoted:

"On the other hand, if the court (they) give (s) effect to considerations which do not constitute 'good cause' within the meaning of the Rule, it (they) exceed (s) the limits of its (their) jurisdiction; and on that ground its (their) decisions are not protected from review".

I would go further and hold that on the particular facts of this case, the order depriving the successful defendant of his costs is, in the words of the judgment in *Mangilal Sitaram Agarwal v. Durgabai w/o Shantiprasad* (4), arbitrary and perverse.

In the circumstances the appeal is allowed with costs and that part of the order awarding the respondent company costs is set aside, and there is substituted therefore an order awarding the appellant his costs on the same scale as ordered in the lower court, such costs to include the expenses of the witnesses from Shinyanga.

Appeal allowed. Order accordingly.

For the appellant:

Fraser Murray, Roden & Co., Dar-es-Salaam

A. Lakha

For the respondent:

R. C. Kesaria, Dar-es-Salaam

Bishop v Attorney-General of Uganda and another [1967] 1 EA 293 (HCU)

Division: High Court of Uganda at Kampala

Date of judgment: 30 March 1967

Case Number: 645/1967

Before: Sir Udo Udom CJ

Sourced by: LawAfrica

[1] *Constitutional law – Action against Attorney-General representing government for tort committed by minister while acting in his ministerial capacity – Whether action should be against government alone or whether minister should be joined as co-defendant – Government Proceedings Act, s. 4 and s. 11 (Cap. 69) (U.).*

[2] *Practice – Joinder of defendant – Action against government for tort committed by minister while acting in ministerial capacity – Whether minister to be joined personally as defendant – Civil Procedure Rules, O. 1, r. 10 (U.).*

Editor's Summary

The plaintiff sued the Attorney-General alone, representing the government of Uganda, for damages for false arrest and imprisonment. The plaintiff alleged that the arrest and imprisonment were caused by Mr. Obwangor, the Minister of Justice, acting in his capacity of Minister. By his defence the Attorney-General denied that Mr. Obwangor was acting in that capacity when the plaintiff was arrested. The plaintiff thereupon applied successfully to join Mr. Obwangor personally as second defendant and filed an amended plaint, in which he again alleged that Mr. Obwangor was acting as a Minister at the material time. At the hearing, counsel for Mr. Obwangor as second defendant contended that Mr. Obwangor should not have been joined as a defendant because, having been sued in his official capacity as a Minister for a tort committed in that capacity, the only proper defendant was the Government of Uganda, and that the plaint disclosed no cause of action against him.

Held – since both the Government and the Minister in his capacity as Minister could not be made liable for the same tort at the same time, and the Attorney-General was already a defendant, the second defendant was wrongly joined in his capacity as Minister and no cause of action had been disclosed against him.

Second defendant struck out.

Cases referred to in judgment:

- (1) *Merricks v. Heathcoat-Amory and Another*, [1955] 2 All E.R. 453.
- (2) *Mackenzie-Kennedy v. Ayr Council*, [1927] 2 K.B. 517.
- (3) *Bowler v. John Mowlem & Co. Ltd.*, [1954] 3 All E.R. 556.

Judgment

Sir Udo Udoma CJ: This is an action which was brought originally against the Attorney-General alone in terms of the provisions of s. 11 of the Government Proceedings Act (Cap. 69). The claim by the plaintiff is for damages against the Government of Uganda for the alleged wrongful act of the second defendant in causing the arrest and imprisonment of the plaintiff.

In the plaint filed, dated August 25, 1965, it was clearly alleged in para. 2 thereof that the second defendant, in doing what he is alleged to have done, was acting in his capacity as a Minister. Be it noted that at the material time when the act complained of is alleged to have taken place, the second defendant

was Minister of Justice in the Government of Uganda and he was so described in the plaint.

A copy of the plaint filed was duly and promptly served on the Attorney-General on behalf of the Government of Uganda. On September 29, 1965, the Attorney-General as defendant entered appearance; and, on October 29, 1965, filed his defence to the action. In his defence the Attorney-General denied that the second defendant, who was then not a party to the suit, acted in his capacity as Minister at the material time the plaintiff was alleged to have been arrested and detained.

It is important to set out the relevant averments contained in both the plaint and the statement of defence.

In para. 2 of his plaint, the plaintiff had pleaded as follows:

- “2. At about 9.15 p.m. on the 26th February 1965 the plaintiff was lawfully upon the premises known as the Club House at Lugogo Stadium Kampala when the Honourable C. J. Obwangor Minister of Justice in the Government of Uganda acting in his capacity of Minister caused the plaintiff to be arrested and removed by a Police Constable to the Jinja Road Police Station and plaintiff was detained there against plaintiff’s will for three hours.”

In his answer to the above averments the Attorney-General had pleaded in paras. 4 and 5 of his statement of defence in the following terms: –

“Statement of Defence

4. The defendant denies that the Honourable C. J. Obwangor was acting in his capacity as Minister in the Uganda Government when the plaintiff was arrested.
5. Alternatively, the arrest and detention of the plaintiff was outside the scope of the Honourable C. J. Obwangor’s ministerial duties and of the duties of the individual Police Officer who arrested the plaintiff.”

It should be noted that, in para. 3 of the statement of defence, the arrest and removal of the plaintiff to Jinja Road Police Station as alleged in the plaint was not denied. Thus, as submitted by counsel for the second defendant, with which submission I agree, at that stage of the pleadings triable issues had been joined between the plaintiff and the defendant, those issues being as to whether or not the Honourable C. J. Obwangor at the material time was acting in his capacity as a Minister and as to whether what he is alleged to have done was within the scope of his duties as a Minister in the Government of Uganda.

In consequence of the stand taken by the Attorney-General as defendant, the plaintiff thereafter on December 8, 1965, successfully moved the court under Order 1, r. 10 of the rules of this court, and his plaint was amended by joining the Honourable C. J. Obwangor as a defendant to the suit, the said Honourable C. J. Obwangor thereby becoming the second defendant.

In the amended plaint dated December 17, 1965, the second defendant is described as Minister of Justice, Uganda which, although not much might be attached to such a description appearing in the title of a suit, still it does give the impression that the second defendant was sued as a Minister, and not in any other capacity. What is more, paras. 2 and 3 of the amended plaint still aver that the second defendant was acting in his capacity of Minister at the material time of the incident, the subject-matter of the suit; which reinforces the impression already gained by looking at the description of the second defendant in the title of the suit; and leaves one in no doubt that the second defendant was sued in his capacity as Minister in the Government of Uganda.

Paras. 2 and 3 of the plaint are in the following terms:

- “2. At about 9.15 p.m. on the 26th February 1965 plaintiff was lawfully upon the premises known as the Club House at Lugogo Stadium Kampala when the second defendant the Honourable C. J. Obwangor Minister of Justice in the Government of Uganda acting in his capacity of Minister caused plaintiff to be arrested and removed by a Police Constable to the Jinja Road Police Station and plaintiff was detained there against plaintiff’s will for three hours.
- “3. The second defendant in causing the arrest of plaintiff as aforesaid purported to act in his ministerial capacity but the first defendant has denied that the second defendant was acting in such a capacity. No reply has been received to a letter dated 8th March 1965 a copy of which is annexed hereto and marked ‘A’ addressed to the second defendant.”

The plaint, as amended, was served on the defendant who defaulted in entering appearance and filing his defence. The case was then set down for hearing for November 4, 1966. On the said date, the second defendant, when the case came up for hearing, applied and was granted leave both to enter appearance and file his defence thereafter. The case was consequently adjourned and costs were awarded both to the plaintiff and the first defendant against the second defendant. Subsequent thereto the second defendant filed his defence.

On March 28, 1967, when the suit came up for hearing counsel for the second defendant raised an objection in point of law solely on the pleadings filed. He drew the court’s attention to the first plaint filed by the plaintiff dated August 25, 1965, and particularly to the averment contained in para. 2 thereof; and to paras. 3, 4 and 5 of the statement of defence filed by the first defendant in reply thereto dated October 29, 1965.

Counsel then submitted that, on the face of the plaint and the defence of the first defendant, issues had been joined, those issues being, as already stated above, as to whether the second defendant at the material time acted in his capacity as a Minister and as to whether or not what he is alleged to have done was within the scope of his duty as a Minister.

The court was then referred to the amended plaint of December 17, 1965, filed by the plaintiff with special reference to paras. 2 and 3 of the said amended plaint wherein it was averred that the action was instituted in consequence of the tort alleged to have been committed by the second defendant in his official capacity as Minister. Thus the Attorney-General, or for that matter the Government of Uganda and the second defendant, were sued for one and the same cause of action – a tort alleged to have been committed by the second defendant as a Minister.

Counsel then referred to para. 5 of the defence filed by the second defendant in which the latter had pleaded that at the material time he had acted in his capacity as Minister. It was then submitted by counsel that, on the face of the pleadings, the second defendant was wrongly joined as a party to the suit; that the plaint does not disclose any legitimate cause of action against the second defendant in his capacity as a Minister; that the joining of the second defendant was both superfluous and misconceived; and that in the circumstances the court should strike out the plaint in so far as the second defendant is concerned in the exercise of its power under Order 6, r. 29.

As I understand it, counsel’s contention is that since the second defendant is sued in his official capacity as Minister for a tort alleged by the plaintiff to have been committed by him in such a capacity, the proper defendant to answer and to be made liable for the alleged wrongful act must be the Government

of Uganda as represented by the Attorney-General in virtue of the provisions of ss. 4 and 11 of the Government Proceedings Act.

The court was also referred to Order 13, r. 1 (4) and (5); and it was contended that, as issues have been joined or framed in the pleadings, the objection raised is a preliminary point of law, which could be raised at any stage in the course of the trial; and that intimation of counsel's intention to raise the objection was given in para. 5 of the second defendant's statement of defence, and to the plaintiff's counsel before the court sat that morning. No further notice was therefore necessary.

Counsel then referred to decisions by English courts in the following cases:

- (1) *Merricks v. Heathcoat-Amory & Another* (1) ([1955] 2 All E.R. at pp. 454-456);
- (2) *Mackenzie-Kennedy v. Ayr Council* (2), and
- (3) *Bowler v. John Mowlem & Co. Ltd.* (3).

Reference was then made to Order 3, r. 4 of the Rules of the Supreme Court of England as to the endorsement of writs of summons in connection with the capacity in which a party sues or is sued.

Mr. Wilkinson, counsel for the plaintiff, in replying contended, quite rightly I think, that this court is bound to follow its own rules of procedure. Counsel then pointed out that whereas in England civil proceedings are usually originated by writs of summons, in Uganda suits are usually instituted by the filing of plaints in court. Therefore the question of endorsement on writs of summons would not apply to Uganda, which contention I fully accept.

Counsel then submitted that Order 6, r. 29 of the rules of this court is regulated by Order 48, r. 1, which requires that:

"all applications to the court, save where otherwise expressly provided in these Rules, shall be by motion and shall be heard in open court",

and that the objection raised by counsel for the second defendant should be dismissed on the ground of non-compliance with Order 48, r. 1.

Alternatively counsel applied, though not seriously, that the matter be adjourned to enable the second defendant to comply with the requirements of the said Order 48, r. 1, by bringing his application in proper form to strike out the second defendant from the suit.

Counsel then contended that the second defendant could not be heard to complain as he well knew that he was joined as defendant in the action in his personal capacity. It was difficult for the court to appreciate this contention by counsel for the plaintiff having regard to the plaintiff's plaints filed in court, copies of which were served on the second defendant.

I turn now to consider the contention of counsel for the second defendant that, since the second defendant is sued in his capacity as Minister for a tort alleged by the plaintiff to have been committed by him in such a capacity, the proper defendant to answer for the alleged tort must be the Attorney-General; and therefore the joining of the second defendant in the suit was wrong in law and misconceived; and the plaint does not disclose a legitimate cause of action against the second defendant in his ministerial capacity other than that for which the Attorney-General is sued.

The authority for this proposition, upon which counsel relied, is to be found in ss. 4 and 11 of the Government Proceedings Act (Cap. 69), the relevant provisions whereof are in the following terms:

"4.(1) Subject to the provisions of this Act and to the provisions of s. 6 of the Law Reform (Miscellaneous

Provisions) Act, the Government shall

be subject to all these liabilities in tort to which, if it were a private person of full age and capacity, it would be subject –

- (a) in respect of torts committed by its servants or agents;
- (b) ...
- (c) ...

“Provided that no proceedings shall lie against the Government by virtue of para. (a) of this sub-clause in respect of any act or omission of a servant or agent of the Government unless the act or omission would, apart from the provisions of this Act, have given rise to a cause of action in tort against that servant or agent or his estate.

“(2)

“(3) Where any functions are conferred or imposed upon an officer of the Government as such, either by any rule of the common law or by any enactment, and that officer commits a tort while performing or purporting to perform those functions, the liabilities of the Government in respect of the tort shall be such as they would have been if those functions had been conferred or imposed solely by virtue of instructions lawfully given by the Government.”

And in s. 2 the term “officer” is defined as “including the President, or Minister and any servant of Government”; and s. 11 provides:

“11. Civil proceedings by or against the Government shall be instituted by or against the Attorney-General.”

By his complaints the plaintiff has clearly admitted that the second defendant had acted at the material time in his official capacity as Minister or had purportedly so acted. Indeed on both the first and the amended complaint the whole basis of the plaintiff’s case is that the second defendant had committed the alleged tort against him while acting in his capacity as Minister.

In those circumstances, and having regard to the provisions of s. 4 (3) of the Government Proceedings Act (Cap. 69), it is plain that it is the Government of Uganda alone which is liable or answerable for the tort alleged to have been committed by the second defendant, assuming of course that the allegation is true. In that event by virtue of the provisions of s. 11 of the Government Proceedings Act (Cap. 69), the proper defendant to be sued by the plaintiff ought to and must be the Attorney-General.

The Attorney-General is already a defendant in the suit; and, since both the Government and the Minister in his capacity as Minister cannot be made liable for the same tort at the same time, I accept the submission of counsel for the second defendant, which I consider sound, that it was wrong in law to have joined the second defendant in the suit in his capacity as Minister in the Government of Uganda. I hold therefore that no reasonable cause of action, other than that disclosed against the Attorney-General, has been disclosed against the second defendant in his capacity as Minister in this suit. I hold also that the joining of the second defendant was both superfluous and misconceived.

I would like to make it quite clear that this ruling is not based on the English authorities to which the court was referred, which authorities may well be relevant to the issue raised in this preliminary objection. But, having regard to the view I take of the submission, I had considered it unnecessary to refer to any English authority on this issue as, in my view, there are adequate provisions in the rules of this court to cover this particular point of law.

As the objection in point of law which was raised and argued before this court is in substance a question of misjoinder of parties, I am satisfied that in the interests of justice and in order to expedite the hearing of this suit, the proper order to make in exercise of the powers vested in this court by Order 1, r. 13 and Order 6, r. 29, is to strike out the second defendant from the suit. The second defendant is accordingly struck out with costs against the plaintiff. The costs awarded are allowed for two counsel.

Order accordingly.

For the plaintiff:

Wilkinson and Hunt, Kampala

P. J. Wilkinson, Q.C., and Radia

First defendant:

P. J. N. Mugerwa (Solicitor-General, Uganda)

For the second defendant:

J. S. Shah, Kampala

John Platts-Mills, Q.C., J. S. Shah and Mrs. Waria

Kwezi v Uganda
[1967] 1 EA 298 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	29 March 1967
Case Number:	533/1966
Before:	Sheridan J
Sourced by:	LawAfrica

[1] *Criminal law – Charge – Particulars – Robbery – No allegation of violence or threat of violence – Whether charge proper – Penal Code, ss. 272, 273 and 347 (U.).*

[2] *Criminal law – Robbery – Particulars of charge – Whether allegation of violence or threat of violence necessary in charge – Whether conviction of theft from the person should be substituted – Penal Code, ss. 256 (a), 272 and 273 (U.).*

[3] *Criminal law – Sentence – Theft from the person by policeman – Proper sentence.*

Editor's Summary

The appellant was convicted of robbery. The particulars of the charge contained no allegation of violence or threat of violence. The appellant was legally represented at his trial. The evidence was that he had

cuffed the complainant, but the trial magistrate did not find that the slaps administered were necessary in order to obtain or retain the stolen property. The appellant, who was a policeman with 10 years' good service, was sentenced to eighteen months' imprisonment and four strokes.

Held –

- (i) (following *C. Kiwanuka and Others v. R.* (unreported)): where the taking is effected forcibly by a sudden taking or snatching away from a person unawares it is not robbery but stealing from the person;
- (ii) the sentence was excessive.

Appeal allowed in part.

Cases referred to in judgment:

- (1) *D. R. Pandya v. R.*, [1957] E.A. 336.
- (2) *Rajabu Kasule v. R.* (unreported) (Uganda Criminal Appeal No. 385 of 1959 – Monthly Bulletin No. 26, Case No. 6/60).
- (3) *Matu s/o Gichimu v. R.* (1951), 18 E.A. C.A. 311.
- (4) *C. Kiwanuka and Others v. R.* (unreported) (Uganda Criminal Appeals Nos. 77, 130 and 131 of 1959 (Monthly Bulletin No. 22, Case No. 50/59).
- (5) *R. v. Gnosil* (1824), 171 E.R. 1206.

Judgment

Sheridan J: On July 2, 1966, the appellant was convicted by a resident magistrate, Mengo, on a charge of robbery contrary to s. 272 of the Penal Code and was sentenced to 18 months' imprisonment and four strokes.

Although the typed record runs to 44 pages – the judgment occupying 14 of them – and there are 14 grounds of appeal, I can dispose of it quite shortly.

The charge reads:

“CHARGE

Uganda versus Yakobo Kwezi, male, Munyoro, a Police Officer of Jinja Road Police Station,
P.O. Box 264, Kampala.

Statement of Offence

Robbery contrary to section 272 of the Penal Code.

Particulars of Offence

Yakobo Kwezi, on the 7th day of February, 1966 at Wampewo Avenue near Kololo Airstrip in the Mengo District robbed MARGARET Ndasi of a mat and Shs. 15/-.”

The facts were that on the night of February 7, 1966, John Paito, who worked for Mr. M. Kagwa, the then Registrar of the High Court, at Mabua Road, was returning home with Margaret Ndasi his wife, along Wampewo Avenue when they met the appellant and P.C. Ndongereye who were on beat duty. According to Paito, the appellant rudely suggested that Ndasi was nothing better than a prostitute, and cuffed them, snatching a mat and Shs. 15/- wrapped in a handkerchief from her. She gave supporting evidence. Ndongereye, a police recruit and junior to the appellant, witnessed the beginning of the incident, of which he disapproved, and left them. Later he rejoined the appellant and they signed off duty together at 1.15 a.m. at the Jinja Road police station. Ndongereye did not report anything unusual to P.C. Rufino Doi at the charge office. This is perhaps not surprising as Ndongereye would be naturally reluctant to report his superior officer for what appeared at the time to be a trivial incident. It was different when he found himself a suspect after the identification parade held on February 9, by Det. Sgt. Dokotum. He then told the story in his cautioned statement.

Criticism is made of Paito following the appellant to the police station but not entering and reporting the alleged robbery that night. Here I agree with the point made by counsel for the respondent that the average houseboy would have recourse to his employer rather than the police, at least in the first instance, and that is what Paito did. There is a discrepancy between him and Ndasi as to when the report was made to Mr. Kagwa. I do not regard this as of any great moment. The fact remains that the report was made and Mr. Kagwa sent them to the police next morning. I am inclined to share Mr. Pandit's scepticism as to whether Paito made a note of the appellant's Force Number, 6205, that night. He said that he made a note of it on his arm whereas Ndasi stated that he wrote it down on a piece of paper. If so, there was no real point in the parade. There was no real point in it anyhow, because the appellant admitted meeting Paito and Ndasi, but he will have it that they did no more than exchange pleasantries. There is a certain air of unreality about a “homing” houseboy with his girl or wife merely politely asking a police patrol when their spell of duty would be finished.

Although Ndongereye was treated as a suspect at one stage it was not incumbent on the police to prosecute him. They were entitled to call him as a prosecution witness and he lent support to the story of Paito and Ndasi which, allowing for the discrepancies which the learned magistrate considered, bore the ring of truth. Considering the evidence afresh and drawing my own inferences, I would have come to the same conclusion as the learned magistrate: *D. R. Pandya v. R.* (1).

Mr. Pandit rightly criticizes the charge. Section 272 is the definition section. The charge should have been brought under s. 273. Further, it does not give the necessary particulars. It should have alleged that the appellant stole the property “and that at or immediately before or immediately after the time of stealing he used, or threatened to use, actual violence to the said Margaret Ndasi in order to obtain or retain the said property”: see Archbold (36th Edn.) para. 1772, but apparently in England it is sufficient to allege that violence was used without specifying the purpose for which it was used.

Mr. Pandit relies on *Rajabu Kasule v. R.* (2), where the appellant had been convicted of an offence contrary to s. 162 (4) of the Penal Code and the charge had omitted to allege that he had misconducted himself “publicly”. The learned judge refused to apply the curative provisions of s. 347 of the Criminal Procedure Code since an essential ingredient had been omitted from the charge and so it disclosed no offence and was bad in law. He relied on *Matu s/o Gichimu v. R.* (3). I would distinguish the present charge in that the appellant, who was legally represented, was fully aware of its nature as defined by s. 272 of the Penal Code.

On the other hand, there was no clear finding by the learned magistrate that the slaps administered were necessary in order to obtain or retain the stolen property. Further, in *C. Kiwanuka and two others v. R.* (4), Lewis, J., held that where the taking is effected forcibly by a sudden taking or snatching away from a person unawares it was not robbery but stealing from the person: see *R. v. Gnosil* (5), cited with approval in Russell on Crime (11th Edn.). I respectfully agree and substitute a conviction for theft from the person contrary to s. 256 (a) of the Penal Code.

As regards sentence I am left with the impression that this incident was unduly magnified. It has been hinted that this may have had something to do with the personality of Paito’s employer. I do not know. The appellant has over 10 years’ good service in the police force. He has been in custody for 4 1/2 months. I think that is sufficient punishment. I reduce the sentence accordingly, which means that he is released forthwith.

Conviction of theft from the person substituted for conviction of robbery. Sentence reduced.

The appellant in person.

For the respondent:

Attorney-General, Uganda

F. W. Kakembo (State Attorney, Uganda)

Kajubi v Kayanja
[1967] 1 EA 301 (HCU)

Division:

High Court of Uganda at Kampala

Date of judgment: 2 May 1967
Case Number: B.301/1965
Before: Sir Udo Udoma CJ
Sourced by: LawAfrica

[1] *Company – “African” – Whether a company all the members of which are Africans is an “African” within Buganda Courts Ordinance, 1940, s. 2 (U.) and therefore able to sue in the Buganda Principal Court.*

[2] *Jurisdiction – Company – Whether a company all the members of which are Africans can sue in the Buganda Principal Court – Buganda Courts Ordinance s. 2 (U.), Interpretation (Special Provisions) Act, s. 2 (U.).*

[3] *Jurisdiction – Buganda Courts – Company all members of which are Africans – Whether Buganda Principal Court can entertain a suit by such a company – Buganda Courts Ordinance, s. 2 (U.), Interpretation (Special Provisions) Act, s. 2 (U.).*

[4] *Practice – Power of attorney – Suit instituted in his own name by holder of power of attorney – Whether suit irregular.*

[5] *Statute – Construction – Whether definition of “African” in s. 2 Buganda Courts Ordinance (U.) is affected by definition of “African” in s. 2 Interpretation (Special Provisions) Act, s. 2 (U.) – Uganda Constitution, 1962, art. 74 (2) and (5) (U.).*

Editor’s Summary

The respondent, claiming to act under a power of attorney, in his own name sued the appellant in the Buganda Principal Court for “misappropriation of Shs. 8,650/- of the K.B. Coffee Growers Co. Ltd.” by the appellant. It was clear from the proceedings that the real plaintiff was the limited company itself. The appellant objected to the jurisdiction of the Principal Court, but that court, after inspecting the “power of attorney”, and having summoned the members of the limited company before it (presumably to satisfy itself that they were all Africans), gave judgment for the respondent. On appeal the appellant contended that, the jurisdiction of the Principal Court being restricted to disputes between “Africans”, it could not try a case in which a limited liability company was the real plaintiff, such a company not being an “African” within the meaning of the Buganda Courts Ordinance, s. 2. The respondent relied on the implicit finding that all the members of the company were Africans and the definition in s. 2 of the Interpretation (Special Provisions) Act.

Held –

- (i) the power of attorney held by the respondent did not authorise him to institute the proceedings in his personal name and capacity; and his doing so made the proceedings fundamentally and incurably irregular;
- (ii) the definition of “African” in the Buganda Courts Ordinance must prevail over that in s. 2 of the Interpretation (Special Provisions) Act because the Ordinance preceded the Act in time and because, at the time of the trial, the provisions of art. 74 (2) and (5) of the Uganda Constitution of

1962 were effective to entrench the Ordinance against any alteration by the Act;

- (iii) therefore, the Principal Court had no jurisdiction to entertain a suit by a limited company, which is not an “African” within the meaning of the Buganda Courts Ordinance.

Appeal allowed.

Cases referred to in judgment:

(1) *Mengo Builders & Contractors Ltd. v. Kasibante*, [1958] E.A. 591.

(2) *Deziderio Kiddonbo v. Kikudebude Growers Co-operative Society Ltd. and Another*, [1963] E.A. 220.

Judgment

Sir Udo Udoma CJ: This is an appeal against the judgment of the Buganda Principal Court dated October 31, 1965. The appeal is by the defendant, Yowakimu Kajubi, now appellant, against whom the judgment was entered. He was ordered by the court to pay the sum of Shs. 4,068/50 to the plaintiff, now respondent, for Kireku Balikyewumya Coffee Growers Co. Ltd.

The appeal was made on two grounds contained in a memorandum of appeal. They are:

1. That the Principal Court had no jurisdiction to have entertained the case since the real plaintiff was Messrs. Kireku Balikyewumya Coffee Growers Co. Ltd., a limited liability company incorporated under the Companies Act; and
2. The decision given was not warranted by the evidence on the record.

At the hearing of the appeal the only ground argued by counsel for the appellant, Mr. Kiwanuka, was ground 1, which is a question as to the jurisdiction of the court to have entertained the case. The question of jurisdiction is of course a fundamental one, as it goes to the root of the trial of the case by the Principal Court; and jurisdiction cannot be conferred on a court by the consent of parties.

The claim against the appellant in the Principal Court as framed reads as follows:

“Misappropriation of Shs. 8,650/- of the Kireku Balikyewumya Coffee Growers Co. Ltd., by the defendant.”

Thus the claim as framed gives one the erroneous impression that the case was one of misappropriation of the money belonging to the Kireku Balikyewumya Coffee Growers Co. Ltd., or that, indeed, the appellant had stolen the money. In fact on the face of the proceedings the claim is a civil one. It is not a criminal proceeding. Strictly the claim was wrongly framed as it stands, but I think this is a proper case in which to apply the provisions of s. 27 of the Buganda Courts Ordinance, the provisions of which are in the following terms:

“27. It is hereby declared that no proceedings in a court and no summons, warrant, process, order or decree issued or made thereby shall be varied or declared void upon appeal or revision solely by reason of any defect in procedure or want of form but every authority exercising the powers of appeal or revision under this ordinance shall decide all matters according to substantial justice without undue regard to technicalities.”

Applying the provisions of s. 27 of the Ordinance set out above the use of the word “misappropriation” is not fatal to the proceedings. The claim as described by the court was for the refund of Shs. 8,650/-, the property of the Kireku Balikyewumya Coffee Growers Co. Ltd. On the evidence the sum claimed was advanced by the company to the appellant for the purchase of coffee, which coffee the appellant failed to buy and deliver to the said company. It is therefore a simple action of debt.

In his submission in respect of ground 1 of the grounds of appeal, counsel for the appellant contended that on the face of the proceedings the real plaintiff

in the suit was a limited liability company, namely, the Kireku Balikyewumya Coffee Growers Co. Ltd. The sum of money claimed was the property of the said company and not that of the respondent, Kezironi Kayanja, whose name appeared in the claim. That submission was conceded by counsel for the respondent; and the appeal was contested on the issue as to whether the real plaintiff being a limited liability company duly incorporated in Uganda it was competent for the Principal Court to have entertained the suit.

Counsel for the appellant then referred the court to the record of proceedings and particularly to a passage in which the nominal plaintiff, Kezironi Kayanja, informed the court that the company had granted him a power of attorney to conduct the case, and the order of the court to the effect that all members of the company should appear in court themselves. That order was duly obeyed. This is exemplified in the passage of the proceedings before the Principal Court which reads as follows:

- “16.7.65. Parties before court. The plaintiff has produced a letter of the company which gives him power of attorney in this case and has been told to call the members to the court. Defendant has produced his defence statement and its copy given to the plaintiff. Adjourned until 2.8.65.
- “2.8.65. Kayanja has brought the members of the company, who gave him the power of attorney in this case and the court has accepted him.”

At this juncture, be it noted that the power of attorney did not authorise the nominal plaintiff, the respondent that is in this court, to institute the suit in his personal name; and even if it did it would be irregular since the debt had not been assigned to him. I shall deal more fully with this point at a later stage in this judgment.

Counsel for the appellant also referred the court to the statement of defence filed in the suit by the appellant and contended that the issue of jurisdiction was raised promptly by the appellant at the very first opportunity, but that the court ignored it and proceeded with the trial of the case.

This is of course true. It is of interest and importance to reproduce the relevant paragraphs of the statement of defence filed by the appellant, which support the submission by counsel that the issue was properly raised before the Principal Court.

The statement of defence is brief and consists of four paragraphs, which are hereunder set forth:

- “1. According to the plaintiff’s plaint in the first paragraph the money claimed by the plaintiff is not his personal property, but it is the property of Kireku Balikyewumya Coffee Growers Co. Ltd., and he puts this more clearly in para. 3 of his plaint.
- “2. This aforesaid company was registered on 12th May, 1964, under s. 16 (1) of the Companies Ordinance, 1958, and I have here with me a certificate of incorporation signed by the Assistant Registrar of Companies.
- “3. Under s. 6 of the Uganda Courts Ordinance this court has got no power to hear cases which concern the companies registered according to the Companies Ordinance. Such cases are supposed to be filed in the court of the Central Government.
- “4. Hence I pray to this court to dismiss this case and may the plaintiff be advised to sue me in the right court if he may wish.”

It is also instructive to refer to para. 1 of the plaintiff’s plaint. It reads as follows:

- “1. I do hereby sue in court the defendant for refusal to pay back Shs. 8,650/-, which had been given to him for coffee trading on behalf of Kireku Balikyewumya Coffee Growers Co. Ltd.”

It is thus quite clear that the real plaintiff in the suit was the Kireku Balikyewumya Coffee Growers Co. Ltd. That was the basis of the claim put forward by the plaintiff, who claimed to be acting under the power of attorney issued to him by the company.

It was further submitted by counsel that under s. 6 of the Buganda Courts Ordinance a limited liability company is not an African over which the Principal Court could exercise jurisdiction because the jurisdiction of the court is restricted to disputes between Africans; and that the word “African” has been clearly defined in s. 2 of the Ordinance. It was the duty of the Principal Court, it was contended, to have made inquiries as to the real parties in the suit. The issue of jurisdiction having been properly raised before the hearing, it was incompetent for the court to have proceeded with the trial of the case.

Counsel then cited and relied upon *Mengo Builders & Contractors Ltd. v. Kasibante* (1), and *Deziderio Kiddonbo v. Kikudebude Growers Co-operative Society Ltd. and Another* (2), both of which decisions were given by this court. Counsel then urged the court to restrict the meaning of the word “African” to the definition of the word as contained in s. 2 of the Buganda Courts Ordinance. Finally counsel submitted that the appeal should be allowed on the ground that the Principal Court had no jurisdiction to have tried it.

Counsel for the respondent submitted that a limited liability company, the membership of which are Africans, was entitled to sue in the Principal Court and to pursue its claim in that court. It was submitted further by counsel that, on the face of the record of proceedings, all members of the company in due compliance with the order of the court had appeared. The court was satisfied that all the members of the company were Africans. That being so, counsel contended that the Principal Court had jurisdiction to have tried the case.

In support of this proposition, the court was referred to s. 2 of the Interpretation (Special Provisions) Act (Cap. 17), the provisions of which are as set out hereunder:

- “2. In any Act of Parliament or Ordinance enacted before the 19th July, 1963, unless it is expressly provided otherwise or the context otherwise requires, references to a native or to an African shall be construed as references to a person who is a member of an indigenous African tribe or community or to a body corporate or incorporate entirely composed of such persons, and references to a non-native or to a non-African shall be construed accordingly.”

Counsel then submitted that the word “African” as defined by the Act would include a company formed by Africans and whose members were exclusively African as in the instant case. On the evidence, contended counsel, the Principal Court was satisfied that all the members of the company were Africans although no specific finding was made by the court on the point to that effect. To satisfy itself, therefore, the Principal Court had to order that the other members of the company should appear before it on a stated day. And it was only on seeing that the members of the company who appeared before the court were all Africans that the Principal Court had proceeded with the hearing of the case. It was therefore competent for the court to have tried the case. It was essentially a dispute between Africans. Counsel finally submitted that in terms of the Interpretation (Special Provisions) Act, the company was African and therefore subject to the jurisdiction of the Principal Court.

I do not think that this submission is sound. The Interpretation (Special Provisions) Act was enacted by the Parliament of Uganda; and it came into force on December 6, 1963. The judgment in this suit was delivered on October 31, 1965. It may be that the provisions of the Interpretation (Special Provisions) Act would probably have applied to and replaced the definition of the word “African” as contained in s. 2 of the Buganda Courts Ordinance. This, however, is doubtful because the definition of African is clearly provided for otherwise in the Buganda Courts Ordinance.

Under the Buganda Courts Ordinance the word “African” is defined in s. 2 as meaning “ any person whose tribe is a tribe of the Protectorate or of the Colony and Protectorate of Kenya, the Trust Territory of Tanganyika, Nyanza, the Sudan, the Belgian Congo, or the Mandated Territory of Ruanda-Urundi and includes a Swahili”. That Ordinance came into force on September 1, 1940, with its own definition of the word “African”. It is therefore difficult to see how the Interpretation (Special Provisions) Act could have applied to alter or modify the definition as contained in s. 2 of the Ordinance.

In any case, the Buganda Courts Ordinance was at the time of the trial of the instant suit entrenched in the Uganda Constitution of 1962. The central government or parliament could not legislate for the alteration of any provision contained in the Ordinance without the consent of the legislative assembly, that is to say Lukiko, of Buganda. The provisions concerning the entrenchment of the Buganda Courts Ordinance are contained in Art. 74 (2) and (5) of the Uganda constitution 1962. The relevant provisions of the Article are couched in the following terms:

“74(2) Parliament shall have power, to the exclusion of the Legislature of the Kingdom of Buganda, to make laws for the peace, order and good government of the Kingdom of Buganda with respect to the matters specified in Part II of Schedule 7 to this Constitution.

“(5) (a) An Act of Parliament, so far as it makes any provision to which this sub-section applies, shall not come into operation unless the Legislative Assembly of the Kingdom of Buganda has by resolution signified its consent that the Act of Parliament should have effect.

“(b) This sub-section applies to:

(i) Any provision for altering or replacing the Buganda Courts Ordinance.”

In view of the definition of the word “African” contained in the Buganda Courts Ordinance, if the provisions of the Interpretation (Special Provisions) Act (Cap. 17), were to apply to the Ordinance, it would widen the meaning attached to the word “African”. In other words the application of the provisions of the Interpretation (Special Provisions) Act to the Buganda Courts Ordinance would be tantamount to amending or altering the provisions of the Ordinance.

It is therefore plain that the provisions of the Interpretation (Special Provisions) Act do not apply to and cannot affect any provision of the Buganda Courts Ordinance in such a manner as to alter the meaning attached to the expressions or words clearly defined in the Ordinance. To hold otherwise would be tantamount to holding that s. 2 of the Buganda Courts Ordinance had been altered by parliament without the consent of the legislative assembly of Buganda, which would render such an amendment invalid and unconstitutional.

Therefore this court is bound to confine itself in this case to the definition of “African” as contained in s. 2 of the Buganda Courts Ordinance as, in my view,

the Interpretation (Special Provisions) Act has no application to the Ordinance. That being so, there can be no doubt whatsoever that as the real plaintiff in the action, as already conceded by counsel for the respondent, was the Kireku Balikyewumya Coffee Growers Co., Ltd., a limited liability company, and the money claimed by way of debt was owed to the company and not to the nominal plaintiff, I hold that the Principal Court had no jurisdiction to have entertained this suit.

Furthermore under s. 6 (3) of the Buganda Courts Ordinance it was the duty of the Principal Court as soon as the appellant objected to the jurisdiction to have referred the matter to an inspecting officer (i.e. the Judicial Courts Adviser to the Buganda Government) for the necessary enquiries as to whether the objection was well founded and made in good faith. In which case, after such enquiry, the Principal Court would have been served with a certificate as to whether or not the claim was justiciable by it. There is no evidence whatsoever that the issue was ever referred to the Judicial Adviser. Indeed the Principal Court seems to have treated the objection with contempt and never dealt with it at all.

In view of the view already expressed by me above to the effect that the action was wrongly instituted in the Buganda Court, which has no jurisdiction over the subject-matter or the parties concerned, it is unnecessary for me to consider the two cases, namely *Mengo Builders & Contractors Ltd. v. Kasibante* (1) and *Deziderio Kiddonbo v. Kikudebuda Growers Co-operative Society Ltd. and Another* (2), as they merely strengthen the view I take that the Principal Court had no jurisdiction to have heard this case.

It may be noted that when the decisions in the above cited cases were given by this court the Interpretation (Special Provisions) Act was not in existence. It was therefore not referred to by the judges in their decisions in those two cases.

Furthermore, it is to be noted that the so-called power of attorney purported to have been given to the respondent to pursue this action in the Principal Court did not authorise him to institute the proceedings in his personal name and capacity. The power of attorney merely authorised the respondent to conduct the case in court on behalf of the company, since the debt owed was never assigned to the respondent by the company.

The suit, therefore, ought to have been instituted in the name of the company as the real plaintiff, and the nominal plaintiff, armed with the power of attorney, would have been entitled to conduct the proceedings before the court.

By instituting the suit in his personal name and capacity the respondent would appear to have been acting outside the powers conferred upon him by the company. In my view, it was fundamentally and incurably irregular for the respondent to have instituted the suit in his personal capacity and not in the name of the company.

This appeal is therefore allowed. The judgment and order of the Principal Court is set aside for want of jurisdiction. The appellant is awarded costs of this appeal in this court and the costs incurred in the Principal Court to which the appellant would have been entitled had the Principal Court considered the objection properly raised by the appellant.

In view of the opinion expressed above, there would appear to have been no trial whatsoever, as the Principal Court had no jurisdiction to have entertained the suit. It must however be pointed out, lest this judgment be misunderstood, that the appellant is still indebted to the company; and it is open to the company to institute fresh proceedings in a court of competent jurisdiction for the recovery of its debt.

This appeal therefore succeeds and it is allowed with costs to the appellant as stated above.

Appeal allowed.

For the appellant:

Kiwanuka & Co., Kampala

B. K. M. Kiwanuka

For the respondent:

Parekhji & Co., Kampala

B. D. Dholakia

Terrazzo Paviers v Standard Joinery & Building Co
[1967] 1 EA 307 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	10 May 1967
Case Number:	203/1967
Before:	Mosdell J
Sourced by:	LawAfrica

[1] *Bill of exchange – Action on cheque – Whether defendant may set up a defence by way of set-off or counter-claim – Whether plaintiff in such case entitled to summary judgment – Civil Procedure (Revised) Rules, 1948, O. 35, rr. 2 and 3 (K.).*

[2] *Practice – Leave to defend – Defendant in action on cheque alternatively for work done and materials supplied setting up defence by way of set-off and counter-claim-Bona fides of defence challenged – Whether defendant should have unconditional leave to defend – Civil Procedure (Revised) Rules, 1948, O. 35, rr. 2 and 3 (K.).*

[3] *Practice – Summary judgment – Action on cheque alternatively for work done and materials supplied – Defence filed setting up set-off and counter-claim – Bona fides of defence challenged – Whether plaintiff entitled to summary judgment – Civil Procedure (Revised) Rules, 1948 O. 35, rr. 2 and 3 (K.)*

Editor's Summary

The plaintiff sued the defendant for Shs. 13,500/- due for work done and materials supplied with an alternative claim for Shs. 14,500/- on a countermanded cheque. The defendant filed a defence setting up a set-off and counterclaim in excess of the plaintiff's claim. On the same day the plaintiff filed this application for summary judgment, and at the hearing asked the court to give judgment in its favour, to

refuse a stay of execution, and to leave the defendant to take action by way of cross suit, and attacked the bona fides of the defendant's defence.

Held –

- (i) (distinguishing *James Lamont & Co. Ltd. v. Hyland Ltd.* [1950] 1 K.B. 585) this was not simply an action on a cheque;
- (ii) (applying *Elizabeth Edmea Camille v. Amin Mohamed Esmail Alibhai Merali and Another*, [1966] E.A. 411) there being insufficient material before the court for it to be able to assess the bona fides of the defendant, and the defendant having an equitable set-off and a counter-claim, the defendant should be given unconditional leave to defend.

Application for summary judgment dismissed with costs. Defendant given unconditional leave to defend.

Cases referred to in judgment:

- (1) *James Lamont & Co. Ltd. v. Hyland*, [1950] 1 K.B. 585.

(2) *Elizabeth Edmea Camille v. Amin Mohamed Esmail Alibhai Merali and Another*, [1966] E.A. 411.

Judgment

Mosdell J: The plaintiff in this case has applied for summary judgment under O.XXXV, rr. 2 and 3 of the Civil Procedure (Revised) Rules, 1948. Its claim is for Shs. 13,500/- being the balance due for work done and materials supplied to the defendant by the plaintiff at the defendant's request during 1965, "particulars whereof are well known to the defendant". In the alternative the plaintiff claims on a cheque for Shs. 14,500/- dated December 2, 1966, which was countermanded by the defendants on January 7, 1967. On the same day on which the defendant filed a defence the plaintiff filed a notice of motion asking for summary judgment. This was on April 18, 1967. In an affidavit sworn on April 14, 1967, by one of the partners in the plaintiff firm, which sets forth particulars of the claim, it is deposed that on January 10, 1967 the defendant paid a sum of Shs. 1,000/- against the said cheque. It is also deposed that "I verily believe there is no defence to this suit". To a replying affidavit sworn on April 25, 1967 by one of the partners in the defendant firm, there is annexed a letter dated February 27, 1967 from the defendant's advocate to the plaintiff's advocate in which an amount in excess of the plaintiff's claim is set-off against such claim by way of set-off and counter-claim. It is a little difficult, therefore, to appreciate how, on April 14, 1967, one of the partners in the plaintiff firm could depose that he verily believed there was no defence to this suit. Counsel for the plaintiff has requested me to give judgment on the plaintiff's claim in its favour, to refuse a stay of execution, and to leave the defendant to take action by way of cross suit in relation to its set-off and counter-claim. He referred to *James Lamont & Co. Ltd. v. Hyland Ltd.* (1), and in particular to the judgment of the court read by Roxburgh, J. ([1950] 1 K.B. at pp. 590 et seq.). The gravamen of the argument of counsel for the plaintiff in this regard was that in an action on a bill of exchange a court should not allow a defendant to set up a defence by way of set-off or counter-claim. The relevant portion of the headnote to this case reads:

"Where an action is between the immediate parties to a bill of exchange and the matters relied on by the defendant afford no defence under the Bills of Exchange Act, the judge in chambers, in proceedings under O. 14 may properly, in the exercise of the powers vested in him, give liberty to the plaintiff to sign immediate judgment".

It must be stated at once, however, that the present suit is not simply an action on a cheque. It is an action claiming money in respect of work done and materials supplied and in the alternative on a countermanded cheque originally given by the defendant to the plaintiff in settlement of this debt. Moreover in the *Lamont* case (1) it was held:

"Having regard to the tenor of the authorities summarized above in cases where the action is on a bill of exchange, it is impossible to say that in giving liberty to sign immediate judgment without a stay the judge in chambers was guilty of an improper exercise of the discretion vested in him. In our view the appeal fails."

Had the judge in chambers exercised his discretion conversely, by granting leave to defend, would the Court of Appeal have necessarily held that this was an improper exercise of his discretion? Counsel for the plaintiff also referred to *Elizabeth Edmea Camille v. Amin Mohamed Esmail Alibhai Merali and Another* (2). In this case there was an application for summary judgment under the same Order XXXV, rr. 2 and 3, where the defendant had no defence

against the claim for rent but had a claim against the plaintiff for damages arising out of the lease of premises. The trial judge entered judgment for the plaintiffs on their claim, with costs of the application, but he ordered a stay of execution, provided the defendant deposited Shs. 25,000/- within 21 days, until the determination of any proceedings which the defendant might take whether in the same suit or by separate action. He refused leave to defend. The Court of Appeal, by a majority, dismissed the appeal in so far as it sought to vary the decision of the trial judge in entering judgment for the plaintiff on the claim but it set aside the other provisions of his decision and gave the defendant leave to file a counter-claim within 15 days, staying execution for a similar period and if a counter-claim were filed within 15 days, continuing the stay until determination of the counter-claim or further order of the court, and lastly ordering that, if no counter-claim were so filed, then the plaintiff was to have costs of the claim and of the motion for judgment, but if a counter-claim were so filed such costs to be in the discretion of the judge who determined the counter-claim. Duffus, Ag. V.-P. agreed with the latter proposals, but Spry, J.A., would have allowed the appeal, set aside the judgment of the High Court and substituted an order giving the appellant unconditional leave to defend by way of counter-claim.

The majority judgments in the *Camille* case (2) proceeded upon the basis that the defendant had no equitable set-off but merely a counter-claim. In the present case the defendant has both an equitable set-off and a counter-claim. Counsel for the plaintiff has submitted that the defence of the defendant is a sham and that its bona fides is in doubt. At this stage there is insufficient material before the court for it to be able to assess the bona fides of the defendant.

Nor do I think that, as submitted by counsel for the plaintiff, the payment by the defendant of Shs. 1,000/- on January 10, 1967, can be regarded as indicating mala fides on the defendant's part. I do not know why it was made. The replying affidavit of Mr. Virdee sworn on April 25, 1967, is inconveniently silent on the point.

In my opinion the defendant should be given unconditional leave to defend this suit and I order accordingly. The plaintiff's application for summary judgment is accordingly dismissed with costs. As a defence has already been filed there is no need for me to lay down a period within which it must be filed.

Application dismissed.

For the plaintiff:

Khanna & Co., Nairobi

R. N. Khanna

For the defendant:

B. J. Hawkes and N. V. Pancholi, Nairobi

Dembeniotis and others v Central Africa Co Ltd and another
[1967] 1 EA 310 (HCT)

Division: High Court of Tanzania at Dar-Es-Salaam

Date of judgment: 17 March 1967

Case Number: 29/1966

Before: Otto J
Sourced by: LawAfrica

[1] *Costs – Several issues – Whether plaintiff who succeeds in main purpose of suit should be deprived of costs of another issue which could not affect the result – Civil Procedure Code, 1966, s. 30 (T).*

Editor's Summary

The plaintiff sued for cancellation of an agreement, raising two issues, one that the agreement had been extorted by force and the other that it was without consideration. By an amended defence the defendant, whilst denying that the agreement was extorted, admitted that it was without consideration, and agreed that it should be cancelled. The plaintiff thereupon applied for judgment as prayed. The defendant argued that the plaintiff should be deprived of part of his costs, not having withdrawn the issue of extortion.

Held – costs should follow the event where the plaintiff succeeds in the main purpose of his suit, and a plaintiff should not be deprived of costs merely because he has raised another issue which in itself cannot affect the result of the suit even if he loses on that issue.

Application allowed. Judgment entered for the plaintiff with costs.

Cases referred to in judgment:

- (1) *Jiwan Singh v. Rugnath Jeram* (1945), 12 E.A.C.A. 21.
- (2) *Blank v. Footman, Pretty and Co.* (1888), 39 Ch.D. 678.

Judgment

Otto J: This is an application made under Order 12, r. 4 of the Civil Procedure Code, 1966, which reads:

“Any party may at any stage of a suit, where admissions of fact have been made either on the pleadings, or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for determination of any other question between the parties: and the court may upon such application make such order, or give such judgment, as the court may think just.”

The only question which was argued in connection with the application was the question of costs. Counsel for the plaintiff asked for judgment to be entered as prayed and as can be seen from the plaint, this was a suit for the cancellation of an agreement made between the parties. In the first instance a defence was filed denying the claim and submitting a counterclaim. This first defence was referred to by counsel for the defendant in his arguments in the present application as being a “stop-gap” defence. Subsequent to this so-called “stop-gap” defence and pursuant to an order made by consent on February 16, 1967, an amended defence was filed and in this amended written statement of defence, the defendants, whilst denying that the agreement was extorted and obtained by improper and illegal pressure and threats, admitted that there was no consideration for the agreement and that in consequence the agreement was and always has been void ab initio, and accordingly the defendants agree to the cancellation of this agreement as demanded by the plaintiffs in their suit. The defendants therefore delivered their copy of the agreement to the court for cancellation.

In those circumstances counsel for the plaintiff submitted that he is entitled to his full costs as provided for in the Code, s. 30, costs to follow the event in the normal manner. Section 30 coincides exactly word for word with s. 35 of the former Indian Code of Civil Procedure. In those circumstances the commentaries are of use and the principles should be applied to this present application. Counsel relied on the case of *Jiwan Singh v. Rugnath Jeram* (1). In that case the Court of Appeal considered the question of costs; and the section of the Code therein referred to, while differing slightly, does not differ materially from the present rule as to costs. There the English cases were considered and the Court of Appeal adopted the words of Kekewich, J., in *Blank v. Footman, Pretty & Co.* (2) (39 Ch.D. at p. 685):

“The defendant is entitled to put his back against the wall and to fight from every available point of vantage. I think it would be extremely hard on defendants if as a rule they were told, at the end of a trial: ‘You have beaten the plaintiff, but because you have raised some points on which you have not succeeded you shall not have all the costs of the action’.”

It was the argument of counsel for the defendant that plaintiff had raised two separate issues, and that in para. 7 of the plaint there was the very serious issue of improper and illegal pressure. This the defendants still maintained and denied to the utmost, and they were prepared to go to trial on that particular issue. However, counsel for the defendant had to agree that in view of the admission that the agreement was without consideration the other issue was largely academic in character. However, he argued that the plaintiffs should be deprived of part of their costs and he pointed out that this other issue had not been withdrawn by the plaintiff. He said it would be over-simplifying the matter to say because the defendants had given up the agreement the plaintiff was entitled to all its costs. It was counsel’s submission that at most only half costs should be allowed.

Looking at the plaint itself, it is clear that although the plaintiffs were raising the question of extortion, they also raised the issue of lack of consideration and I cannot accept that because the prayer of the plaint asks first for a declaration that the agreement was extorted by force, that the claim as a whole and in its main purpose was nothing other than a suit for a declaration that the agreement be cancelled. This was the main purpose of the suit, which was one for cancellation of the agreement and on this issue the defendants conceded defeat. As is pointed out in the cases referred to in *Singh v. Jeram* (1), it is not on every issue in a suit that success will bring a right to the costs of that issue. Clearly costs should follow the event where the plaintiff has succeeded in the main purpose of his suit, and I do not consider he should be deprived of costs merely because he has raised another issue which in itself cannot affect the result of the suit even if he loses on that issue. Here he has not only substantially succeeded in the main purpose of the suit, but he has obtained the full relief claimed and that was the cancellation of the agreement. He obtained the precise form of relief he wanted, and it is immaterial that the other issue is left undecided, because whichever way that issue falls to be decided it cannot affect the result.

For these reasons the application succeeds and the prayer is granted as prayed, i.e. there will be judgment for the plaintiffs on the admissions contained in the amended defence together with the costs of and incidental to the suit.

Application allowed. Judgment for the plaintiff with costs.

For the plaintiff:

Fraser Murray, Roden & Co., Dar-es-Salaam

A. A. Lakha

For the defendant:

Donaldson & Wood, Dar-es-Salaam

M. D. Riegels

Sir George Arnautoglu v Commissioner of Income Tax
[1967] 1 EA 312 (CAD)

Division: Court of Appeal at Dar-Es-Salaam
Date of judgment: 16 November 1966
Case Number: 38/1966
Before: Sir Charles Newbold P, Duffus Ag VP and Law JA
Sourced by: LawAfrica
Appeal from: The High Court of Tanzania at Dar-es-Salaam – Biron, J.

[1] Income tax – Residence – Individual – Basis of averaging days spent in the Territories – Whether permissible to aggregate periods of mere presence with periods of presence with a home – East African Income Tax (Management) Act, 1952, s. 2 (1) (b) (ii).

Editor’s Summary

The appellant disputed his 1962 assessment for income tax on the ground that he was not resident in the Territories in that year. The agreed facts were that in 1960 the appellant had a home in Dar-es-Salaam and was present for periods totalling 249 days; in 1961 the appellant sold his home and was present for a total of 124 days. In 1962 he had no home but was present for 62 days and thus was present on average for more than 4 months in each of the three years. It was argued for the appellant in relation to the definition of “resident in the Territories” in the E.A. Income Tax (Management) Act, 1958, firstly that it was not permissible to aggregate periods of residence with periods of mere presence and secondly that “averaging” in sub-section (1) (b) (ii) meant in effect that 4 months’ presence was required in each of the relevant years.

Held –

- (i) it was permissible for the purposes of the Income Tax (Management) Act, 1958, s. 2 (1) (b) (ii) to aggregate periods of residence and of presence in the Territories;
- (ii) in s. 2 (1) (b) (ii) *ibid.*, the period to be averaged was the total of days spent in the Territories over the three relevant years.

Appeal dismissed. Order accordingly.

No cases referred to in judgment.

The following judgments were read:

Judgment

Sir Charles Newbold P: The appellant was assessed to income tax in respect of the year of income 1962 on the basis that he was resident in the Territories in that year. He appealed against that assessment to the Local Committee on the ground that he was a non-resident in that year and the Local Committee allowed the appeal. The Commissioner of Income Tax then appealed to the High Court against the decision of the Local Committee and the High Court allowed the appeal holding that the appellant was resident for the year of income 1962. From that decision the appellant has appealed to this court.

The facts relevant to the appeal are not in issue. These facts are that in 1960 the appellant had a home in Dar-es-Salaam and was actually present in the Territories for two separate periods totalling 249 days. In 1961, following a serious illness, the appellant decided to leave Tanganyika and in that year he sold his home. He was, however, present in the Territories in that year for two periods totalling 124 days. In 1962 the appellant was present in the Territories

for two separate periods totalling 62 days, but had no home therein. In the result, in the three years 1960, 1961 and 1962 the appellant was present in the Territories for a total of 435 days, though in 1962 he had no home in the Territories. It is not in dispute that if this total number of days is divided by three, the resultant figure for each of the three years would show that the appellant had been present in the Territories for on average more than four months in each of such three years.

The submissions made by the appellant raise two separate issues. The first issue, which had not been argued before the trial judge, was that in 1960 and 1961 the appellant had a home in the Territories and resided in it, whereas in 1962 he did not have a home therein but was merely present in the Territories and that it was not permissible to aggregate periods of residence in the Territories with periods of mere presence in the Territories for the purposes of the definition of “resident in the Territories” contained in s. 2 of the East African Income Tax (Management) Act, 1958. The second issue was that having regard to the words “in each such year” in para. (1) (b) (ii) of that definition the word “averaging” should be construed as if it applied to each separate year and as if in respect of each separate year it meant aggregating.

This appeal depends upon the construction of the definition of “resident in the Territories” in s. 2 of the East African Income Tax (Management) Act, 1958. That definition, in its application to an individual, is as follows:

“‘resident in the Territories’, when applied in relation to any year of income –

- (1) to an individual, means that such individual resides, except for such temporary absences as the Commissioner may determine to be reasonable, in any of the Territories; and an individual shall be deemed to reside in the Territories if he –
 - (a) has a home in any of the Territories and was present in the Territories for any period in such year of income; or
 - (b) has no home in any of the Territories but –
 - (i) was present in the Territories for a period or periods exceeding in the aggregate six months in each year of income; or
 - (ii) was present in the Territories in such year of income and in each of the two preceding years of income for periods averaging more than four months in each such year of income;”

Before I deal with the two issues I wish to draw attention to the general scheme of this definition. First, an individual is defined as residing in the Territories if he in fact does so; secondly, an individual is deemed to reside in the Territories if the facts are such that he would not normally be regarded as residing in the Territories or there would be doubt as to whether he did so. I wish to emphasise that the deeming provisions of this definition only come into play if the facts are such that the individual would not normally be regarded as residing in the Territories. I wish also to point out that the moment the legislature requires something to be deemed, then that of necessity means that something is to be treated as if it were a thing different from what in fact it is. This cannot but, in certain circumstances, give rise to anomalous and extraordinary results. The existence, however, of these anomalous and extraordinary results are not to be used as an argument for saying that the thing is not to be treated as if it were something else if in fact the legislature so requires.

Turning to the first issue, it is urged that for the purposes of para. (b) (ii) of the definition the words “no home” applies to each of the three years and that a year of presence in the Territories without the

existence of a home should not be considered together with a year of residence in the Territories when an individual did have a home. I do not agree. The definition comes into play in

relation to a particular year of income and, as I have said, if the deeming provisions are resorted to, then one is seeking to ascertain whether a person who is not in fact a resident, should be treated as a resident. The words of para. (b) (ii) require the element of “no home” only in relation to the particular year in which it is sought to be ascertained whether the individual is to be treated as resident in the Territories. This does not mean that in each of the two preceding years he is also required to have no home in the Territories. For the purposes of the deeming provisions it is immaterial whether or not he had a home in the two preceding years so long as on the basis of averaging he was present in each of those two years for the requisite period. If the definition were to be construed as the appellant urged that it should, it would create even more anomalous results than the examples which were given in support of the submissions. For example, it would mean that an appellant who had no home in a particular year, but was present therein for five months, having had a home during the previous two years and being resident in the Territories for the whole of those two years, would not be treated as resident in the Territories; nor would he be so treated in the following year if he continued to have no home but was present for five months; but he would be treated in the third year as resident in the Territories if he continued to have no home but was present for five months. I do not accept the submissions of the appellant that it is only years in which the appellant has no home in the Territories to which regard may be paid for the purposes of para. (b) (ii).

Turning to the second issue, it is submitted that para. (b) (ii) should be construed in such a way as to require four months’ presence in each of the relevant years. It is urged that this should be so because if the construction of the trial judge were accepted it could mean that a person would be treated as resident in a year in which he had no home in the Territories and was present therein for only a single day; and also because the words “in each such year” connote an aggregation in each year rather than an averaging over three years. To accept this submission would entail substituting the word “aggregating” for the word “averaging” in para. (b) (ii). I do not think this should be done. I accept that anomalous and extraordinary results may follow as a result of the construction adopted by the trial judge, but, as I have said, this is very often the result of deeming something to be what it is not. I see no reason to construe the word “aggregating” as if it meant “averaging” especially as the latter word is used in the same subsection very shortly after the word “aggregate” and in obvious contradistinction to it. I agree with the reasoning of the trial judge and reject the submissions of the appellant.

For these reasons I would dismiss the appeal with costs. As my brethren are of the same view it is so ordered.

Duffus Ag VP: I agree.

Law JA: I also agree.

Appeal dismissed.

For the appellant:

George N. Houry & Co., Dar-es-Salaam

K. Bechgaard, Q.C., and M. N. Shukla

For the respondent:

The Legal Secretary, E.A.S.C.O.

J. Maynard (Asst. Legal Secretary, E.A.C.S.O.)

M'ibui v Dyer
[1967] 1 EA 315 (HCK)

Division: High Court of Kenya at Nairobi
Date of judgment: 20 January 1967
Case Number: 1276/1965
Before: Farrell J
Sourced by: LawAfrica

[1] *Criminal law – Arrest by private person on suspicion of felony – General observations – Shot wounds inflicted on suspect – Whether justifiable in the circumstances – Criminal Procedure Code (Cap. 75) s. 34 (1) (K.).*

[2] *Criminal law – Assault – Shot wounds inflicted in the course of an arrest by private person on suspicion of felony – Whether justifiable in the circumstances.*

[3] *Damages – Assessment – Personal injuries – Psychological factors of malingering and “compensationitis” taken into account.*

[4] *Damages – Aggravation – Shooting on arrest on suspicion of felony – Persistence by defendant during trial in allegations of criminal conduct of plaintiff adding to damage.*

[5] *Firearms – Arrest – Use by private person in course of arrest on suspicion of felony – Suspect wounded by shot – Whether wounding lawful – Whether use of firearm lawful.*

[6] *Negligence – Personal injuries caused by shot fired in the course of an arrest – Whether arrest lawful – Whether violence used reasonable – Defendant negligent in the discharge of the shots – Criminal Procedure Code (Cap. 75) s. 34 (1) (K.).*

[7] *Trespass to the person – Damages – Shooting in course of arrest on suspicion of felony – Aggravation of damages by element of injury to reputation – Defendant’s conduct at trial relevant.*

Editor’s Summary

The plaintiff, a trader in “miraa”, and five others were travelling by landrover from Meru district to Nairobi late one night in order to deliver a load of sacks of “miraa” to the Nairobi market the following morning. Because of shifta activity in the area, they decided to travel over a secondary road as attacks had been made on persons travelling on the main road. This secondary road crossed a number of sheep farms and while the landrover was crossing the defendant’s farm, it developed minor engine trouble and the vehicle was stopped while running repairs were carried out. In the meanwhile, the defendant, a farm manager, who had been asleep in his home, was wakened by his herdsman and told that there was an attack being made on his sheep boma. It was common cause that stock-thefts were prevalent in that area and that because of this most of the farmers and their herdsman were licensed to carry firearms. The defendant, with two of his staff, drove to the sheep boma where he found his sheep scattered and then drove towards the road in an attempt to track down the thieves. The defendant saw the plaintiff’s vehicle stopped and, as he approached it, he saw two men scramble into it and the vehicle move off. The defendant saw what he thought were a number of sheep in the

landrover but which were, in fact, the sacks of "miraa". The defendant alleged that as the landrover moved off he and his men shouted for it to stop and he fired two shots into the air. The vehicle then stopped and three men, one of whom was the plaintiff, got out and ran away. The defendant then fired a third shot aiming upwards but in the direction of the plaintiff at a range of some 60 yards; the two other men stopped and the plaintiff disappeared. A search party with a torch discovered him nearby with a gunshot wound in his shoulder and

another in his leg. The plaintiff then attacked the defendant and inflicted minor injuries on him, for which the defendant counterclaimed in the suit. The defendant then took the plaintiff to Timau police station where the matter was reported and the plaintiff sent for hospital treatment.

The plaintiff, who had refused to have the shotgun pellet removed from his shoulder, claimed damages for his injuries and the court framed the issues on liability as follows: – (i) Had the defendant reasonable grounds for suspecting that the plaintiff had committed a felony? (ii) If so, was the defendant negligent in the particular manner in which he used his shot-gun?

During the trial the defendant maintained the attitude that the plaintiff was a stock-thief.

Held –

- (i) in Kenya law there is no distinction between the power of a police officer and of a private person to arrest without warrant on suspicion of felony; and, so long as there are reasonable grounds for the suspicion, a private person is entitled to arrest and in doing so to use such force as is reasonable in the circumstances or is necessary for the apprehension of the offender;
- (ii) there were reasonable grounds for suspecting that a felony had been committed;
- (iii) the defendant was not negligent in firing the first two shots in the air by way of warning;
- (iv) the defendant was negligent in firing the third shot in the direction of the plaintiff and was not protected by any of the provisions of the criminal law as the amount of force used in the particular circumstances was neither reasonable nor necessary;
- (v) the fact that the plaintiff had refused to have the pellet removed from his shoulder and the fact that his inability to resume work was largely due to psychological factors would be taken into account in assessing the damages;
- (vi) shooting for the purpose of arrest on suspicion of felony being to some extent analogous to false imprisonment, the defendant's persistence in the course of the trial in regarding the plaintiff as a stock-thief aggravated the damage to the plaintiff's reputation and he was entitled to recover accordingly.

Judgment for the plaintiff on claim and for defendant on counterclaim.

Cases referred to in judgment:

- (1) *Fowler v. Lanning*, [1959] 1 All E.R. 290; [1959] 1 Q.B. 426.
- (2) *Merin v. Ross*, [1933] 1 W.W.R. 109; 46 E. & E. Digest (Repl.) 424, 644.
- (3) *Cretzu v. Lines*, [1941] 2 D.L.R. 413; 46 E. & E. Digest (Repl.) 424, 641.
- (4) *Woodward v. Begbie* (1962), 31 D.L.R. (2d) 22; 46 E. & E. Digest (Repl.) 424, 640.
- (5) *Bennett v. Pearl Assurance Co.* (1961), *Guardian* Newspaper, November 18.
- (6) *Walter v. Alltools Ltd.* (1944), 61 T.L.R. 39.
- (7) *Warwick v. Foulkes* (1844), 12 M. & W. 507; 152 E.R. 1298.

Judgment

Farrell J: The plaintiff is a miraa trader living in the Meru area where most of the miraa produced in Kenya is grown. Miraa is a product which requires to be delivered early to the customer as it deteriorates rapidly, and the practice of the miraa traders in Meru is to buy the product in the market during the afternoon and to transport it to Nairobi by night. For this purpose the plaintiff and four other miraa traders hired a landrover, belonging to one Stephen Muchiri. The landrover left Meru between 10 and 11 p.m. on the night of August 3, 1965, and was driven by Stephen. The

plaintiff and another man, Kirimania, sat in front, and the other three in the rear seat. Behind them at the back of the landrover they had a considerable number of sacks containing bundles of miraa. From Meru to Nairobi there are two main routes, one via Embu and the other via Nanyuki. As there was considerable shifta activity in the neighbourhood at that time, they chose to travel via Nanyuki, and in doing so not to use the main road between Meru and Timau, but a smaller road, which crosses the shoulder of Mount Kenya at a height of about 8,000 feet. This road is known as the Kibirichia road, and passes through a number of sheep farms.

After the party had travelled about 30 miles, and reached the highest part of the road, the landrover developed engine trouble, and the driver had to stop to attend to a faulty plug. There is a conflict of evidence whether it stopped once or twice, but at any rate on the last occasion it stopped near Kisima estate at a point marked D on a survey map, exhibit C. The driver and some of the passengers got out, and the trouble was quickly rectified. Just as the landrover started off again, another vehicle drew up behind and flashed its headlights. There were shouts from the other vehicle, and two shots were fired in the air. Upon this, the landrover was quickly brought to a stop, and the three persons in the front seat jumped out, and ran forward along the road, Stephen on the right side, the plaintiff and Kirimania on the left. Another shot was fired, and the plaintiff was hit twice, once in the shoulder and once in the leg. In respect of the injuries thus inflicted upon him he now claims damages.

It is now necessary to look at the incident from the point of view of the defendant and his witnesses.

The defendant is the European manager of Kisima farm where the incident took place. The farm extends on both sides of the Kibirichia road, the house being below the road at an altitude of about 8,000 feet and the sheep pastures mostly above the road. There is a boma at about 9,000 feet where the sheep are enclosed at night. In this area stock theft is unfortunately very prevalent, and the police coverage is very thin. Timau police station is about 15 miles away, and an armed patrol of two constables is sent out every night, but rarely if ever reaches the farm on which the defendant is employed. In these circumstances the farmers have to rely mainly on their own vigilance and resources to defeat the depredations of stock thieves. On the defendant's farm, he and another European are licensed to carry firearms. The herdsmen are not armed, although on other farms they are. On a recent occasion as many as 172 head of cattle were stolen, of a value of £1,720.

On the night in question the defendant was roused from sleep about 10.30 p.m. and received a report from his chief herd that the sheep boma had been attacked. It was said that men had come down from above and thrown stones at the herds' shelter and then gone down the hill towards the road. The defendant took his double-barrelled shotgun and a torch, and with his house-servant and the herdsman drove from the house to the sheep boma on the mountain-side, where he found the sheep scattered in groups, a sign that they had been disturbed. The defendant drove down the track towards the road in search of the thieves who he was convinced had been at work. He thought he saw a light down below, moving from right to left above the road. Then as he approached the road he saw a car moving slowly along the road in the direction from Meru towards Timau. From where he was the defendant had a good view of the road, and he saw the vehicle stop at the point marked D on the map, close to a stock-loading ramp and just below the wheat-store of the farm from which considerable quantities of grain had recently been stolen.

The defendant, whose suspicions were aroused, drove on to the road and followed the vehicle, which he had now identified as a landrover. He had only his sidelights on, but as he came close to the landrover, he switched on his

headlights. At that moment he claims to have seen two men scrambling into the vehicle, and as they lifted the canopy he saw in the back of the landrover what he took to be a number of sheep. The landrover then began to move off. He and his men shouted “Simama”, and the defendant fired two shots in the air. The landrover then stopped, and three men got out and ran away, two on the left and one on the right. The defendant got out and climbed a small bank on the left of the road, and as the three men showed no sign of stopping, just before the man on the left (who in fact was the plaintiff) disappeared into the darkness at a distance which the defendant estimates as 60 yards, he fired a third shot aiming upwards but in the direction of the plaintiff. Upon this the other two men stopped running and came back to where the two vehicles were standing, but the plaintiff had disappeared, and was not found until a search party had gone after him with a torch, and brought him back with the injuries already described.

The defendant’s case is that when the plaintiff came back and reported that he had been hit in the shoulder, the defendant put out his hand to ascertain the extent of his injury, but the plaintiff refused to let the defendant touch him, stooped down to pick up a stone, and with the stone in his hand, hit him on the side of the head. The defendant hastily withdrew, and as he did so the plaintiff threw another stone and hit him on the ankle. This episode is denied by the plaintiff and all his witnesses.

After that the defendant took off his coat and put it round the plaintiff’s shoulders, put him in his own landrover, and drove him to Timau police station, where a report was made and the plaintiff was taken in a police vehicle to Nanyuki Hospital for treatment. The defendant himself was examined by a doctor the next day and treated for his injuries.

All the events which I have described took place on a dark night, and having regard to the circumstances there is surprisingly little disagreement as to the essential facts. The chief discrepancy concerns the firing of the three shots, as the plaintiff and his witnesses say that only one shot was fired before the defendant’s vehicle stopped, and two more were fired after the plaintiff had got out of the landrover. It would be natural enough for the plaintiff to think that, having received two injuries, he had been shot at twice. But it is obvious that the defendant was in a better position to know when he fired. The defendant had no motive for misleading the court on this point and I have no hesitation in finding that only one shot was fired after the vehicles had stopped, and that two pellets from this one shot hit the plaintiff, one in the shoulder and one in the leg. It is significant that this is confirmed by the driver of the landrover, Stephen, who was called as a witness for the defence.

Apart from the question of the shots, there are a number of discrepancies, as might be expected, on minor matters, such as the speed of the landrover as it moved down the road, what sort of lights it had on, the range at which the plaintiff was shot, the distance to which he ran, who went and fetched him, whether or not in the meantime the vehicles had moved, and whether or not the landrover overtook the defendant’s car on the way to the police station. Several of these are points of little or no significance, which I do not propose to examine in detail. I am, however, satisfied that the plaintiff did cross the fence alongside the road into the defendant’s farm, though not nearly as far as some of the witnesses estimated who judged the distance merely by the sound of voices at night. I am also satisfied that the plaintiff was not beside the landrover when he was first hit, and I accept the defendant’s evidence that he was about to disappear into the darkness of the bush on the left of the road. I shall later consider whether the range was, as the defendant claims, as much as 60 yards.

As regards the alleged attack by the plaintiff on the defendant, the medical evidence supports the defendant's version, and although Stephen claimed to have seen nothing of the kind happen, I gained the impression from his evidence that he had seen more than he admitted. I find that this attack did take place as described by the defendant, and to this extent the plaintiff and his witnesses are discredited. The defendant succeeds on the counterclaim, and the issue that remains to be decided is the more difficult one arising on the plaintiff.

As originally filed the plaintiff alleged merely that the defendant shot at the plaintiff and caused him injury, but on the basis of the ruling in *Fowler v. Lanning* (1), an amended plaintiff was filed alleging in the alternative that the shooting was either intentional or negligent. The defence in the first place denies both intention and negligence, but goes on to allege justification in that the defendant was trying to effect an arrest on reasonable suspicion that a felony had been committed. Two other grounds of justification were pleaded but not pressed at the trial. There is also an allegation of contributory negligence. Finally there is a plea of inevitable accident, but this I take to be no more than a denial of negligence in another form (see *Fowler v. Lanning*, [1959] 1 Q.B. at p. 433).

The defendant in his evidence categorically denied any intention of hitting the plaintiff, and I believe him nor do I find any circumstances proved from which such an intention must necessarily be inferred. I accordingly reject this allegation, and propose to consider the claim on the basis of the alternative allegation of negligence.

The law with regard to trespass to the person is strangely uncertain, and in particular there is very little authority as to the use of firearms for the purpose of arrest. This is no doubt to be explained by the fact that in England and most Commonwealth countries the police are not normally armed. There are, however, one or two Canadian cases briefly reported in *The English and Empire Digest*, Repl. Vol. No. 46, at p. 424, to which I shall refer later.

The defendant relies principally on s. 34 (1) of the Criminal Procedure Code which defines the powers of arrest conferred in this country on a private person as follows:

"Any private person may arrest any person who in his view commits a cognizable offence, or who he reasonably suspects of having committed a felony."

It is not disputed that cattle theft is a cognizable offence to which the subsection applies, and a felony.

It is also pertinent to mention s. 21 of the Code (although no reference to it was made in argument) which reads as follows:

- "(1) In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.
- (2) If such person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, such police officer or other person may use all means necessary to effect the arrest.
- (3) Nothing in this section contained shall be deemed to justify the use of greater force than was reasonable in the particular circumstances in which it was employed or was necessary for the apprehension of the offender."

It is, perhaps, worth mentioning at this point that, so far as concerns arrest on suspicion of felony, there is no distinction in this country between the power

of a police officer and of a private person. Each is entitled to arrest without warrant “any person whom he reasonably suspects” (or “suspects upon reasonable grounds”) “of having committed a felony”; and a private person does not have to prove in addition, as he does under English law, that a felony has actually been committed. So long as there are reasonable grounds for the suspicion, a private person is entitled to arrest and in doing so to use such force as is reasonable in the circumstances or is necessary for the apprehension of the offender.

No issues were agreed or framed at the trial, nor indeed was any law opened on either side. So far as the plaintiff was concerned, the omission did no harm; but I can imagine few cases in which it would have been more advantageous for the defence to make clear at the outset the law on which it relied. At this stage it seems to me that the issues which fall for decision are the following:

- (1) had the defendant reasonable grounds for suspecting that the plaintiff had committed a felony?
- (2) (depending on the answer to (1))
 - (a) was the defendant negligent in using a firearm at all?
 - (b) was the defendant negligent in the particular manner in which he used his shotgun?

As regards the first issue, there were many circumstances which might reasonably have made the defendant suspicious. He knew from past experience that stock-theft was rife in his area. He had been woken up late at night and given a report which he had no reason to disbelieve that stock thieves appeared to be at work, and his discovery that the sheep were scattered confirmed in his mind that they had been disturbed. He thought he could see lights on the hillside between himself and the road, and whether there were any lights there or not, I accept his bona fides on this point. Then he saw a vehicle moving along the road in the middle of the night. I do not find it established that the vehicle was travelling unusually slowly or that there was anything unusual about its lights. But it was not the road normally used by vehicles travelling from Meru to Nanyuki, and its presence at that time was in itself a ground for cautious suspicion. The suspicion must have appeared to be confirmed when the vehicle stopped on the road at a point which the defendant knew was close to the stock-loading ramp and below the wheat-store. When he followed and drew up behind it one or more persons got in hastily, and he saw what he took to be sheep in the back of the vehicle. The vehicle then drove off. Finally, when it was brought to a stop by the shouts and the shots which were fired, the occupants ran away.

All these circumstances must inevitably have aroused the suspicions of the defendant, and it is not surprising if he felt that he had at last caught a gang of stock-thieves red-handed. On the other hand, there were certain matters which might have influenced his judgment if he had regarded the situation more calmly. First of all, the road is a public road on which vehicles have a right to pass at all hours of the day or night, and even if it is not the main road from Meru to Nanyuki, there was good reason for vehicles to use it in preference to the lower road which was, as the defendant readily recognised when it was pointed out to him, more exposed to shifta attacks. Then, as Mr. Kapila rightly points out, there must have been a considerable lapse of time between the original stone-throwing incident and the appearance of the plaintiff's landrover at the eastern boundary of the estate. During that time a report had to be taken on foot to the house three miles away where the defendant was sleeping, the defendant had to dress and drive his car up to the sheep boma, and he must have spent some little time investigating. Then, some considerable time after the original incident, a vehicle is seen approaching from a direction away from

the estate. It may be asked whether there was any reasonable justification for connecting the vehicle with the incidents which had been reported. The strongest ground of suspicion in the mind of the defendant must undoubtedly have been the sight of what he took to be sheep in the back of the landrover. If I had not been so impressed with the essential honesty of the defendant's evidence, I should have been inclined to discount this factor. I have, however, accepted that the defendant genuinely believed that he had seen sheep in the landrover. Whether his belief was not only honest but also reasonable is, however, open to question, and it is significant that his herdsman, Mutharia, who had the same opportunity of observation as the defendant, recognised the sacks for what they were. Finally, the conduct of the plaintiff and his companions in running away might readily be explained, not as the defendant assumed as evidence of guilt, but as being due to their belief that they were being attacked by shifta.

It is easy to sit in an armchair and suggest that the defendant, if he had had all these considerations present to his mind, might have hesitated before concluding that the occupants of the landrover were cattle thieves. But the matter must be looked at in the context of the defendant's situation and the heavy responsibilities he carried on his shoulders; and taking all the circumstances into account, I am satisfied that the defendant genuinely believed that the plaintiff and his companions were cattle thieves and that he had reasonable grounds for his belief. That being so it was his duty, both as a citizen and as manager of his estate, to arrest them if he could, and he was justified in using as much force as in the circumstances was reasonable or necessary for this purpose.

I do not think any valid criticism can be levelled at the defendant for firing his gun in the air when he saw the landrover moving off. His own past experience showed that the pursuit of cattle thieves is a hazardous operation. The defendant could see that his party was outnumbered. Shouting had proved ineffective to stop them, and it was no more than a measure of prudence to let the suspected offenders know that their pursuers were armed. Nor was there any reason to suppose that shots fired in the air would cause any danger or injury to anybody, nor is there any suggestion that any danger in fact arose. The plaintiff does not make any complaint as regards any shot which was fired while the two vehicles were moving, and I find that the defendant was not negligent in firing the first two shots in the air by way of warning nor would it have been negligent if he had fired the third shot in the same way. The first limb of the second issue is decided in favour of the defendant.

As regards the second limb of that issue, the defendant has clearly admitted that he fired one shot above the man on the left, i.e., the plaintiff, and that he "aimed to fire above his head". His explanation was that he wished to make the intruders realise they could not all get away, and that a shotgun fired over a man's head makes a whistling noise which is calculated to cause alarm. According to him, it was this which stopped the other two men. The last point, however, is invalidated by his admission that he shot only above the man on the left. Neither Stephen nor Kirimania says anything about hearing any whistling noise, and there is some evidence that the reason which led them to come back was that they recognised the voices of their companions calling them. But if they were at all checked in their flight by the defendant's shot, it would seem that it was the sound of the shot itself, and not any whistling noise which stopped them. If it was necessary or reasonable to shoot at all in the circumstances, it is probable that the intended effect would equally well have been achieved by shooting upwards in the air, as the defendant had done on the first two occasions.

The defendant claims that he waited until he considered the plaintiff was at a safe distance of 60 yards, but the event proved that he was wrong either in his assessment of the actual distance, or in his view of what would be a safe range. It would be very easy to make a mistake as to the distance of a retreating object in the dark. Nor does the expert evidence, as I understand it, support the view that 60 yards would necessarily be a safe range. It might be safe in the sense that a pellet fired from a shotgun at that range would be unlikely to kill (though the pellet which passed through the plaintiff's leg must have had some considerable penetration): but even if unlikely to kill it does not follow that it would be unlikely to hit. The evidence of Mr. Anderson is that at 60 yards the pattern of a shot fired from an improved cylinder, i.e., from a similar gun to the defendant's, would show not more than 20-30 per cent. of the pellets within a 30 in. radius; the remainder would be scattered in all directions. At that range it might be expected that a bird would not be hit, since even if it was in the line of fire, the concentration of pellets would be too thin. For that reason the effective range for killing a bird has been put at 40-45 yards. But if a pellet did hit in a vital part, it could kill a bird beyond that range. It is needless to point out that a human body is a much larger object than a bird, and at 60 yards a man is far more likely to be hit than a bird. Moreover, the fact that at 50 yards pellets will be losing velocity and beginning to drop, suggests that at 60 yards it would be not only a "wild pellet" or a "flyer" which might be expected to strike a man on the ground after a shot had been fired over his head.

I find that by firing in the direction of the plaintiff the defendant took a substantial risk of hitting him, as in fact happened, and that it was neither necessary for the purpose of effecting the plaintiff's arrest, since the other two fugitives were stopped in their flight without any shot being fired in their direction, nor was it reasonable in the circumstances to use a degree of force which could or might probably result in the infliction on the plaintiff of gunshot wounds.

In this connection it is pertinent to compare the Canadian case of *Merin v. Ross* (2), summarised as follows:

"In an action against a police officer for the death of a person who had been killed by the ricocheting of a bullet from a revolver which the officer had fired, without aiming at anyone, when pursuing the deceased in order to arrest him:

Held: the officer believed on reasonable and probable grounds that the deceased had been abetting one who he also believed on such grounds had broken into a shop, and the officer in shooting as he did was acting properly within his rights and doing no more than his duty required him to do."

Without a fuller report and material upon which to compare the Canadian law with the law of this country, such decisions must be treated with caution, but some significance may be found in the words "without aiming at anyone".

Reference may also be made, for what it is worth, to case number 641 on the same page, *Cretzu v. Lines* (3), where it was held that, although the police officer believed on reasonable grounds that the deceased had committed a crime which rendered him liable to arrest, he had used a revolver unnecessarily, and therefore unjustifiably, and also negligently.

The case immediately preceding, *Woodward v. Begbie* (4) might at first sight appear to be in favour of the defendant, as the circumstances which negatives justification in that case are not present here. But it is not clear from the summary whether, even if the use of the pistols had been found justified, it

might not have been open to argument that the particular use of them, in aiming so close to the plaintiff, in the circumstances was negligent.

While no great reliance can be placed on any single case among these cited, it may perhaps be fair to remark that in the one Commonwealth country where the use of firearms in effecting arrest is, so it appears, not uncommon, the only reported case in which the infliction of injuries has been held justifiable is one in which the defendant had fired without aiming at anybody.

In the light of the above considerations I find that the defendant was negligent in shooting at and injuring the plaintiff, and that he is not protected by any provisions of the criminal law as the amount of force he used in the particular circumstances was neither reasonable nor necessary.

I turn now to the question of damages. Special damages have been agreed at Shs. 315/-. In addition, I propose for convenience to consider under the head of special damages the loss of earnings during the period of complete incapacity as a result of the injuries, and a further period during which the plaintiff is likely to be incapacitated through a recommended operation for the removal of the pellet. I shall then consider the general damages arising apart from loss of earnings.

The first matter to be considered is the average earnings of the plaintiff before his incapacity. His own evidence is that he used to take 30,000 or 40,000 bundles of miraa twice a week to market in Nairobi, and that his profit on 40,000 bundles would be Shs. 800/-. The plaintiff's second witness, who is also a miraa trader, stated that the cost of 100 bundles at Meru was Shs. 18/-, and the sale price in Nairobi was Shs. 22/-. This would give a gross profit of Shs. 4/- per 100 bundles, as compared with Shs. 2/- according to the plaintiff's calculation. But the difference may be accounted for by transport costs and the cess referred to by Stephen. I accept the figure of Shs. 2/- per 100 bundles as the average rate of profit, but taking into account the possibility of losses referred to by Stephen, and bearing in mind that the plaintiff has produced no documentary evidence to substantiate his trading figures, I shall take his profits to have been Shs. 4,000/- or £200 per month. From this there would fall to be deducted income tax, which in the absence of evidence, I estimate at current rates as not less than £25 per month, leaving net earnings of Shs. 3,500/- per month.

As regards the period of incapacity, I accept the evidence of Mr. O'Donoghue, which differs little from that of Mr. Bhatia, that so far as physical disability is concerned the plaintiff could have resumed his work in January, 1966, i.e., five months after the accident. The difficulty arises from the psychological factors which have prevented the plaintiff from resuming his work up to the present time. Both surgeons agree that he has a psychotic fear of the presence of a foreign body in his shoulder. According to Mr. Bhatia this fear is reasonable (whatever exactly that may mean). Mr. O'Donoghue appears to suggest that judged by civilised standards his attitude would not be reasonable, but it would be wrong to apply civilised standards to a primitive mind.

In a recent English case, *Bennett v. Pearl Assurance Co.* (5) (see Clarke and Lindsell on Torts, Fourth Cumulative Supplement to 12th edn. on para. 319), it was held that when a plaintiff though not malingering failed to exercise the necessary will-power to overcome a particular disability, he could not recover damages in respect of the suffering attributable to such failure. There is a suggestion here in the evidence of Mr. O'Donoghue that the plaintiff shows signs of what he calls "compensationitis", which I understand to come close to malingering, and in view of this I have come to the conclusion after some hesitation that a fortiori the same principle should be applied here as in the English case.

A suggestion has been put forward on behalf of the defence that the plaintiff either contributed to his own sufferings or failed in his duty to mitigate his damages by not having the pellet removed from his shoulder at Nanyuki. Mr. Bhatia was of the opinion that it would have been better if this had been done, while Mr. O'Donoghue does not consider it was unreasonable to leave the pellet where it was. What, however, is clear beyond argument is that the doctor who treated the plaintiff at Nanyuki hospital rightly or wrongly advised against the removal of the pellet. Even assuming that the advice was misguided, it would be wholly unreasonable to expect a patient to go against the advice of a qualified medical practitioner and to deprive him of damages to which he would otherwise have been entitled merely because he followed his doctor's advice. I totally reject this suggestion put forward on behalf of the defence.

Both surgeons agree that there will be a further period of incapacity lasting for about three months as a result of the recommended operation to remove the pellet, and I accordingly assess the damages for loss of earnings as equivalent to eight months at Shs. 3,500/- per month, amounting to Shs. 28,000/-.

The general damages comprise compensation for pain and shock, and the inconvenience resulting from the injuries. As regards the last head, the wound in the leg had very little lasting effect, but the injury to the shoulder will, even if an operation for removal of the pellet is successful, leave a permanent impairment of the use of the arm to the extent of five per cent.

Shooting for the purpose of arrest on suspicion of felony is to some extent analogous to false imprisonment in that the one tort like the other carries with it the imputation that the person arrested or sought to be arrested is a felon. That being so, consideration must be given in assessing the compensation to the element of damage to reputation. In this case, if there was any imprisonment, it was no more than momentary, and there was no publicity attached to the event which happened in a remote area and at dead of night. Nevertheless, it must have become known in the plaintiff's own neighbourhood that he had been taken for a stock thief, and he is in my view entitled to some compensation on that basis. The compensation would in the circumstances be nominal but for one regrettable feature in the presentation of the defendant's case. The bare facts of the matter are that the defendant, showing perhaps excessive zeal in the performance of onerous duties, was led into an honest but mistaken view as to the felonious intention of the plaintiff and his companions. As a result the plaintiff and to a lesser extent his companions were made to suffer injury and inconvenience. The mistake was quickly discovered and it is to his credit that the defendant thereupon did everything in his power to assist the plaintiff, notwithstanding the savage attack which the plaintiff had made upon him. It might then have been thought that, if the matter had to come to court, the defendant would have taken the attitude that he had genuinely believed the plaintiff and his companions to be stock thieves, that too late he had realised his mistake, that he greatly regretted it and unreservedly withdrew the imputation he had made on the character of the plaintiff. Instead of that, the defendant in cross-examination has expressed himself as follows:

“Q. Did you find that they were innocent miraa-traders?

A. I found out they were miraa traders.

Q. You found that they had stolen no stock?

A. I found no evidence of it. I still have my suspicions and I very much regret having injured the plaintiff. But I am still entitled to my suspicions of their behaviour on that occasion.”

In other words, the defendant persists in making allegations of crime against the plaintiff and his companions which he is wholly unable to substantiate by evidence in this or any other court of law.

Consistently with this attitude the defendant through his counsel has put his case, not to the plaintiff himself, but to his witness Kirimania, as follows:

“I put it you stopped there to see if there were any stock and that you would have taken them with you.”

In view of this allegation, it is legitimate to express some surprise that the defendant thought fit at a later stage to call the driver of the landrover Stephen as his own witness. Not content with this allegation, counsel sought to prove the stock-thieving propensities of Kirimania, and, by implication, of the plaintiff, by the introduction of evidence that Kirimania kept a shop at Nanyuki at which he sold meat and that on an occasion some two months later he had been seen bringing a sheep from Meru to Nanyuki.

It is difficult to see what advantage was sought to be gained by these allegations and the evidence sought to be brought in support of them. It is reasonable to suppose that the defendant must have been advised that the standard of proof of criminal allegations is very high and that the sort of evidence available to him against the plaintiff and his companions fell very far short of substantiating what he alleged. Nevertheless, the allegations have been made and persisted in, and it is proper that they should be taken into account in the assessment of damages, as indeed was intimated to defendant’s counsel in the course of the hearing. In this connection reference may be made to *Walter v. Alltools Ltd.* (6), and in particular to the judgment of Lawrence, L.J., at p. 40 where, after referring to *Warwick v. Foulkes* (7):

“a case of false imprisonment in which the defendant pleaded that the plaintiff had committed a felony, but at the trial his counsel withdrew the plea and exonerated the plaintiff”,

the learned judge went on to cite the following passage from the judgment of Lord Abinger, C.B.:

“The putting this plea on the record is, under the circumstances, evidence of malice and a great aggravation of the defendant’s conduct, as showing an *animus* of persevering in the charge to the very last. A justification of a false imprisonment, on the ground that the defendant had reasonable and probable cause to suspect that the plaintiff had been guilty of felony, is very different; such a justification is in the nature of an apology for the defendant’s conduct.”

The learned Lord Justice continues:

“In my opinion that case lays down that any evidence in a case of false imprisonment which shows or tends to show that the defendant is persevering in the charge which he originally made in bringing about the false imprisonment is evidence which may be given for the purpose of aggravating the damages. In the same way the defendant would be entitled to give any evidence which tended to show that he had withdrawn, or had apologized for having made, the charge on which the false imprisonment proceeded. The general principle, in my view, is that any evidence which tends to aggravate or mitigate the damage to a man’s reputation which flows naturally from his imprisonment must be admissible up to the moment when damages are assessed. A false imprisonment does not merely affect a man’s liberty; it also affects his reputation. The damage continues until it is caused to cease by an avowal that the imprisonment was false.”

Although the cases cited were cases of false imprisonment, I can see no reason why the same principle should not be applied where the cause of action is trespass to the person in the course of effecting an arrest, since in each case the justification relied on is reasonable suspicion of felony, and it is equally material in either case whether the allegation of felony is persisted in or withdrawn.

In the light of these considerations I award the plaintiff a further sum of Shs. 10,000/- as general damages.

The injuries to the defendant were fortunately much less serious in their consequences. There was little damage remaining to the ankle after three weeks. The effects of the concussion from the injury to the head were more lasting. I do not take into account that the injuries were to some extent induced by the defendant's own wrong done to the plaintiff, and I award him Shs. 1,000/- in respect of both injuries.

There will be judgment for the plaintiff on the claim for Shs. 38,315/- with interest from date of judgment, and for the defendant on the counterclaim for Shs. 1,000/- with interest, from the date of judgment. At the request of counsel for the defendant, I will hear argument before the award of costs.

Judgment for plaintiff on claim; for defendant on counterclaim.

For the plaintiff:

D. V. Kapila, Nairobi

For the defendant:

Hamilton, Harrison and Mathews, Nairobi

H. N. Armstrong

Jooma and Jaffer v Bhambra

[1967] 1 EA 326 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	22 February 1967
Case Number:	3/1967
Before:	Saidi J
Sourced by:	LawAfrica

[1] *Practice – Extension of stay of execution of eviction order – Whether proper exercise of inherent jurisdiction – Section 151, Indian Civil Procedure Code (T.).*

[2] *Practice – Inherent power of court under s. 151, Indian Civil Procedure Code – Extension of stay of execution of eviction order – Whether power to be exercised.*

Editor's Summary

The respondent was granted a stay of execution of an eviction order and given three months' extension of time within which to deliver vacant possession of the premises to the appellant landlords. The appellants asked that their appeal against this stay be treated as an application for a revision, as both parties agreed that no appeal lay against the order, which the magistrate in the court below had purported to make in the exercise of his inherent powers under s. 151 of the Indian Civil Procedure Code.

Held –

- (i) no order should be made under s. 151 unless there are no specific provisions (as there were in this case) to meet the necessity of the case and it is necessary for the ends of justice or to prevent abuse of the process of the court;
- (ii) there was no abuse of the process of the court in this case as there had been a consent judgment and the respondent agreed to vacate the premises within a certain period.

Order set aside.

Cases referred to in judgment:

(1) *Muhammad Akbar Khan v. Amar Nath and Others* (1930), A.I.R. Lah. 789.

Judgment

Saidi J: The appellants sued the respondent in the District Court of Dar-es-Salaam claiming vacant possession of a shop which the respondent occupied as a tenant and mesne profits at the rate of the rent agreed from July 18, 1966 till vacant possession was delivered. On October 20, 1966 judgment was entered for the appellants by the consent of the respondent who agreed and promised to vacate the shop by the end of November, 1966. As the respondent did not vacate the shop at the end of November, 1966 the appellants filed execution proceedings on December 12, 1966 to recover mesne profits and costs and also applied for an eviction order which was issued by the District Court on December 27, 1966. On the following day the respondent's advocate filed a chamber application under s. 151 of the Indian Civil Code asking the court to set aside and/or stay the execution proceedings and extend the time within which the respondent was to vacate the shop. On January 2, 1967 the District Court gave a ruling in the matter in the following terms:

"After hearing the submission of both counsel, I find no reasons to upset the order of this court given on the 27th of December, 1966. But, I think it is equitable to extend the time to enable the tenant to find alternative accommodation.

I hereby order that the tenant be given 3 months to deliver vacant possession of the premises to the landlord. This order is made without costs."

By this ruling the District Court did, in fact, stay the execution proceedings and enlarge the time within which the respondent was to vacate the shop by three months. It is against this ruling that the present appeal was brought.

At the hearing of the appeal on February 3, 1967 it was agreed by counsel for the parties that no appeal would lie against an order of a court exercising inherent powers under s. 151 of the Civil Procedure Code, but counsel for the appellants submitted that the present appeal could be treated as a revision. I note that in *Muhammad Akbar Khan v. Amar Nath and Others* (1), where a similar situation arose, the memorandum of appeal was treated as a petition for revision and then the High Court proceeded to consider whether or not the lower court had jurisdiction to exercise inherent powers under s. 151 of the Civil Procedure Code in the circumstances of the case.

Counsel for the appellant contended that the District Court was not entitled to take action in this matter under s. 151 of the Civil Procedure Code since there were other express provisions in the Code under which the respondent could have sought the same remedy. These provisions, he continued, were O. 41, r. 5 and s. 148 of the Code. It is clear that the District Court could have stayed the execution proceedings under O. 41, r. 5 and could have also extended the period within which the respondent was to vacate the shop under s. 148. The District Court could have also stayed the execution proceedings and extended the time for vacating the shop under s. 19 (5) of the Rent Restriction Act. In his commentary on s. 151 of the Civil Procedure Code, Mulla (10th Edn., p. 434) says:

"... Inherent jurisdiction must be exercised subject to the rule that if the Code does contain specific

provisions which would meet the necessities of the case in question, such provisions should be followed and the inherent

jurisdiction should not be involved . . . A court cannot make use of the special provisions of this section where the applicant has his remedy provided elsewhere in the Code and has neglected to avail himself of it . . . And, further, no order should be made under this section unless it is necessary for the ends of justice or to prevent abuse of the process of the Court.”

I would agree with counsel for the appellant in that there was no abuse of the process of the court in the present case as there had been a consent judgment and the respondent had agreed to vacate within a certain period. Counsel for the respondent had urged this court to consider the hardship which the respondent would have to face if he was ordered to vacate the shop before he had managed to secure an alternative shop for his goods. It may be the respondent will eventually have to suffer hardship as alleged, but the issue before me is whether or not this was a case where inherent powers would have been exercised under s. 151 of the Civil Procedure Code. The answer is in the negative because there were other express provisions in the Code and also in the Rent Restriction Act under which the same remedy could have been obtained.

The order of the District Court dated January 2, 1967 is accordingly set aside. There will be no order as to costs.

Order set aside.

For the appellant:

H. M. Dekhtawala

For the respondent:

Houry and Co

M. S. Shukla

Tumuheire v Uganda
[1967] 1 EA 328 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	18 May 1967
Case Number:	124/1967
Before:	Sir Udo Udoma CJ
Sourced by:	LawAfrica

[1] *Criminal law – Stealing from a public office – Bank is not a “public office” within the meaning of s. 256 (f) Penal Code (U.).*

Editor’s Summary

The appellant stole a Barclays Bank Savings Bank passbook and impersonating the owner by means of forgery withdrew Shs. 500/- and Shs. 100/- on two separate occasions (the two sums being the whole amount of the account) from the account at Barclays Bank Kabale branch. He was charged with and convicted of (i) theft (1st count) under s. 252 of the Penal Code (U.), (ii) stealing from a public office (2nd and 3rd counts) under s. 256 (f) and (iii) forgery (counts 4 and 5) under s. 326 of the Penal Code (U.), and was sentenced to 2 1/2 years' imprisonment in respect of each count, the sentences to run concurrently. He appealed.

Held – convictions and sentences for (i) theft and (iii) forgery upheld but conviction for (ii) stealing from a public office quashed on the ground that the bank was not a public office. A public office is an office maintained by public funds. The bank was a privately owned limited liability company.

Appeal allowed in part.

Cases referred to in judgment:

- (1) *Teper v. R.*, [1952] A.C. 480.
- (2) *R. v. Taylor, Weaver and Donovan* (1928), 21 Cr. App. R. 20.
- (3) *Re Mirams*, [1891] 1 Q.B. 594.
- (4) *Re Edgar Cohen v. Edgar*, [1939] 1 All E.R. 635.
- (5) *R. v. Charles Whitaker*, [1914] 3 K.B. 1283.

Judgment

Sir Udo Udoma CJ: The appellant was tried on a charge containing five counts. The first count was of theft contrary to s. 252 of the Penal Code. On the second and third counts the appellant was charged with stealing from a public office contrary to s. 256 (f) of the Penal Code. Counts 4 and 5 charged the appellant with forgery contrary to s. 326 of the Penal Code.

The appellant was found guilty on all counts by the Magistrate Grade 1 in the Kigezi Magisterial area. He was sentenced to 2 1/2 years' imprisonment on each of the counts, the sentences to run concurrently. This appeal is against conviction and sentence.

The case of the prosecution was that David Binugwa, in September, 1963 opened a savings account with Barclays Bank D.C.O., Kabale Branch. He was issued with a Savings Bank Pass Book. He was also given a specimen signature card, which he duly completed and returned to the bank for retention and safe custody.

Since he opened the account he had never withdrawn any money from it so that by June 28, 1966 his account was in credit in the sum of Shs. 580/- plus interest thereon.

It was David Binugwa's practice to leave his pass book in their home with his brother, Charles Kasimbazi, a schoolboy of seventeen years of age as David Binugwa was all the time working as a porter away from his home at the Kino Tea Estate.

For the safety of the pass book, Charles Kasimbazi always kept it in a box in their room in the house. The box was usually locked with a padlock.

Then, on June 28, 1966 the appellant, a friend of the family and a brother-in-law of Charles Kasimbazi, as was his custom, visited the family. He remained there overnight. Charles Kasimbazi left him alone in the house and went to school. That was on June 29, 1966. When he returned from school that day the appellant was no longer in the house. He had left.

Charles Kasimbazi then noticed that the box containing the bank pass book had been broken open. The padlock with which he had locked the same was lying on the floor. On opening the box the bank pass book was no longer there. He therefore wrote and informed his brother, David Binugwa, that his bank pass book had been stolen by someone from the box in which he had kept it.

On June 29, 1966 the appellant went to the bank with the pass book. He applied to Angelina Basekula, a counter clerk of the bank, for a withdrawal form. Angelina Basekula supplied him with the form which the appellant duly completed requesting to withdraw Shs. 500/-.

Angelina Basekula observed that the pass book was in the name of David Binugwa and, on comparing the signature on the form completed by the appellant she noticed some discrepancy in the name as signed by the appellant and the specimen signature in the custody of the bank.

Angelina Basekula entertained some doubt as to the genuineness of the signature on the withdrawal form completed by the appellant. She therefore insisted that the appellant should bring somebody to identify him. The appellant then left the bank but soon returned with George Wellington Banamba, who endorsed the form at the bank counter thereby identifying the appellant as someone well known to him. As explained later by George Wellington Banamba, he had known the appellant as his school mate but could not remember his real name.

Still Angelina Basekula was not satisfied. She insisted on further identification. To satisfy her the appellant produced a photograph of himself showing that he was a member of the Uganda Police (Special Force).

Having seen the photograph which indicated that the appellant was a member of the Special Force, Angelina Basekula appeared convinced and thereupon authorised payment of the money and accordingly the sum of Shs. 500/- was paid out to the appellant.

Again on July 4, 1966 the appellant visited the bank. He applied for a withdrawal form. He told Angelina Basekula that he wanted to close the account as he was leaving the country. He was again supplied with a withdrawal form which he duly completed as before. The form was completed in the presence of Angelina Basekula. It was for the withdrawal of the sum of Shs. 100/- which was the balance standing to the credit of David Binugwa, including the interest due thereon. The withdrawal form was then submitted to the bank and the sum of Shs. 100/- was duly paid out to the appellant. The account was accordingly closed.

Then on July 5, 1966 David Bingwa reported to the bank that his savings pass book was missing, it having been stolen from their home where he had kept it. He was told by the bank that he had no longer any account with them; that he had withdrawn all his savings; and that at his request his account had been closed.

David Binugwa denied having at any time withdrawn any money from his savings account with the bank. He contended that since he opened the savings account in 1963, he had never applied to the bank for withdrawing any money at all. In particular, he denied having withdrawn on June 29, 1966 and July 4, 1966 the sums of Shs. 500/- and Shs. 100/- respectively as alleged by the bank. He maintained that he was not in Kabale at all on the two dates in question and could not possibly have withdrawn the two sums stated to have been withdrawn from the bank. In any case, he maintained he had never requested his savings account in the bank to be closed.

David Binugwa immediately reported the matter to the police. As a result the appellant was apprehended. At an identification parade the appellant was picked out by Angelina Basekula as the man to whom the two sums of money were paid on her approval. George Wellington Banamba also picked out the appellant as the man on whose solicitation he had identified to the bank on June 29, 1966 for the payment of Shs. 500/-, although he was not there when the money was actually paid to him. The appellant was thereupon charged with the offence as stated above.

In his defence, the appellant said that he was discharged from the Uganda Police Force on June 6, 1966 in Kampala; that he only returned to Kabale on June 16, 1966; that on June 26, 1966 he was not at Kabale but at Kampala on a visit for the purpose of collecting his personal effects; and that he did not return to Kabale until July 13, 1966. He maintained that Angelina Basekula was mistaken in identifying him as the person to whom the two sums of money had been paid as he was not in Kabale during the dates in question.

The appellant, in support of his defence of an alibi, called Daniel Emmanuel Onvia whose testimony was that the appellant was dismissed from the Uganda Special Force in Kampala on June 6, 1966.

In his judgment the learned trial magistrate reviewed the evidence as a whole. He found as a fact that it was the appellant to whom the two sums of money were paid by the bank; that when getting the money from the bank the appellant had forged the signature on the withdrawal forms, purporting the same to be the genuine signature of David Binugwa.

On those findings the learned trial magistrate drew, rightly and correctly, I think, the only reasonable and conclusive inference that it was the appellant who had stolen David Binugwa's bank pass book from the box in David Binugwa's house.

In his petition or memorandum of appeal, the appellant has complained that the case against him was not proved and that the decision of the magistrate was not supported by the evidence.

I find no substance in this the only ground of appeal. The evidence against the appellant as to identification and as to his signing the withdrawal forms, purporting the signature thereon to be that of David Binugwa was overwhelming.

There is no doubt whatsoever that, in the peculiar circumstances of this case, the learned trial magistrate came to a right conclusion and drew the only possible inference that it was the appellant who had stolen the bank pass book, the property of David Binugwa. The box in which the pass book was kept was accessible to the appellant; and he, having been left alone in the house when Charles Kasimbazi left for school, had the fullest possible opportunity to have stolen, and did steal, the pass book belonging to David Binugwa.

On the evidence, counts 1, 4 and 5 had been proved to the hilt. It is of course true, as the learned trial magistrate observed, that the evidence as to the theft of the pass book in the house of David Binugwa was circumstantial.

It should be observed that there is nothing derogatory in referring to evidence against an accused person as circumstantial. Indeed, circumstantial evidence in a criminal case is very often the best evidence in establishing the commission of a crime by a person as in the present case.

As was said by Lord Normand in *Teper v. R.* (1) ([1952] A.C. at p. 489):

"Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another . . . It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the influence."

In *R. v. Taylor, Weaver and Donovan* (2) the principle as regards the application of circumstantial evidence was enunciated in these words:

"Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial."

Senior State Attorney, in the course of his submissions, expressed some doubt as to the correctness of the order of the learned trial magistrate in convicting the appellant on counts 2 and 3. It is a doubt which I share.

I propose therefore to examine carefully the evidence and the circumstances surrounding this case in

order to see whether the prosecution was right in laying counts 2 and 3 of the charge against the appellant under s. 256 (*f*) of the Penal Code; and also as to whether the learned trial magistrate did direct

himself correctly in law, and therefore right in convicting the appellant under the section as charged.

In both counts the appellant was charged with having stolen the sums of Shs. 500/- and Shs. 100/- respectively from a “public office”.

The question which must be considered and answered is, can a bank be rightly described as a public office in law? I think not.

In order to appreciate the import of the expression “public office” within the context of the Penal Code and to find an answer to the question, it is necessary, I think, to examine the expression analytically in relation to the provisions of s. 252 as well as s. 256 (f) of the Penal Code.

The provisions of ss. 252 and 256 (f) of the Penal Code ought to be considered together as they are inter-related. The provisions are as follows:

Section 252:

“Any person who steals anything capable of being stolen is guilty of the felony termed theft, and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment for five years.”

And s. 256 (f) provides:

“If a theft is committed in any of the circumstances following: –

- (f) if a thing is stolen from a public office in which it is deposited or kept, the offender is liable to imprisonment for seven years.”

Unfortunately the expression “public office” has not been defined in the Penal Code. I have searched in vain in The Eastern Africa Law Reports for a definition of the expression. The expression appears not to have been judicially considered before in any other case.

On reading the provisions of s. 256 (f) of the Penal Code, however, the natural reaction should be that the expression “public office” as used in that section can only be referable to a Government office or department and not to a private business house or office such as a bank.

In the Shorter Oxford English Dictionary “public office” is defined as meaning a building used for various departments of civic business including the judicial or police departments.

In Halsbury’s Laws of England (3rd Edn.), Vol. 30, para. 1319, it is stated that different meanings have been given to the terms “public office” and “public officer” according to the statutes in which they occur. That is, as was said by Cave, J. in *Re Mirams* (3):

“To make an office a public office, the pay must come out of the national and not out of local funds and the office must be public in the strict sense of the term. It is not enough that the due discharge of the duties of the office should be for the public benefit in a secondary and remote sense.”

In *Re Edgar Cohen v. Edgar* (4), it was said by Bennett, J., at p. 637, that:

“A public office includes the holding of a commission in the territorial army or in any other of the armed forces of the Crown.”

See also Roland Burrows’ “Words and Phrases Judicially Defined”, Vol. IV, at p. 427, para. 882.

In *R. v. Charles Whitaker* (5), it was held that it was a misdemeanour at common law for a public officer, whether judicial or ministerial, to accept a bribe as an inducement to him to show favour or forbear to show disfavour to

anyone towards whom an impartial discharge of the officer's duty demands that he should show no favour or that he show disfavour.

In that case Lawrence, J., at p. 1296, had said:

"A public officer is an officer who discharges any duty in the discharge of which the public are interested. More clearly so if he is paid out of fund provided by the public."

To come nearer home, in the Interpretation Act, Cap. 16, which is not particularly of assistance in this case, in Part II, s. 3, at p. 296, Laws of Uganda, 1964: "public office", "public officer" and "public service" have the same meanings as in the Constitution.

In Art. 144, cl. 1, of the Constitution of Uganda "public office" is defined as meaning an office of emolument in the public service; and "public service" means, subject to the provisions of cl. 2 and 3 of this article, the servants of the Government of Uganda in a civil capacity.

Article 144, cl. 2, to which reference is made in the definition of "public office" in art. 144, cl. 1, provides:

"In this constitution, unless the context so requires, references to offices in the public service shall be construed as including references to the offices of judges of the High Court and references to the offices of members of all other courts of law established by Parliament, other than Courts Martial, being offices by emolument attaching to which are paid directly out of moneys provided by Parliament, and references to the offices of members of the Uganda Police Force."

In my view the only reasonable inference to be drawn from the above definitions is that "public office" in the strict sense of the expression considered structurally must be an office which is maintained with public funds. To put it in another way, a "public office" from the point of view of the structure or building, having regard to the provisions of s. 256 (f) of the Penal Code, must mean a Government department or office established for civic business in the interest of the national, and maintained out of public or national, as distinct from local funds, the occupiers or incumbents whereof being paid out of public or national funds.

In the light of the above definition, I hold that the bank, and in particular Messrs. Barclays Bank D.C.O., Kabale Branch, from which the sums of Shs. 500/- and Shs. 100/- had been stolen on June 29, 1966 and July 4, 1966 respectively, cannot properly be described as a "public office". I am of the opinion that the "public office" in the context of s. 256 (f) in the contemplation of the legislature must be a government department or ministry, and not an institution like a bank, which is a limited liability company privately owned. Stealing from a bank, in my view, cannot be stealing from a public office since the bank involved in the instant case is not a government institution or department.

In the circumstances, therefore, it is my considered view that counts 2 and 3 as laid down under s. 256 (f) of the Penal Code in the context and on the evidence of the instant case which was accepted by the learned trial magistrate, was wrong in law. The learned trial magistrate did not direct his mind to this question at all. Had he done so it might well be that he would have come to the conclusion that a bank like Messrs. Barclays Bank D.C.O., Kabale Branch cannot be possibly described as a public institution. The learned trial magistrate was therefore wrong in law to have convicted the appellant on counts 2 and 3 of the charge.

To the extent mentioned above, this appeal of the appellant in respect to the charge contained in counts 2 and 3 succeeds. It is allowed. The conviction and sentence passed on the appellant in respect of the two counts are accordingly quashed. The appellant is acquitted and discharged on both those counts.

The appeal of the appellant in respect of his conviction and sentence on counts 1, 4 and 5 is dismissed; and the appellant stands convicted on the three counts aforesaid. The sentences, each of which was 2 1/2 years' imprisonment imposed on him on those counts are therefore confirmed, those sentences having been ordered by the learned trial magistrate to run concurrently.

Appeal allowed on two counts only.

The appellant appeared in person.

For the respondent:

Attorney-General, Uganda

A. G. Deobhakta (Senior State Attorney, Uganda)

Misana v Republic
[1967] 1 EA 334 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	2 May 1967
Case Number:	144/1966
Before:	Sir Charles Newbold P, Duffus and Spry JJA
Sourced by:	LawAfrica
Appeal from:	The High Court of Tanzania – Erokwu, AG. J.

[1] *Appeal – Record – No written record of decision of lower court – Course to be followed by appeal court.*

[2] *Criminal law – Appeal against verbal decision of High Court that appeal from finding and sentence of a resident magistrate be dismissed – Course to be adopted by appeal court where no written record.*

Editor's Summary

The appellant, formerly a District Magistrate in Tanzania, was convicted by a Resident Magistrate of theft and, the offence being a scheduled offence under the Minimum Sentences Act, 1963, was sentenced to two years' imprisonment, 24 strokes of corporal punishment and was ordered to pay compensation. He appealed to the High Court, and in April, 1966, Erokwu, Ag. J., ordered additional evidence to be taken by the trial magistrate. On August 4, 1966, after this additional evidence had been taken, Erokwu, Ag. J., again considered the appeal and made a note that judgment would be delivered on August 6, 1966. That

judgment was not delivered. On November 30, 1966, Platt, J., considered the matter and, since it appeared that on August 6, 1966, Erokwu, Ag., had verbally announced that the appeal was dismissed and reasons would be given later, allowed the appellant to appeal to the Court of Appeal. In February, 1967, the Court of Appeal considered the papers and ordered that the proceedings before the trial magistrate be copied to form part of the record. Subsequently the Court of Appeal, in the absence of the appellant, further considered the appeal and ordered a re-hearing before the High Court. The reasons for the re-hearing were given in the case now being reported.

Held – there being no written record of the decision of the High Court nor any reasons for the decision the only proper course was to remit the matter to the High Court for the original appeal to be re-heard. [*Zaver v. Rex* (2) and *Yosefu Muwonge v. Uganda* (3) followed.]

Re-hearing by the High Court ordered.

Cases referred to in judgment:

- (1) *R. v. Ruwalia*, [1957] E.A. 570.
- (2) *Zaver v. Rex* (1952), 19 E.A.C.A. 244.
- (3) *Yosefu Muwonge and Two Others v. Uganda* (Criminal Appeal No. 86 of 1965) (unreported).

Judgment

Sir Charles Newbold P, delivered the following reasons for the judgment of the court: The appellant, who had been the district magistrate of the district court of Tarime was, on October 11, 1965, convicted by a resident magistrate of the offence of theft, contrary to ss. 265 and 270 of the Penal Code; and as it was a scheduled offence under the Minimum Sentences Act, 1963 (Cap. 526), he was sentenced to two years' imprisonment and 24 strokes of corporal punishment and a compensation order was made.

The particulars of the charge were that the appellant had stolen Shs. 1,100/-, being the property of a district council, which had been an exhibit in a case before the appellant in his capacity as a district magistrate. The appellant's defence was that he had returned the money which had been an exhibit, together with a cashbook and a receipt book, which had been other exhibits, to the person who was at the time the exhibits were returned, the treasurer of the district council. The defence of the appellant was not accepted by the resident magistrate and he was convicted. From this conviction the appellant appealed to the High Court. On the appeal being heard in the High Court by Erokwu, J., an order was made on April 15, 1966, remitting the case to the resident magistrate for additional evidence to be taken on a particular point. The resident magistrate took that additional evidence and forwarded it to the High Court. The appeal again came before Erokwu, J., on August 4, 1966, and at the end of the hearing, according to the record, there is a note that judgment would be delivered on August 6, 1966. Nothing appears on the record thereafter until November 30, 1966, when the matter came before Platt, J., in the High Court. It appears that evidence was then given by the appellant and a statement from the Bar made by the State Attorney that on August 6, Erokwu, J., in court stated that the appeal was dismissed and that reasons would be delivered later. In view of the evidence and statement, Platt, J., permitted the appellant to appeal to this court on the basis that a decision of the High Court on appeal had been made and announced. The appeal originally came before this court in February, 1967, but as the record was such that we were unable to ascertain any facts in relation to the matter we directed that it be adjourned to this session and that the proceedings before the resident magistrate be copied and form part of the record. On the matter coming before us again there was no record that the appellant had been served with notice of the date of the hearing. As we did not wish any further delay to take place and as the decision which we took was a decision in favour of the appellant, we proceeded, in the absence of the appellant, to hear the appeal on the assumption that he had, in fact, been served. Having heard the appeal we allowed it and remitted the proceedings to the High Court for the original appeal of the appellant to the High Court to be re-heard and determined and we stated that we would give our reasons therefore in writing, which we do now.

It is quite obvious that the proceedings before the resident magistrate were not as satisfactory as they might have been. We desire to say little about the facts of the case as the original appeal is to be re-heard

by the High Court, but one of the aspects which requires consideration is what happened to the

cash book and the receipt book of the district council which were exhibits in the case before the appellant and which the appellant alleged had been returned at the same time as the money exhibit had been returned. If, in fact, there is no record of what happened to these books it would seem strange that the treasurer of the district council, deprived for some months of such an important book as a cash book, made no enquiries, so far as is known from the evidence, about this book. We mention this matter in order to point out that there are many facts in relation to the conviction of the appellant which justify careful scrutiny by the High Court on appeal from the resident magistrate.

The appellant, on appeal to the High Court, is entitled to have all the evidence before the resident magistrate re-examined and evaluated by the High Court in order to determine whether there was evidence upon which the resident magistrate could properly make the finding which he did (see *Ruwala* (1)). When this is done the appellant is also entitled to appeal to this court on a matter of law from the decision of the High Court. Quite apart from the fact that on an appeal to the High Court from a resident magistrate, a written record should exist setting out the decision of the High Court, it is quite impossible for an appellant effectively to appeal to this court on a matter of law unless this court knows not only the decision of the High Court but, at least in broad outline, the reasons for that decision. In this case there is neither any written record of the decision of the High Court nor any reasons for that decision. It is clearly impossible for this court, in the absence of such decision and reasons, to arrive at a decision whether, as a matter of law, the appellant had good grounds of appeal. In effect, therefore, the appellant has, by the action of Erokwu, J., been deprived of his statutory right of appeal to this court; and he has also been deprived of his right of knowing the reasons, however brief they may be, for the decision of the High Court on his appeal.

In these circumstances we considered that the only proper course to take was to remit the matter to the High Court for the original appeal to be re-heard. This is in accordance with the principle behind the decisions of this court in *Zaver v. Rex* (2), and *Yosefu Muwonge and Two Others v. Uganda* (3) where this court ordered a re-hearing in cases where the record or an important part of the record had been lost. It is true that the appellant has, we understand, already served his sentence and for all we know already received his corporal punishment; but whether or not a conviction of this nature should remain in existence against the appellant must obviously be a matter of considerable importance and in spite of the very lamentable delay which has existed up-to-date in this case we nevertheless considered that the proper order to make was that we have set out above.

Order accordingly.

The appellant was not present and was not represented.

For the respondent:

Attorney-General, Tanzania

K. R. K. Tampi

Nakholi v Republic
[1967] 1 EA 337 (CAN)

Division: Court of Appeal at Nairobi

Date of judgment: 3 May 1967
Case Number: 20/1967
Before: Sir Clement de Lestang, VP, Duffus and Spry JJA
Sourced by: LawAfrica
Appeal from: The High Court of Kenya – Madan, J.

[1] *Criminal law – Rape – Distinction between rape and carnal knowledge of a girl under sixteen years of age – Penal Code, s. 139 and s. 145 (K.).*

[2] *Criminal law – Defilement – Consent is no defence under Penal Code, s. 145 (K.), but is a defence under Penal Code, s. 139 (K.).*

Editor's Summary

The appellant, a schoolmaster, was convicted of the offence of rape and sentenced to five years' imprisonment. The complainant's age at the time of the incident was taken by the trial judge to be about thirteen years of age but the medical officer's evidence was that her age ranged from thirteen to sixteen years. The judge in his address to the assessors and in his judgment stated that the question of the consent or otherwise of the complainant was not important as she was incapable at her age of giving consent. On appeal:

Held –

- (i) lack of consent is an essential ingredient in the proof of rape, and although a girl may be of such tender years that mere proof of her age is sufficient to establish lack of consent, this must be proved before convicting;
- (ii) a girl under the age of sixteen years is capable of consenting to sexual intercourse. The accused was not charged with indecent assault under s. 144 of the Penal Code or with carnal knowledge of a girl under sixteen years of age under s. 145 Penal Code, on which latter charge evidence of consent by the girl is no defence. The accused may not be properly convicted of rape under s. 139 Penal Code unless lack of consent by the girl is proved.

Appeal allowed and conviction and sentence quashed.

Cases referred to in judgment:

- (1) *R. v. Ronald Harling* (1937), 26 Cr. App. R. 127, p. 128.
- (2) *R. v. Eria Ngobi* (1953), 20 E.A.C.A. 154.
- (3) *R. v. Abudonio Alemo* (1953), 20 E.A.C.A. 201.

Judgment

Duffus JA, read the following judgment of the court: The appellant, a schoolmaster, was convicted in the High Court at Kisumu of the offence of rape and sentenced to five years' imprisonment. He now

appeals against the conviction and sentence.

The complainant is a school girl at Sigalame School. There appears to have been some doubt as to her age. The learned trial judge made a note before her evidence was taken “apparent age fourteen years”, and her mother gave evidence that she was born on July 2, 1953 but in the appeal record there is a certificate from the medical officer of health, Bungoma, estimating her age as between thirteen and sixteen years. It is not clear how this certificate became part of the record although it is marked Ex. 2. The judge, however, was apparently satisfied that she was only about thirteen years of age at the time of the incident as he refers to this in his judgment and also in his summing up to the assessors.

The facts are relatively simple. The appellant was a teacher at Sigalame School. On the day of the incident, June 18, 1966, a district sports meeting was held at Busia, and the complainant and another young girl from her school, Mary Anyango, the daughter of Khaira, went to Busia for this meeting, and the appellant also attended. After the sports meeting both the girls and the appellant and others returned by bus to Sigalame School. They arrived at about 8 p.m. Two members of the complainant's family met her but the appellant and another schoolmaster, Nelson Obura who had also come up, both decided that they themselves would escort the girls home. Both girls then went with the appellant and Nelson Obura to his home. There the appellant had his supper and then Nelson and himself left with the two girls to escort them home. It is the prosecution case that it was on the way home that the appellant forcibly held the complainant and raped her whilst the other schoolmaster, Nelson Obura was also then interfering with the other girl. After this incident all four continued on their way home, the girls weeping, until they met the complainant's brothers and uncle Humphreys Juma coming to look for the girls and then both the appellant and Nelson ran away. A report was made that night to the Headmaster and to the police and the complainant was taken to the hospital. The complainant was examined by Dr. Ndabari two days after the incident and he found that her hymen had been recently ruptured, within the past two days, but found no other injuries or signs of the struggle. The appellant denied having raped the complainant or having had sexual intercourse with her. His story is that Nelson Obura and himself were escorting the girls when they met a number of people with weapons, headed by Humphreys Juma with a grass slasher, who rushed at them saying "tonight they die" and then both Nelson and himself ran away. The learned trial judge after a full summing up to the assessors and in a considered judgment, found the appellant guilty of rape.

Counsel for the appellant has argued on some ten grounds of appeal but in our view the main ground of substance is his complaint that the judge misdirected both the assessors and himself in stating that the question as to whether the complainant consented or not was not important as she could not at her age consent. The passages complained of which occurred in the summing up and in the judgment respectively read as follows:

"If Esther believed intercourse undoubtedly without consent which in view of her age of no importance. At her age she could not consent."

and

"He threw her down and, according to the complainant, had intercourse with her twice without her consent which is really of no importance, even though the accused is not charged with defilement for the complainant then was only about thirteen years of age. She could not consent legally."

With respect this is a serious misdirection. The lack of consent is an essential ingredient in a charge of rape and this is so whether the complainant is a woman or a girl. We would in this respect first refer to the definition of rape set out in s. 139 of the Penal Code as follows:

"Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representations as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of the felony termed rape."

The two essentials are therefore carnal knowledge of a woman or girl and lack of consent and both these essentials must be established by the prosecution

and accepted by the court before a conviction for rape can be arrived at. It is a fact that the age of the girl is material and that in some cases the girl may be of such tender years that mere proof of her age may be sufficient to establish the lack of consent on her part, as the girl would on account of her age be unable to understand what was happening and would not be able to consent as she would not know what she was consenting to. In such a case then the age of the child would be evidence from which the court could arrive at the conclusion that the act was done without her consent, but the court would still have to find this as a fact before convicting of rape. The law in England on this question is the same as the law in Kenya and we would in this respect refer to the judgment of the Court of Criminal Appeal in the case of *Ronald Harling* (1), and to the following passage which in our view correctly sets out the law:

“It is desirable that this court should restate the law, which is not subject to doubt, but which it may perhaps be useful to repeat, that while a girl under the age of sixteen is perfectly capable of consenting, and, as everyone knows who tries these cases, frequently does consent to an act of sexual intercourse with a man, the law has provided that such consent affords no defence to a man on a charge of carnal knowledge of a girl under sixteen; but there is no such provision as to the crime of rape. In every case of rape it is necessary that the prosecution should prove that the girl or woman did not consent and that the crime was committed against her will. It may well be that in many cases the prosecution would not need to prove much more than the age of the girl, and in this case that fact, coupled with the fact that the girl was a weakling, is enough to prove that there was no consent on her part.”

In this case it is quite possible that the girls were in fact willing participants in what occurred, and certainly the second assessor appeared to have thought so, but directed as they were that consent was immaterial, all the assessors gave it as their opinion that the appellant was guilty of rape. The final conclusion of the learned judge was that the intercourse was forcible, and he accepted the complainant's evidence that the act took place against her will and without her consent, but the learned judge only arrived at this conclusion after having had the opinions of the assessors based on the misdirection as to consent and also after wrongly directing himself that consent was of no importance as the complainant could not consent legally.

It would appear in this case that the provisions of s. 145 of the Penal Code which makes it an offence to have carnal knowledge of a girl under the age of sixteen have been confused with those of s. 139 which defines the offence of rape. Consent is no defence under s. 145. The purpose of s. 145 is clearly intended to protect the virtue of a girl under sixteen, and this section would not have been necessary if mere carnal knowledge of a girl under sixteen was an offence under s. 139, irrespective of whether she consented to the act or not.

In the case of *Eria Ngobi* (2), a case from Uganda, this court drew attention to the advisability, where it was clear that the girl was under the age limit, of bringing the charge under the section which makes it an offence to have carnal knowledge of a girl of that age, rather than to bring a charge of rape where consent is a necessary element of the charge. We would also refer to another Uganda case *Abudonio Alemo* (3) where this court also pointed out the desirability in a charge of rape of adding a second count for defilement, where the complainant was under the age limit, in case the charge of rape broke down on the issue of consent.

In both of these cases the trial court acted under the provisions of the Criminal Procedure Code which allows a conviction for an offence other than that

charged, and in one case the court convicted for an indecent assault and in the other case for defilement of a girl under age. In this case, the trial court undoubtedly had the power to have convicted the appellant either for an indecent assault under s. 144 of the Penal Code or of defilement under s. 145 of the Penal Code and this court could now exercise this power. In considering this matter there are two factors to be borne in mind. First there is the fact that age is not really an issue in cases of rape, and secondly the appellant would now be deprived of the possibility of raising the defence that he had reasonable cause to believe and did in fact believe that the complainant was of or above the age of sixteen years. As we have already stated the learned trial judge appeared to have accepted the evidence that the complainant was thirteen years of age, but he does not appear to have fully considered this matter and did not consider the opinion of the medical officer that he age ranged from thirteen to sixteen years. This opinion of the medical officer would have had to be fully gone into before either the trial court or this court would enter a verdict of guilty under either s. 144 or s. 145. The medical officer was not called to give evidence, and there was no other medical evidence of age, except his bare statement in the certificate Ex. 2.

Learned counsel for the State, whilst conceding that there had been a serious misdirection on the question of consent, asked this court to uphold the conviction as there had in fact been no miscarriage of justice.

We cannot agree that this is the position in this case. In our view there is a very real possibility that the court might have come to a different conclusion if the learned judge had properly directed the assessors and himself on this question, and we do not consider that this would be a proper case in which to substitute a conviction under any of the other sections of the Penal Code.

Accordingly we allow this appeal, and quash the conviction and sentence.

Appeal allowed.

For the appellant:

Amin, Behan and Morzeria, Kisumu

J. S. Behan

For the respondent:

Attorney-General, Kenya

S. Sangale (State Counsel, Kenya)

Bukenya v Uganda
[1967] 1 EA 341 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	14 February 1967
Case Number:	1142/1966
Before:	Sir Udo Udoma CJ
Sourced by:	LawAfrica

[1] *Criminal law – Practice – Plea of guilty – Conviction on a plea of guilty – All ingredients of offence not admitted – Failure to admit medical report as an exhibit – Penal Code (Cap. 106), s. 212 (U).*

Editor’s Summary

The appellant was charged with assault causing grievous bodily harm contrary to s. 212 of the Penal Code. The appellant when asked to plead to the charge stated “I did give her injuries on her body” and the magistrate entered the plea as one of “guilty”. A medical report on the complainant was submitted but the magistrate made no comment on the report, did not admit it as an exhibit and convicted the appellant on his plea of guilty.

Held –

- (i) the statement “I did give her injuries on her body” did not amount to an unequivocal plea of guilty to the charge having regard to the ingredients necessary to constitute the offence;
- (ii) the magistrate erred in not admitting the medical report as an exhibit, as the medical evidence was indispensable for the purpose of establishing whether the injury was grievous harm or just ordinary hurt or no harm at all.

Appeal allowed.

Cases referred to in judgment:

- (1) *R. v. Yonasani Egalu and Others* (1942), 9 E.A.C.A. 65.
- (2) *Byarufu s/o Gofa v. R.* (1950), 17 E.A.C.A. 125.
- (3) *Uganda v. Hadi Jamal*, [1964] E.A. 294.
- (4) *Katumo Mulumba v. R.*, [1957] E.A. 397.

Judgment

Sir Udo Udoma CJ: This is an appeal against the order of the Chief Magistrate, Magistrate’s Court, Mengo, in which the appellant was convicted on a purported plea of guilty. The appeal is against conviction and sentence.

There are two grounds of appeal, namely: (1) that the learned trial magistrate erred in entering a plea of guilty against the appellant, whose admission did not amount to an unequivocal plea of guilty; and (2) the sentence was excessive.

The appellant was charged with unlawfully doing grievous harm to one Pilisika Nambi on November 29, 1966, at Katwe Kinyoro village contrary to s. 212 of the Penal Code.

On December 7, 1966, the appellant appeared before the Chief Magistrate. The charge was read and explained to him. In answer thereto the appellant said: “I did give her injuries on her body”. The chief magistrate thereupon entered a plea of guilty against the appellant and immediately convicted him, according to the magistrate, on his own plea of guilty.

Then shortly thereafter before passing sentence, the record of proceedings contains the following

notes:

“Onega (for the prosecution): Here is a medical report.

Accused: ‘I only pushed her’.

Sentence: Accused sentenced to nine months’ imprisonment.

(sgd.) D. L. K. Lubogo.”

In his submission for the appellant on the first ground of appeal counsel for the appellant contended that the plea of the appellant did not amount to a plea of guilty; that the statement of the appellant “I did give her injuries on her body” as recorded in the proceedings did not amount to a plea of guilty to the offence charged, having regard to the allocutus attributed to the appellant, when he said before sentence: “I only pushed her”.

To constitute a plea of guilty, contended counsel, the appellant must clearly be shown to have admitted all the ingredients that go to constitute the offence.

In support of these submissions counsel for the appellant referred the court to and relied on *R. v. Yonasani Egalu and Others* (1) and *Byarufu s/o Gafa v. R.* (2).

State Attorney for the respondent conceded that the record was unsatisfactory, but that the statement “I did give her injuries” could quite possibly amount to an unequivocal plea of guilty, because, as stated in the allocutus, the appellant did push the complainant and such a push might have resulted in a grievous harm to the complainant. In which event the learned trial magistrate would be justified in convicting the appellant.

State Attorney pointed out that he was in some difficulty because the learned trial magistrate appeared to have looked at the medical report as to the injuries suffered by the complainant without having that report exhibited in the proceedings. He was unable to obtain the report even from the police and so was unable to ascertain the type of injuries suffered by the complainant.

To be able to appreciate the seriousness of the submissions of counsel in this case, it is necessary, I think, to examine the charge and the offence alleged to have been committed by the appellant, in order to ascertain the ingredients or elements that would constitute the offence of unlawfully doing grievous harm

The charge was laid under s. 212 of the Penal Code. And it was for the offence of unlawfully doing grievous harm to another person, which is classified in the Penal Code as a felony. It carries the maximum penalty of seven years’ imprisonment.

Under s. 4 of the Penal Code, “felony” is defined as:

“an offence which is declared by law to be a felony or, if not declared to be a misdemeanour, is punishable, without proof of previous conviction, with death, or with imprisonment for three years or more.”

“Grievous harm” means:

“any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense.”

“Harm” means:

“any bodily hurt, disease or disorder whether permanent or temporary”.

In terms of the above definition of “grievous harm” it would appear that before the appellant could be convicted of the offence as charged the burden on the prosecution would be a heavy one. The

prosecution, had the case gone to trial, would have been bound to establish to the satisfaction of the court

that the harm caused Pilisika Nambi, the complainant, was so serious as to amount to a maim, or dangerous harm; or that the harm was such as to cause serious or permanent injury to her health such as disfigurement. Such injury must be shown to be permanent and must either affect her external or internal organs, membranes or senses.

I do not think that in a case like the present, where the appellant was not represented by counsel, the mere statement by him “I did give her injuries on her body” would be sufficient to amount to a plea of guilty to the charge as laid under s. 212 of the Penal Code, having regard to the ingredients necessary to constitute the offence as defined above. For such an injury might only amount to a scratch or an abrasion.

It was the duty of the trial magistrate to ascertain from the appellant a thorough explanation as to the nature of the injury; and as to whether the injury was such as to constitute a main or dangerous harm or permanent disfigurement or such as to permanently injure the health of the complainant.

In *Yonasani Egala and Others* (1), it was laid down as a matter of law that, in any case in which a conviction is likely to proceed on a plea of guilty (in other words, when an admission by the accused is to be allowed to take the place of the otherwise necessary strict proof of the charge beyond reasonable doubt by the prosecution) it is most desirable not only that every constituent of the charge should be explained to the accused, but that he should be required to admit or deny every constituent of the offence, and that what he says should be recorded in a form which will satisfy an appeal court that he fully understood the charge and pleaded thereto unequivocally.

On the other hand, I am of the opinion that the decision in *Byarufu s/o Gafa* (2) is not relevant to the issue involved in this case; and that it is distinguishable from the facts and circumstances of the instant appeal. In *Byarufu s/o Gafa* (2) the criticism of the court was directed to the mode of recording a plea of guilty without the use of the exact words uttered by the appellant in that case. The court had merely observed that it was desirable that the plea of the appellant should not have been entered as “not guilty” simpliciter since the appellant was not speaking in English; and that the plea ought to have been recorded in the exact words of the appellant as interpreted to the court; and that the court should only have reduced such a statement into a plea of guilty in English if satisfied that that was the only appropriate and correct statement or inference to be drawn from such a statement.

In the instant case, that practice was followed. It is precisely because the statement of the appellant was recorded as it had been interpreted to the court that it is possible to examine the statement in order to ascertain whether it amounted to a plea of guilty or not.

There are two cases to which reference was not made by the counsel for the appellant which I consider more relevant to the issues in this case. They are *Uganda v. Hadi Jamal* (3) and *Katumo Mulumba v. R.* (4). I propose to consider both these cases in that order.

In *Uganda v. Hadi Jamal* (3) – a criminal revision – the accused was charged with an offence under reg. 18 (7) of the Traffic Regulations, 1951, which prohibits or restricts the use of a spotlight on a motor vehicle. The particulars of the charge alleged that the accused being the owner of a motor vehicle had permitted its use without rear red reflectors. At the trial the accused admitted the charge and was convicted and cautioned under s. 318 (1) (b) of the Criminal Procedure Code. After recording the conviction the magistrate added “the reflectors were covered with mud. Now they are all right”.

On an application for a revisional order enhancing the sentence, it was held, on that part of the judgment relevant to the issues in the instant case, that in

view of the words presumably uttered by the accused that the reflectors were covered with mud, the accused did not intend to admit the facts as set out in the particulars of the charge when he pleaded guilty thereto; and accordingly the magistrate was not entitled to enter a plea of guilty against him. It was held further that as there was no trial properly so-called there was no sentence which could be enhanced by the court.

In *Katumo Mulumba v. R.* (4) the appellant appealed from his conviction and sentence for assault occasioning bodily harm contrary to s. 246 of the Kenya Penal Code. In answer to the charge the appellant stated: "It is true I cut him with a knife", and the magistrate accepted this as a plea of guilty. The appellant lodged a memorandum of appeal which indicated that when he made the statement to the magistrate he did not intend to admit the offence although he did admit the act itself.

It was held that, although the plea as it stood was capable of being construed as an unequivocal plea of guilty, it was also capable of being construed as a mere admission that the appellant caused the injury stated in the charge without admitting that this was done in the circumstances amounting to an offence. In the circumstances the plea should not have been construed as being an unequivocal admission of guilt of the offence charged.

On the principle applied in the above cases and, in particular, having regard to the law as laid down in *Yonasani Egala and Others* (1) and the definition of "grievous harm" as contained in the Penal Code, it is plain that the mere statement by the appellant: "I did give her injury on her body" ought not to have been accepted by the learned chief magistrate as an unequivocal plea of guilty. It is clear from the allocutus of the appellant, when he said "I only pushed her", that the appellant did not intend to admit the facts, particulars and the ingredients necessary to constitute the charge of doing grievous harm.

That the appellant did not intend to admit the allegations and particulars of the charge as laid is manifest on the face of the record of proceedings. The statement made by the appellant in the allocutus clearly substantiates and reinforces the submission of counsel for the appellant that the learned trial magistrate was in error in law in treating the appellant's admission of having injured the complainant as an unequivocal plea of guilty to the charge of doing grievous harm.

Then there is the important question of the medical report which, according to the record, was apparently read and examined by the learned trial magistrate, but was never admitted in evidence as an exhibit. This in itself is a very serious irregularity.

As a general rule of law a magistrate can only decide a case on the evidence before him. He is not entitled to import into the case his personal knowledge or extraneous matter. In a case of unlawfully doing grievous harm to another, medical evidence is indispensable for the purpose of establishing whether the injury was grievous harm or just ordinary hurt or no harm at all.

As the appellant was not represented by counsel at the trial, it was the duty of the magistrate on examining the medical report and being satisfied that the medical report would not support a charge of doing grievous harm to have advised the appellant to withdraw his plea of guilty or to plead guilty to a lesser offence of the same class.

Because the medical report was not produced at the hearing of this appeal, despite enquiries I am informed by the State Attorney, this court is not in a position to say whether the injury amounted to grievous harm or to ordinary harm or hurt.

In the result this appeal is allowed. It is ordered in terms of the application of the State Attorney that

the case be sent back to the magistrate's court, Mengo,

to be there tried de novo by a magistrate of competent jurisdiction. It is further ordered that in the event of a conviction, as I understand that the appellant has already served two months' imprisonment, the period served by the appellant be taken into consideration in passing sentence. Order accordingly.

Appeal allowed.

For the appellant:

M. V. Jobanputra

For the respondent:

Attorney-General, Uganda

F. W. Kakembo (State Attorney, Uganda)

Mwasya v Republic
[1967] 1 EA 345 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	14 April 1967
Case Number:	91/1967
Before:	Rudd and Trevelyan JJ
Sourced by:	LawAfrica

[1] *Criminal law – Charge – Defective – Error in particulars of charge not sufficient to occasion a failure of justice – Criminal Procedure Code, s. 382 (K.).*

Editor's Summary

The appellant, accompanied by another, tendered a forged currency note of Shs. 100/- at the entrance to a night club in Nairobi, the price of entrance being Shs. 10/- a head. The forged note was accepted and change was given. The appellant later gave another forged note inside the club for cigarettes and received change. The appellant's companion later tendered another similar forged note for another packet of cigarettes to the receptionist who, on going to get change, discovered the forgery. The appellant was arrested as he left the club, but his companion escaped. The club handed over five forged notes in its possession to the police. The appellant was convicted under s. 367 (e) of the Penal Code and (having previous convictions) was sentenced to five years' imprisonment. The charge read:

"Having possession of paper for forging contrary to s. 267 (e) of the Penal Code (in that) (the appellant) on 25th day of December, 1966, at Nairobi . . . jointly with others . . . without lawful authority or excuse knowingly had in his possession five papers upon which were such words, figures, letters, marks, lines as were intended to resemble and pass as a special paper such as is prescribed and used for making bank or currency notes."

These particulars were a mixture of sub-ss. (e) and (a) of s. 367 of the Penal Code. On appeal:

Held –

- (i) the charge was defective, but not of such an irregularity or error as had occasioned a failure of justice under s. 382 of the Criminal Procedure Code:
- (ii) a conviction was not proved in respect of three of the five pieces of paper but was proved in respect of the two other pieces of paper and to that extent the conviction should be upheld;
- (iii) the notes were cleverly planned forgeries.

Appeal from conviction and sentence dismissed.

No cases referred to in judgment.

Judgment

Rudd J, read the following judgment of the court: Although the appellant in this case appealed against conviction on grounds of fact, there can be no doubt but that upon the evidence the following facts were established beyond any possibility of doubt.

The appellant and another man were admitted to a night club upon the tender by the appellant of a forged currency note for Shs. 100/-. The price of admission was Shs. 10/- a head and in exchange for the note the appellant and his companion were admitted to the club and the appellant was given Shs. 80/- change. A few minutes after this the appellant tendered another similar forged note at the reception desk at the night club in respect of a purchase of a packet of cigarettes. In exchange for this note the appellant received the packet of cigarettes and Shs. 98/15 change. Some time later the same evening the appellant's companion tendered a third similar forged note to the receptionist at the club and asked for another packet of cigarettes. The receptionist having no change went to get change and the forgery was discovered. The police were sent for and the appellant was arrested as he was trying to leave the club but his companion made good his escape. In all, five similar forged currency notes for Shs. 100/- each were produced to the police from the cash boxes of the club.

Upon this evidence the appellant was convicted of an offence against s. 367 (*e*) of the Penal Code in respect of the five forged notes.

The appellant's defence was limited to a complete denial of any connection with any of the forged notes. In order to understand the effect of s. 367 (*e*) of the Penal Code it is necessary to set out the whole section which reads as follows:

“367. Any person who, without lawful authority or excuse, the proof of which lies on him –

- (a) makes, uses or knowingly has in his custody or possession any paper intended to resemble and pass as a special paper such as is provided and used for making any bank note or currency note; or
- (b) makes, uses or knowingly has in his custody or possession any frame, mould or instrument for making such paper, or for producing in or on such paper any words, figures, letters, marks, lines or devices peculiar to and used in or on any such paper; or
- (c) engraves or in anywise makes upon any plate, wood, stone or other material any words, figures, letters, marks, lines or devices the print whereof resembles in whole or in part any words, figures, letters, marks, lines or devices peculiar to and used in or on any bank note or currency note; or
- (d) uses or knowingly has in his custody or possession any plate, wood, stone or other material upon which any such words, figures, letters, marks, lines or devices have been engraved or in anywise made as aforesaid; or
- (e) uses or knowingly has in his custody or possession any paper upon which any such words, figures, letters, marks, lines or devices have been printed or in anywise made as aforesaid,

is guilty of a felony and is liable to imprisonment for seven years.”

Upon the facts there can be no doubt but that the appellant was in fact guilty of an offence under s. 367 (*e*) in respect of at least two of the forged notes and possibly in respect of three of them. There was no connection proved as regards

two of the five forged notes that were handed over by the club to the police. It is probable that on the doctrine of joint possession the appellant was also guilty of such an offence in respect of the note that was tendered by his companion. This, however, was not fully considered by the lower court and so we consider it safer to say that such an offence was sufficiently established against the appellant only in respect of the two notes which he himself tendered and used.

There is, however, a difficulty in upholding the conviction of the appellant in respect of any of the notes inasmuch as the particulars of the charge did not properly set out the particulars of an offence under s. 367 (e).

The charge read as follows:

“Having possession of paper for forging contrary to s. 367 (e) of the Penal Code (in that) Nthenge s/o Mwasya: on 25th day of December, 1966, at Nairobi in the Nairobi Area jointly with others not before the court without lawful authority or excuse knowingly had in his possession five papers upon which were such words, figures, letters, marks, lines as were intended to resemble and pass as a special paper such as is prescribed and used for making bank or currency notes.”

It is clear that whoever drafted this charge was pretty badly confused in his mind as regards the effect of s. 367 (a) and s. 367 (e). The charge and particulars reflect a hotchpotch of paras. (a) and (e) of the section and it can be said that the charge and particulars might have been valid, if far from artistic, as a charge under s. 367 (a) if that paragraph had been referred to. Yet the facts constituted an offence under para. (e) rather than para. (a). The conviction, however, was under para. (e) and was correct on the facts proved, though the charge was not a good charge under para. (e). A defective charge, however, does not necessarily render a conviction unsustainable.

The defect is not fatal to the conviction if the case falls within the provisions of s. 382 of the Criminal Procedure Code which reads:

“Subject to the provisions hereinbefore contained no findings, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint summons, warrant, charge proclamation, order, judgment or other proceedings before or during the trial or in any enquiry or other proceedings under this Code, unless such error, omission (or) irregularity has in fact occasioned a failure of justice:

“Provided that in determining whether any error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage of the proceedings.”

As regards the proviso to this section no objection to the charge has been raised at all to this very moment by the appellant. The appellant has, however, appeared in person without the assistance of an advocate in all the proceedings and this, to a large extent, excuses the failure on his part to object to the charge.

On the other hand, if he had objected to the charge at any proper time in the lower court the charge could have been amended to fall within the provisions of s. 367 (e) in which case the conviction would be unassailable.

In point of fact it was clear from an early stage that the notes in question fell within the paragraph. This was never a contested issue during the trial and on the facts and circumstances of the case we find it impossible to hold that any failure of justice occurred. The conviction is altered in the very minor

respect adverted to already in that it will apply to two of the notes or pieces of paper not to five pieces of paper. The notes in question were cleverly planned forgeries. The appellant had previous convictions as a thief and as a rogue and vagabond and the sentence of five years' imprisonment, though severe, is not manifestly excessive.

Subject to the minor amendment of the conviction as regards the number of the forged notes the appeal from conviction and sentence is dismissed.

Order accordingly.

The appellant did not appear and was not represented.

For the respondent:

Attorney-General, Kenya

A. A. Kneller (Senior State Counsel, Kenya)

Kotak Ltd v Kooverji
[1967] 1 EA 348 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	13 May 1967
Case Number:	4/1967
Before:	Hamlyn J
Sourced by:	LawAfrica

[1] *Practice – Appeal from order – No certified copy of order accompanying memorandum of appeal to High Court – Effect – Civil Procedure Code, 1966, O. 39, r. 1 (1) and O. 40, r. 2 (T.).*

[2] *Appeal – Appeal to High Court – No certified copy of order appealed from accompanying memorandum of appeal – Appeal incompetent – Civil Procedure Code, 1966, O. 39, r. 1 (1) and O. 40, r. 2 (T.).*

Editor's Summary

In an appeal to the High Court from an order made in the District Court of Dar-es-Salaam a preliminary point was taken by the respondents that no certified copy of the order accompanied the memorandum of appeal (although a certified copy of the ruling was attached) as required by O. 39, r. 1 (1) of the Civil Procedure Code, 1966, read with O. 40, r. 2 of that Code.

Held – a ruling is not an “order” and the appeal had not been legally preferred. Appeal dismissed with costs.

Cases referred to in judgment:

- (1) *Munshiram & Co. v. Star Soda Water Factory* (1934), 16 K.L.R. 50.
- (2) *Qasim Ali Khan v. Bhagwanta Kunwar* (1918), I.L.R. 40 All. 12.
- (3) *Bashir Ram and Others v. The Municipal Committee Chiniot* (1922), A.I.R. Lah. 191.
- (4) *Farrab Incorporated v. The Official Receiver and Provisional Liquidator* (1959), E.A. 5.

Judgment

Hamlyn J: This is an appeal against an order made in the District Court of Dar-es-Salaam in Civil Case No. 1172 of 1966, in that court. Upon the appeal being called for hearing, counsel for the respondents desired to make a preliminary submission that the appeal was incompetent, on the grounds that the appellant had failed to comply with the provisions of O. 40, r. 2, of the Civil Procedure Code, 1966. The parties were accordingly heard on the matter and a decision thereon was reserved.

Order 40, r. 2 of the Code applies the provisions of O. 39 (which concern appeals from original decrees) to appeals from orders, and r. 1 (1) of that Order provides as follows:

“1(1) Every appeal shall be preferred in the form of memorandum, signed by the appellant or his advocate and presented to the High Court (hereinafter in this Order referred to as ‘the court’) or to such officer as it appoints in this behalf. The memorandum shall be accompanied by a copy of the decree appealed from and (unless the court dispenses therewith) of the judgment on which it is founded.”

The appeal being against an order of the District Court, the provisions of O. 40, r. 2, require that the words “a copy of the order appealed from” be substituted for the existing words, “a copy of the decree appealed from” and the word “ruling” replace the word “judgment” in O. 39, r. 1 (1).

Counsel for the respondent contended that no certified copy of the order had been attached to the memorandum of appeal, though a certified copy of the ruling had been filed. Perhaps I should remark at this stage that both counsel agreed that the document headed “Decree” and attached to the memorandum had no relevance to the appeal; it was extraneous matter supplied by the lower court and referred to a judgment of that court which was not the subject of the present proceedings before this court.

Counsel for the respondent held that, though a copy of the ruling had been filed, no formal order had been obtained and attached to the memorandum and that, O. 39, r. 1 (1) being imperative, the present appeal was no appeal at all, and should be dismissed. Counsel for the appellant argued at some length that the papers constituting the ruling were, in fact, a copy of the order as well as of the ruling, it concluding with the words “The Applicant’s application is therefore dismissed with Shs. 60/- costs”. I was further pressed to hold that the appellant, having applied to the lower court for “certified copies of decree, order and proceedings” in the relevant case, the papers supplied by the court were attached to the memorandum before it was filed in the High Court and that any error (if such there be) did not concern the appellant – an argument of a somewhat specious nature in my view. The cash receipt for the papers issued to the appellant by the district court was handed up by his counsel and this is on the record before me.

Now, O. 29, r. 1 (1) is quite clear as to what shall accompany the memorandum of appeal; the rule (varied by O. 40, r. 2, in respect of court orders, as opposed to decrees) requires a certified copy of the ruling; this, it is conceded by the respondent, has been filed. The Order also requires a copy of the order appealed from. The appellant avers that this is contained in the ruling; the respondent maintains that it is a separate entity which has not been supplied and exhibited.

Though the point raised by counsel for the respondent is a technical one, I consider it to be one of substance for the relevant order is mandatory; “shall be accompanied” says the rule. Counsel for the respondent referred me to the Kenya case of *Munshiram & Co. v. Star Soda Water Factory* (1), the headnote of which reads:

“That O. 39, r. 1 is mandatory in requiring every memorandum of appeal to be accompanied by a copy of the decree or order appealed from, and that where an appellant has failed to comply with this provision, the appeal is not properly before the court and must be dismissed.”

In that case, an appeal was preferred to the Supreme Court of Kenya from an order made by the resident magistrate. The memorandum of appeal had

attached to it a certified copy of the judgment or ruling of the resident magistrate, but no certified copy of the order appealed from had been included, such order never having been drawn up. The Supreme Court had no hesitation in finding that a copy of the formal order is a part of the papers to be filed when initiating an appeal and rejected the argument of the appellant that no formal order was usual or necessary: the appeal was consequently dismissed.

Counsel for the appellant invited my attention to the definition of the word “order” in s. 3 of the 1966 Civil Procedure Code. That reads:

“‘order’ means the formal expression of any decision of a civil court, which is not a decree.”

I think the operative word in that definition is the word “formal”. The order is not a decision of the court, but a formal expression of such decision. By analogy, the same section defines “judgment” as “the statement given by the judge or the magistrate of the grounds of a decree or order”, while the “decree” means “the formal expression of an adjudication . . .” and so on. Thus the judgment is expressed by a formal decree or a formal order, quite distinct from the judgment itself, judgments are concerned with reasoned arguments – decrees and orders are merely formal expressions of the decision reached by such judgments. As the court said in *Qasim Ali Khan v. Bhagwanta Kunwar* (2) – a case referred to in *Munshiram’s* case:

“In the case of ‘orders’ also the Code clearly distinguishes between the judgment, i.e., the grounds of the order and the ‘order’ itself, which is the formal expression of the decision.”,

and in *Bashir Ram and Others v. The Municipal Committee Chiniot* (3) where a copy of judgment was filed with the memorandum of appeal, but no copy of the decree was filed, the court said:

“Presentation of memorandum of appeal unaccompanied by a copy of decree is no legal presentation.”

The same considerations apply of course to orders by virtue of O. 40, r. 2 of the Code.

Counsel for the appellant referred me to the *Farrab* case (4). That case, however, turned on rr. 56 and 72 of the Eastern African Court of Appeal Rules, 1954, and has no bearing on the present argument. I was also invited to consider that matter in the light of ss. 95 and 96 of the Civil Procedure Code. The former section is a reproduction of s. 151 of the Indian Code, which concerns the inherent powers of the court. As has been said so often, a court cannot make use of the special provisions of that section, where the applicant has his remedy provided elsewhere in the Code and has neglected to avail himself of it: that is what appears to have taken place here. Section 96 of the 1966 Procedure Code has been termed the “Slip rule” and does not concern the present case in any manner.

I cannot in any way adhere to the argument that the appellant filed in this court such papers as he received as a result of his application to the district court. It may be that he did not receive the papers he desired or even those which he asked for; that is a matter between him and the court clerk dealing with the matter. The respondent (and indeed the appellate court) is entitled to receive the proper papers which the Code requires to be attached to the memorandum and the appellant cannot be heard to say that he was given different papers which he produced when he filed his appeal.

In the event, it is clear that the respondent must succeed on this preliminary point, for as the court said in *Bashir Ram's case*, there has been no legal presentation of the memorandum of appeal at all. The appeal is therefore dismissed and the respondent must have his costs, which I order accordingly.

Appeal dismissed with costs.

For the appellant:

R. C. Kesaria, Dar-es-Salaam

For the respondent:

Fraser Murray Roden and Co., Dar-es-Salaam

B. Versi

Desai v Warsama
[1967] 1 EA 351 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	2 June 1967
Case Number:	51/1966
Before:	Hamlyn J
Sourced by:	LawAfrica

[1] *Customary Law – Definition of – Whether claim for rent is a claim under “customary law” within Magistrates Courts Act, 1963, s. 14 (1) (a) (i) (T.)*

[2] *Jurisdiction – Primary Court – Whether Primary Court has jurisdiction to determine claim for recovery of rent – Magistrates Courts Act, 1963, s. 14 (T.).*

[3] *Jurisdiction – Decision made without jurisdiction – Effect.*

[4] *Jurisdiction – Whether a court can confer jurisdiction upon itself.*

Editor's Summary

A Primary Court of Tanga, Tanzania entertained a claim to recover a sum of Shs. 1,500/- being house rent, plus Shs. 393/- fees for medical treatment and gave an ex parte judgment in favour of the appellant, an Asian. The respondent, a Somali, filed an appeal in the district court. The appellant there argued, inter alia, that his claim was within s. 14 (1) (a) (i) of the Magistrates' Courts Act, 1963, as a claim under customary law. The district court held that the Primary Court had no jurisdiction to hear the case. The appellant then appealed to the High Court.

Held –

- (i) no court can confer jurisdiction upon itself;
- (ii) customary law cannot be the basis of any decision or found any proceedings between parties who meet on no common ground of legal procedure and jurisprudence; therefore
- (iii) the Primary Court had no jurisdiction and the ex parte judgment was a nullity.

Appeal dismissed with costs.

Case referred to in judgment:

(1) *Kabaka v. Kitonto*, [1965] E.A. 278.

Judgment

Hamlyn J: The appellant, Dr. J. D. Desai, filed civil proceedings in the Urban Primary Court of Tanga to recover a sum of Shs. 1,500/- being house rent, plus Shs. 393/- fees for medical treatment. It is common ground that the appellant is an Asian and the respondent is a Somali.

At the Primary Court the respondent entered a defence, but, when the case was called on for hearing, he was not present or represented. The appellant gave evidence as to the debt (totalling Shs. 1,893/- in all) and the Primary

Court passed ex parte judgment in his favour for the sum claimed together with costs of Shs. 62/-.

The respondent thereafter filed an appeal to the District Court against the ex parte judgment of the Primary Court. It is a little difficult to know why he took such a step, for the natural course would have been to apply to the trial court to set aside its ex parte judgment. The case came up before the district magistrate on March 3, 1966, when the respondent was represented by counsel, the appellant Desai appearing in person.

For the respondent, it was argued that the Primary Court had no jurisdiction, recovery of rent being a matter for the Rent Restriction Board, and that, in any event, the proceedings were a nullity.

The appellant put forward arguments supporting the judgment which he had obtained in the Primary Court, submitting that that court had jurisdiction to decide claims under "customary law", it being a custom of people to lease houses and pay rent therefore.

Not very surprisingly, the District Court ruled against the appellant, holding that in any event the Primary Court had no jurisdiction to hear the case between the parties then before it, and that the Magistrates' Courts Act, 1963, gave no such jurisdiction. From that judgment the appellant now appeals. He has filed a long and verbose memorandum of appeal, setting out the various matters of which he complains.

The first two paragraphs of the memorandum deal with procedure in the District Court at the hearing of the appeal, but I do not consider that, at this stage, it is necessary for me to deal with the matters raised there. The fundamental point which must have primary consideration in this appeal is the question of whether the Primary Court had any jurisdiction to hear the case at all, for if that court lacked jurisdiction in the matter, then the whole proceedings were a nullity and there was, in law, no decision against which any appeal could be taken.

The appellant, in his memorandum of appeal, urges that he was correct in filing his case in the Primary Court and that he did so "after being assured by the District Court clerk and the Primary Court magistrate that the Primary Court had the jurisdiction to decide the case". I am afraid that an argument of this nature cannot be accepted by this court, even if the allegations made are correct. No officer of any court can confer jurisdiction upon himself to hear and determine any proceedings; such jurisdiction must be conferred by a superior legislative body having the power to do so. The claim that the appellant purported to obtain an assurance from officers of the Primary Court that the court had jurisdiction to deal with his claim matters in no way. Jurisdiction is a matter of fact and not of opinion, and it is therefore necessary to see whether the law, at the material time, did confer upon the Urban Primary Court of Tanga the jurisdiction to deal with and adjudicate upon the appellant's claim.

As the district magistrate has correctly pointed out, s. 14 of the Magistrates' Courts Act, 1963, provides for the jurisdiction of Primary Courts, and the Fourth Schedule to the Act sets out provisions relating to their civil jurisdiction.

Section 14 reads as follows:

"14.(1) A primary court shall have and exercise jurisdiction –

(a) in all proceedings of a civil nature –

(i) where the law applicable is customary law or Islamic law:

Provided that no primary court shall have jurisdiction in any proceedings –

(here follow provisions clearly not applicable to this case)

- (ii) for the recovery of civil debts, rent or interest due to the Republic, the Government or any municipal, town or district council, under any judgment, written law (unless jurisdiction is expressly conferred on a court or courts other than a primary court), right of occupancy, lease, sub-lease or contract, if the value of the subject matter of the suit does not exceed two thousand shillings, and any proceedings by way of counterclaim and set off therein of the same nature and not exceeding such value;
- (b) in all proceedings in respect of which jurisdiction is conferred on a primary court by the First Schedule to this Act;
- (c) in all proceedings in respect of which jurisdiction is conferred on a primary court by any other law.”

The appellant, in his memorandum of appeal, contends that the case before the Primary Court was one of “customary law” and that the court therefore had jurisdiction to deal with the claim under the provisions of s. 14 (1) (a) (i) supra. Section 9 of the Judicature and Application of Laws Ordinance (Cap. 453) does not assist the appellant in this contention, for it specifically provides for “customary law” to apply between members of a community or between members of different communities having similar customary laws. In *Kabaka v. Kitonto* (1), the Court of Appeal considered the expression “customary law” in s. 10 (b) of the Buganda Courts Ordinance. The court was clear that such law was applicable to cases where the parties themselves were governed by such law – a contention which seems to lie at the root of our own Judicature and Application of Laws Ordinance. I could not hold that any customary law (save the provisions of common law) could be the basis of any decision or found any proceedings between parties who meet on no common ground of legal procedure and jurisprudence. It is well-established law that a judgment of a court without jurisdiction is a nullity and 9 Halsbury 351 sets out the proposition briefly thus:

“Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing.”

Perhaps I should here add that the provisions of s. 19 of the Civil Procedure Code, 1966, have no reference to the question of a court’s powers. That section concerns only matters of irregularity in the exercise of jurisdiction and not of the complete absence of jurisdiction of the tribunal. I reject therefore the contention of the appellant that any basis of customary law can found jurisdiction in the Primary Court to decide this case.

The appellant, in his memorandum, complains that the District Court was guilty of “gross miscarriage of justice” in that, if the Primary Court had, in fact, no jurisdiction, it should have transferred the matter to the District Court for trial. It is true that under O. 7, r. 10 (1) of the Civil Procedure Code, 1966, the court in which a suit is filed, where it has no jurisdiction, shall return the plaint for it to be presented to the court in which the suit should have been instituted. This undoubtedly would have been the proper analogous course, had the magistrate of the Primary Court been aware of his lack of jurisdiction. It is, however, the duty of a party to select with care the forum in which he institutes his proceedings and to assure himself, in so far as he can, that that tribunal selected has jurisdiction in the matter.

The memorandum also submits that s. 32 (2) of the Magistrates’ Courts Act, 1963, should have governed the appeal to the District Court: that section reads:

“32(2) No decision or order of a primary court or a district court under this Part shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint, any process or charge,

in the proceedings before or during the hearing, or in such decision or order, or on account of the improper admission or rejection of any evidence, unless such error, omission or irregularity or improper admission or rejection of evidence has in fact occasioned a failure of justice.”

I cannot agree that this section bears in any way on the question of lack of jurisdiction in the Primary Court. If there was no jurisdiction, then the whole of the proceedings were a nullity and the appellant cannot pray in aid this provision of the law. Lack of jurisdiction goes far beyond any “error, omission or irregularity”, nor can it be regarded as a mere technicality. There is in law nothing to be reversed or altered and there is a complete absence of any material from which an appeal can be had.

The contentions put forward by the appellant in the first two paragraphs of his memorandum (consideration of which I deferred earlier in this judgment) can now be dealt with briefly. They are that (1) the appeal to the District Court by the respondent in these proceedings was out of time; and (2) that the present appellant was correct in seeking to recover outstanding rent in the Primary Court and not in the Rent Restriction Tribunal.

As regards the first point raised by the appellant, the District Court did not concern itself with the merits or demerits of the appeal. It limited itself to a finding that the proceedings in the court below were a nullity. This, in my view, was a correct assumption of jurisdiction and, had there been no appeal, there would have been justification for the District Court to have dealt with the matter thus suo motu.

In so far as the contention that the original proceedings should not have been brought in the Rent Board are concerned, the finding that the Primary Court proceedings are a nullity disposes of this point, nor is there any necessity for this court to make a finding thereon.

I consequently dismiss this appeal; the proceedings in the Primary Court are a nullity and are quashed. The ruling of the District Court to that effect is upheld, there being nothing before that court which could ground any appeal. The respondent herein will have his costs of this appeal both here and in the District Court.

Appeal dismissed with costs.

Neither party appeared or was represented.

Republic v Masalu
[1967] 1 EA 355 (HCT)

Division:	High Court of Tanzania at Mwanza
Date of judgment:	11 November 1966
Case Number:	79/1966
Before:	Platt J
Sourced by:	LawAfrica

[1] Criminal law – Evidence – Post mortem report – Whether admissible the maker of the report being absent abroad – Indian Evidence Act, 1872, s. 32.

[2] Evidence – Post mortem report – Whether admissible when maker absent abroad – Indian Evidence Act, 1872, s. 32.

[3] Evidence – Admissibility – Statement of witness – Post mortem report – Whether admissible when maker abroad – Indian Evidence Act, 1872, s. 32.

Editor's Summary

The accused was charged with murder. The prosecution sought to produce in evidence a post-mortem report on the deceased made by a doctor who had since left the country, under s. 32 of the Indian Evidence Act, 1872.

Held – Although the report was technically admissible in evidence the court should exercise its discretion to refuse to admit it as prejudicial to the accused.

Report ruled inadmissible.

No cases referred to in judgment.

Judgment

Platt J: The prosecution seeks to produce as evidence the post mortem report of the doctor who examined the deceased person in this case, as alleged by the report. This doctor unfortunately left this country on retirement to England before the preliminary investigation was commenced. The learned committing magistrate was, therefore, faced with the difficulty of having no witness before him to explain the cause of death and relied on s. 213 of the Criminal Procedure Code (as amended) in order that the post-mortem report of the doctor should be produced before him and this formed part of the record of the committal proceedings. It is generally conceded that the learned magistrate should have acted under s. 220 of the Criminal Procedure Code and not s. 213. There is no need for me to elaborate on that point.

The report, having thus been admitted in evidence, still remains at this trial the only record of what the doctor discovered during his post-mortem examination. It is, therefore, sought to be adduced as evidence not within the terms of the Criminal Procedure Code but within the terms of s. 32 of the Indian Evidence Act. The distinction is of importance. Under the Criminal Procedure Code there are substantial safeguards with regard to depositions of an absent witness such as that the accused should have seen the witness give evidence at the time the deposition was sworn or affirmed and that he should have had the right to cross-examine the witness. Those safeguards having been complied with, the deposition may in certain circumstances be admitted in evidence. Under s. 32 of the Indian Evidence Act, however, an exception is made whereby although the witness has never made any deposition in such circumstances that an accused may have had the right to cross-examine or see the deponent make his deposition. Nevertheless, documents made by such a person in the course of his professional duties (see s. 32 (2) of the Indian Evidence Act) may be admitted in evidence.

The conflict is of interest in that the basic rule in a criminal trial is that the accused should be able to test the evidence which is adduced against him so that justice can be seen to be done as the judgment proceeds upon evidence which has been seen to be given in court. On the other hand, s. 32 seeks to provide a method where, by virtue of death or other circumstances, when the only evidence is a document, that document should be admitted in evidence. The safeguards under s. 32 are that the document should have been made in such circumstances that in the normal way of things mistakes would not occur, and that there would not be any reason why the maker of the document should state anything but the truth.

In his first argument, the learned State Attorney appearing for the Republic called upon the court to understand the difficult situation in which this country finds itself with regard to technical experts of one sort or another who do not always remain in the country. Of course, the courts must have every sympathy on this point and the Criminal Procedure Code does attempt to provide some aid in this direction. But since the Republic is well aware of the difficulties which it faces, I do not think that it can be argued that such difficulties cannot be overcome by normal administrative arrangements. Of course, in the case of death which happens as it may be without warning no such arrangements can easily be made. But in the case of persons retiring and leaving the country I cannot say that it could be beyond the resources of the Republic to arrange for experts such as doctors to leave on the record the circumstances of the post-mortem examination which they have undertaken. With respect therefore to the learned State Attorney, I think the situation cannot be brewed to such an extent that the basic rules of criminal procedure should be foregone. In my opinion, it is of greater importance that an accused person should be able to see and hear and test the evidence adduced against him than that the Republic should be permitted to adduce evidence which cannot be so tested. I am also aware of the reasons for the production of the document under s. 32, as I have explained above, but again I would say that it cannot be entirely satisfactory to rely on a report, such as post-mortem report in a capital charge, when it is reasonably well-known that from time to time mistakes do occur in such reports. I think to rely entirely upon an untested report would not be in the interest of the Republic in general.

Section 32, in my opinion, provides for the technical admissibility of this document. But to admit such document would be prejudicial to the accused and, as I have said, it would not be in the interests of the Republic in general. I think it is clear beyond doubt that in a criminal trial the court always has a discretion to refuse to admit evidence which may be prejudicial to the accused although technically admissible.

I have no doubt that it would be wrong in that it would be prejudicial to the accused to admit this post-mortem report in the circumstances in this case and accordingly I reject it.

Report ruled inadmissible.

For the State:

Attorney-General, Tanzania

Effiwatt (Senior State Attorney)

For the accused:

J. S. Mann, Mwanza

Republic v William Gabagombi
[1967] 1 EA 357 (HCT)

Division: High Court of Tanzania at Mwanza
Date of judgment: 21 January 1967
Case Number: 111/1966
Before: Platt J
Sourced by: LawAfrica

[1] Criminal law – Uttering false currency note – Whether “intent to defraud” an ingredient of the offence – Currency Notes Ordinance, s. 6 (1) (T.).

[2] Criminal law – Plea of guilty – What words constitute, for an offence of uttering a false currency note – Currency Notes Ordinance, s. 6 (1) (T.).

Editor’s Summary

Section 6 (1) of the Currency Notes Ordinance (T.) – Cap. 175 reads:

“If any person, with intent to defraud, forges or alters any currency note or knowing any note purporting to be a currency note to be forged or altered, utters the same, he shall be liable to imprisonment . . .”

The accused was charged in the following terms:

“Statement of offence: Uttering a forged note contrary to s. 6 (1) of the Currency Notes Ordinance, Cap. 175.
Particulars of offence: The person charged on the 12th day of October, 1966 at about 9.00 p.m. at Muhunze Trading Centre within the District and Region of Shinyanga did utter a forged note, No. 710291 of Shs. 100/- to one Issa s/o Selemani knowingly the said note to be a forged note, and purporting to be a true currency note, and that he obtained three bottles of beer valued Shs. 9/90 and obtained a change of Shs. 90/10.”

The District Court accepted pleas of guilty to the above charge (and to another charge framed in a similar manner). On revision in the High Court the first question for consideration was whether intent to defraud was an essential ingredient of the offence of uttering. The second question for consideration was whether the accused’s words when pleading to the charge, “I agree the note was not genuine”, were sufficient to be accepted as a plea of guilty.

Held –

- (i) the words “intent to defraud” in s. 6 (1) of the Currency Notes Ordinance govern both forging a currency note and uttering a currency note, and the charge was defective;
- (ii) the words “I agree the note was not genuine” should not have been accepted as a plea of guilty.

Convictions and sentences quashed and a re-trial ordered.

No cases referred to in judgment.

Judgment

Platt J: The accused was convicted on two counts of uttering forged notes contrary to s. 6 (1) of the Currency Notes Ordinance, Cap. 175 and was sentenced to nine months' imprisonment on each count to run consecutively. The resulting sentence was subject to confirmation by this court and when the record has been received for this purpose I ordered that the case should be set down for hearing on revision. The main point at issue was whether the charge had been properly made out according to law and the second point concerned the nature of the plea, as to whether it should have been accepted as one of guilty. Both counts were charged in the same way and, therefore, it will only be necessary to set out the first count.

Count 1

STATEMENT OF OFFENCE: Uttering a forged note contrary to s. 6 (1) of the Currency Notes Ordinance, Cap. 175.

PARTICULARS OF OFFENCE: The person charged on the 12th day of October, 1966, at about 9.00 p.m. at Muhunze Trading Centre within the District and Region of Shinyanga, did utter a forged note, No. 710291 of Shs. 100/- to one Issa s/o Selemani knowingly the said note to be a forged note, and purporting to be a true currency note, and that he obtained three bottles of beer valued Shs. 0/90 and obtained a change of Shs. 90/10.

Section 6 (1) of the Currency Notes Ordinance provides as follows:

“If any person, with intent to defraud, forges or alters any currency note or knowing any note purporting to be a currency note to be forged or altered, utters the same, he shall be liable to imprisonment for any period not exceeding ten years.”

It will be seen that the question at issue is whether the intent to defraud is a necessary part of the mens rea in the offence of uttering a currency note. If it is, then there is a fatal defect in the charge because, as the charge stands, the accused was only alleged to have uttered a forged note knowing it to be forged and he was not charged with uttering with the intent to defraud. It is well known in a criminal case of this nature that if the necessary ingredient of the offence is the intent to defraud, it must be charged and proved by the prosecution before it can be said that the charge has been made out.

The learned Senior State Attorney who appeared for the Republic, however, submitted that s. 6 (1) did not provide that the intent to defraud was a necessary part of the charge of uttering a forged currency note. He submitted that, although the prosecution had to prove that the accused knew that the note purporting to be a currency note was forged or altered, and that thereafter the accused uttered that note, he thought that the words “with intent to defraud” applied solely to a person who forged or altered a currency note. He conceded that by way of comparison the charge of uttering a false document contrary to s. 342 of the Penal Code included both elements; that of knowingly and fraudulently uttering the false document. But his view was that s. 6 (1) of Cap. 175 was a special offence and pertained to that Ordinance.

After reconsidering s. 6 (1) in the light of the argument submitted by the Republic, with respect, I am unable to agree. To my mind, the sense of s. 6 (1) is that the phrase “with intent to defraud” controls the various phrases which follow. I think this must be so because of the position of the commas dividing that section. There are three phrases separated by commas. The phrase “with intent to defraud”, is followed by the phrase, “forges or alters any currency note or knowing any note purporting to be a currency note to be forged or altered”, the third phrase is “utters the same”. The third phrase seems to refer to a note actually forged or altered by the person uttering it, or a note known to be so forged or altered and then uttered. There is no comma in the second phrase dividing the forgery or alteration of the note, from the mere knowledge that it has been so forged or altered. Whether the section really provides two offences; one of forgery and the other of uttering, is a moot point. The marginal note refers to forgery alone. But this must be misleading. To give the section the meaning suggested by the Republic, there should have been a dividing comma in the second phrase. As the section stands, it seems to me that the sensible interpretation must be that the person uttering a false note, whether he forged or altered it himself, or merely knew it to be so forged or altered, is guilty of an offence if the uttering was with intent to defraud. The substantive offence indeed appears to be the uttering rather than the forgery. I hold, therefore, that the charge was defective in that the accused was not charged

with uttering the forged note with intent to defraud, although he was correctly alleged to have known that the note was forged, since he was not charged with being the actual author of the forgery.

I turn now to the second matter which arises in this case and that is that the accused having been charged with uttering he stated in his plea to each count “I agree the note was not genuine”. That does not state in terms that he admitted uttering the note. The plea, therefore, should not have been accepted as a plea of guilty.

For all these reasons, in my view the trial was a nullity from which it follows that the conviction must be quashed and the sentence imposed thereon set aside. But as there was ample evidence to support a proper charge, I order that the accused should be re-tried before a court of competent jurisdiction, preferably before another magistrate. If at the conclusion of the re-trial, the accused is further convicted, the learned magistrate will no doubt take into account the time which will have elapsed from the date on which the accused was first brought to court to the date on which he is finally convicted, when imposing a further sentence.

Order accordingly.

Accused not represented.

For the Republic:

Attorney-General, Tanzania

For the prosecution:

Effiwatt (Senior State Attorney, Tanzania)

Republic v Magina and another [1967] 1 EA 359 (HCT)

Division:	High Court of Tanzania at Mwanza
Date of judgment:	1 March 1967
Case Number:	112/1996
Before:	Platt J
Sourced by:	LawAfrica

[1] *Criminal law – Unlawful possession of Government trophy – Trophy – Meaning of “trophy” under Fauna Conservation Ordinance ss. 2, 47 (1) (a), (b), (c), 53 (T).*

[2] *Game – Unlawful possession of Government trophy – Meaning of “trophy” and “Government trophy” – Fauna Conservation Ordinance ss. 2, 47 (1) (a), (b) and (c), 53 (T).*

Editor's Summary

The District Court of Nzega, Tanzania, convicted two accused of being in unlawful possession of a government trophy contrary to ss. 49 (1) and 53 of the Fauna Conservation Ordinance. Each accused admitted being in possession of giraffe meat without permission, which the District Court accepted as pleas of guilty of the offence mentioned above. On revision to the High Court:

Held –

- (i) a “government trophy” as defined in s. 47 (1) (a) of the Ordinance includes an animal killed or captured without a licence or the trophy of such an animal;
- (ii) “trophy” defined in s. 2 of the aforesaid Ordinance means a durable portion of an animal;
- (iii) the meat of an animal would not constitute a government trophy (unless the animal was found dead, as provided by s. 47 (1) (b) of the Ordinance);
- (iv) there being no evidence whether the giraffe had been killed, captured or found dead, the convictions could not stand.

Convictions and sentences quashed.

Cases referred to in judgment:

- (1) *Yahya Sadiki v. R.* (Criminal Appeal No. 666 of 1961) (unreported).
- (2) *Abdulla Libengyile v. Republic* (Criminal Revision No. 3 of 1963) (unreported).
- (3) *Republic v. Mohamedi Musa* (Criminal Revision No. 79 of 1963) (unreported).

Judgment

Platt J: Two accused were convicted of the unlawful possession of a government trophy contrary to ss. 49 (1) and 53 of the Fauna Conservation Ordinance, Cap. 302, and each sentenced to pay a fine of Shs. 300/- or four months' imprisonment in default. The record was called for since the return showed that the trophy in question was giraffe meat.

On perusing the record, it shows that each accused pleaded to being in possession of giraffe meat without permission. This was taken as a plea of guilty. The only question which arises is whether the giraffe meat was in law a government trophy. The definition of "trophy" in the Ordinance is as follows in s. 2:

“ ‘Trophy’ means any animal, alive or dead, and any horn, ivory, tooth, tusk, bone, claw, hoof, skin, hair, feather, egg or other durable portion whatsoever of any animal whether processed or not, provided that it is readily recognisable as a durable portion of an animal.”

This definition, as has often been held, does not include the meat of a game animal because it is not a durable portion of the animal (see *Yahya Sadiki v. R.* (1) and *Abdulla Libengyile v. Republic* (2)). Indeed it will be seen from other provisions in the Ordinance that there is a distinction between “animal, meat or trophy” (see s. 53 (2) of the Ordinance). The definition is understandable since the provisions with regard to trade in trophies depend on it as well as the provisions contained in s. 49.

The term “government trophy” is defined in s. 47 of the Ordinance. Subsection (1) of s. 47 provides a number of illustrations of what a government trophy is. So, for instance, any game animal which had been killed or captured without a licence or in contravention of any of the provisions of the Ordinance is a government trophy, as well as “the trophy” of any such animal (see s. 47 (1) (a) and (c)). In general s. 47 deals with the “animal” or the “trophy” of such animal and in this way continues the distinction drawn in the definition of trophy in s. 2. But s. 47 (1) (b) goes further. It provides as follows:

“(b) any game animal found dead and the trophy of any such animal or any part of any game animal which is found.”

The last clause “or any part of any game animal which is found” would seem to be wide enough to cover the meat of such animal. It appears to me that this clause refers to animals found dead although it is not quite specific; but that is the only reasonable construction that can be placed upon the clause. At any rate this seems to have been accepted in *Republic v. Mohamedi Musa* (3) where it was held that the meat of a game animal might be a government trophy if the case fell within s. 47 (1) (b), whereas such meat could not be a government trophy if the case fell within s. 47 (1) (a); and I would add if the case fell within any of the other sub-sections of s. 47 of the Ordinance.

Applying this construction of s. 47 defining a government trophy, it will be seen that the facts of the present case do not specify whether the giraffe had been killed or captured or whether it had been found

dead. Without such evidence it was not clear whether the meat of the giraffe was itself a government trophy. Of course a giraffe is a game animal, but for its meat to be a government

trophy the case had to fall within s. 47 (1) (b) of the Ordinance. In these circumstances the plea was not unequivocal and the facts presented by the prosecution did not clarify the issue. Accordingly the conviction must be quashed and the sentence imposed thereon set aside as the trial was a nullity. There will be no order for a re-trial since the accused have already served their sentence which was imposed in default of the payment of the fines ordered. The result is somewhat academic but may serve as a guide for the learned magistrate in future.

The learned Senior State Attorney did not wish to appear in opposition to this order.

Order accordingly.

Neither party appeared or was represented.

Masenu Butiti v Republic
[1967] 1 EA 361 (HCT)

Division:	High Court of Tanzania at Mwanza
Date of judgment:	7 March 1967
Case Number:	379/1966
Before:	Platt J
Sourced by:	LawAfrica

[1] *Criminal law – Housebreaking – Essential ingredients to establish offence – Penal Code, s. 296 (T.).*

Editor’s Summary

The District Court of Mwanza convicted the appellant of housebreaking contrary to s. 296 of the Penal Code. The evidence established that the appellant broke a garage door but ran away before any entry was made into the garage. On revision to the High Court:

Held –

- (i) the essential ingredients of housebreaking are: – (a) a breaking and entering, (b) into one of the buildings specified in s. 296, Penal Code, (c) the commission of a felony therein;
- (ii) here there was no entry, and, (obiter) a garage is not generally a warehouse, so that the conviction was wrong; but
- (iii) a conviction of causing malicious damage contrary to s. 326 (1) of the Penal Code should be substituted.

Conviction set aside. Conviction of causing malicious damage substituted.

No cases referred to in judgment.

Judgment

Platt J: The appellant was convicted of breaking into a building contrary to s. 296 of the Penal Code and sentenced to two years' imprisonment carrying with it the statutory twenty-four strokes of corporal punishment. This is another example of a misunderstanding of the offences created by s. 296 of the Penal Code. I had better set out the section, sub-s. (1) of which is relevant only:

“296. Any person who –

- (1) breaks and enters a school house, shop, warehouse, store, office or country house, or a building which is adjacent to a dwelling house and occupied with it but is no part of it, or any building used as a place of worship and commits a felony therein . . . is guilty of felony and is liable to imprisonment for seven years.”

The prosecution has therefore to prove (1) a breaking and entering; (2) into one of the specified buildings and (3) the commission of a felony therein.

The evidence in this case established a breaking of a garage door, no entry being proved or implied. The appellant was disturbed before any further act took place. He was chased as he escaped and eventually apprehended. By no stretch of the imagination could the learned magistrate have convicted the appellant under s. 296 (1) of the Penal Code. There being no entering nor the commission of a felony inside the garage, it is immaterial whether a garage could come within the scope of one of the buildings specified. Some argument was addressed to the court that a garage might come within the term “warehouse”. But to my mind I would venture the obiter opinion that a garage is not generally a warehouse. If one should look at the relevant provision in English law one will find that a garage is specified together with a warehouse and store (inter alia) suggesting that it is a particular kind of building not covered by the other type of buildings. The case affords another example of the necessity for amending s. 296 of the Penal Code as has been pointed out already on several occasions.

If this be so then it was suggested that the facts supported a conviction under s. 297 of the Penal Code. This could not be so because there was no entry. It seems to me that the most satisfactory conviction would be one of causing malicious damage contrary to s. 326 (1) of the Penal Code. Section 296 (1) of the Penal Code involved a breaking. Therefore, as the “breaking” involved a malicious damage to the door I consider that by virtue of s. 181 of the Criminal Procedure Code a conviction for the lesser offence of causing malicious damage may be substituted.

Accordingly I set aside the conviction imposed and substitute therefore one of causing malicious damage contrary to s. 326 (1) of the Penal Code. This not being a scheduled offence it follows that the sentence must be set aside in its entirety. I substitute therefore such sentence as will result in the appellant’s immediate release.

Order accordingly.

Appellant in person.

For the respondent:

Attorney-General, Tanzania

G. B. Luindi (State Attorney, Tanzania)

Katimba v Uganda [1967] 1 EA 363 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	21 June 1967
Case Number:	249/1967
Before:	Sir Udo Udoma CJ
Sourced by:	LawAfrica

[1] *Criminal law – Housebreaking with intent to steal – Penal Code, ss. 281 (1), 252 (U.).*

[2] *Criminal law – Housebreaking with intent to commit a felony – Penal Code, s. 28 (1) (U.) – Where not charged yet subsequently convicted.*

[3] *Criminal law – Indecent assault – Penal Code, s. 122 (1) (U.) – Uncorroborated evidence.*

Editor’s Summary

Before the Magistrate’s Court of Mengo at Kampala the accused was found not guilty of breaking into a house with intent to steal some ground nuts (Penal Code, s. 281 (1) and 252), and not guilty of the alternative charge of receiving ground nuts knowing or having reason to believe the same to have been feloniously obtained (Penal Code, s. 298); but was found guilty of breaking into the house for the purpose of committing a felony (Penal Code, s. 28 (1)) (although never charged with such an offence) and guilty of indecently assaulting a female as charged (Penal Code, s. 122 (1)). On appeal:

Held –

- (i) the acquittals under ss. 281 (1) and 252 and in the alternative under s. 298 of the Penal Code (U.) were correct;
- (ii) the purported conviction of breaking into the house for the purpose of committing a felony, in respect of which there was no fresh charge, should be quashed;
- (iii) the only evidence to support the evidence of indecent assault was the uncorroborated evidence of the female herself, and in any event such evidence if believed constituted the offence of rape with which the accused was not charged; and the conviction under s. 122 (1) should accordingly be quashed;
- (iv) the magistrate had no jurisdiction to try the offence of rape (s. 10 (1) (a) Magistrates’ Courts Act (as amended), 1966).

Appeal allowed. Convictions and sentences quashed and appellant acquitted.

Cases referred to in judgment:

- (1) *R. v. Thomas Finch* (1916), 12 Cr. App. R. 77.
- (2) *R. v. Thomas James Jones* (1925), 19 Cr. App. R. 40.

Judgment

Sir Udo Udoma CJ: This is an appeal against conviction and sentence. The appellant was convicted by the Magistrate Grade I, N. G. Patel, Esq., in the Magistrate’s Court, Mengo, on two counts, the first of which was burglary and theft contrary to ss. 281 (1) and 252 of the Penal Code, the other being of indecent assault contrary to s. 122 (1) of the Penal Code. The appellant was sentenced to two years’ imprisonment on the first count and three years’ imprisonment on the second count.

The charge against the appellant originally comprised three counts, one of which was an alternative to the first count. The counts read as follows:

“Count 1.

Statement of Offence

Burglary and theft contrary to ss. 281 (1) and 252 of the Penal Code.

Particulars of Offence

Yosamu Katimba in the night of the 1st day of December, 1966 at Nsagi Village in the Mengo District did break and enter the dwellinghouse of Merabu Namono with intent to steal therein and did steal therein some ground nuts valued at Shs. 35/-, the property of the said Merabu Namono.

Count 2.

Statement of Offence

Indecent assault to a female contrary to s. 122 (1) of the Penal Code.

Particulars of Offence

Yosamu Katimba on the 1st day of December, 1966 at Nsagi Village in the Mengo District unlawfully and indecently assaulted Merabu Namono.

Alternative Charge to Count 1

Statement of Offence

Receiving or retaining stolen property contrary to s. 298 (1) of the Penal Code.

Particulars of Offence

Yosamu Katimba on the 2nd day of December, 1966 at Nsagi Village in the Mengo District received or retained some ground nuts, property of Merabu Namono knowing or having reason to believe the same to have been feloniously stolen or obtained.”

In his petition of appeal the appellant has complained that the decision of the trial magistrate was wrong in law and contrary to the evidence; and that in respect to the charge of indecent assault there was no medical evidence to support the allegation.

The case of the prosecution in support of the charge was that at about 11 p.m. on December 1, 1966, while Merabu Namono was sleeping alone in her house at Nsagi Village and a small tin lamp was burning in the said house, she was awakened by a loud noise caused by someone hitting hard at the door of her house. As a result the door, which was made of wooden reeds, fell down. With the aid of the light in the house, she was able to recognise the appellant who had then entered her one-room house.

On entering the house, the appellant fell upon her on her bed and immediately had sexual intercourse with her on the said bed. She said that, although she did not resist the sexual intercourse, she did raise an alarm on the completion of the sexual intercourse when the appellant was running away.

During the intercourse she said she was unable to raise any alarm because the appellant had successfully covered her mouth with his hand. She struggled also unsuccessfully to free herself from the grip of the appellant. Her right leg was twisted. As a result of the alarm raised by her, Sulemaini Magombe and Yusufu Wanyani arrived at the scene that night. Both of them were able, it being a moonlight night, to not only see but also recognise the appellant running away from the house of Merabu Namono towards the forest. Merabu Namono reported the incident to both Sulemaini Magombe and Yusufu Wanyani.

Merabu Namono accompanied by both Sulemaini Magombe and Yusufu Wanyani went to the house of the mutongole chief, Karoli Walusimbi that night for the purpose of reporting the incident to him, but found him absent. They then all returned to the house of Merabu Namono. It was then that Merabu Namono found that some of her ground nuts were missing, although when the appellant ran away from the house after the sexual intercourse she did not notice the appellant carrying away anything.

The next morning Merabu Namono again accompanied by Sulemaini Magombe and Yusufu Wanyani reported the incident concerning the sexual

intercourse to the mutongole chief and added that the appellant had also stolen Merabu Namono's ground nuts. The mutongole chief, Karoli Walusimbi, immediately visited the house of Merabu Namono. In consequence of the report, the mutongole chief and Sulemaini Magombe and Yusufu Wanyani visited the appellant's house. They found ground nuts in a drum. On being questioned, the appellant told the mutongole chief that the ground nuts were given to him by one Mazunga – a neighbour.

Mazunga was then contacted and he denied having given any ground nuts to the appellant. The appellant was thereupon taken to the house of the chief and therefrom to the muluka chief together with the tin of ground nuts, while Merabu Namono was taken to the hospital, where she was treated by an Assistant Medical Officer. In his report, which was tendered and admitted and marked in the proceedings as Exhibit 1, the medical assistant, on examining Merabu Namono, found that she had a sprain of the right knee and a bruise on the neck, both which injuries he classified as harm. He was of the opinion that the injuries could have been caused by someone twisting Merabu Namono's knee and neck. Later the appellant was handed over to the police, who thereupon charged him. After due caution, the appellant denied the charge.

In his defence the appellant, on oath, denied having committed the offence with which he was charged. He said that during the night of December 1, 1966, he did not go out anywhere. He was at home. The following morning the mutongole chief, Karoli Walusimbi, Sulemaini Magombe and Yusufu Wanyani came and, with his consent, searched his house. They could find nothing except a drum containing a quantity of ground nuts. He maintained that the drum was his and so too the ground nuts contained therein.

The trial magistrate, in his judgment, held that the prosecution had failed to establish beyond reasonable doubt the charge contained in count 1, in which the appellant was charged with burglary and stealing contrary to ss. 252 and 298 (1) of the Penal Code; and the alternative count thereto in which the appellant was also charged with receiving or retaining stolen property.

On this aspect of the case the trial magistrate, in his judgment, concluded as follows:

"In view of the above conflicting evidence I find as a fact that both the burglary and theft and receiving and retaining stolen property have not been proved by the prosecution beyond reasonable doubt and I find accused not guilty both under s. 252 and/or s. 298 (1) of the Penal Code."

On the evidence it is impossible to hold that the learned trial magistrate was wrong in coming to that conclusion.

The Senior State Attorney intimated to the court that he could not support the conviction of the appellant by the learned trial magistrate on the count of indecent assault. He submitted that the learned trial magistrate was wrong in law to have convicted the appellant.

I propose therefore to examine the judgment of the learned trial magistrate with respect to the evidence on the charge of indecent assault upon which the appellant was convicted.

The learned trial magistrate, in considering what he described as "the charges of breaking and indecent assault", after a review (for want of a better expression) of the evidence, said:

"Merabu Namono is quite strong, rather stronger than the accused as I saw in the court and could have been free by struggling and raising the alarm soon when he, the accused, came in towards her bed. It appears, perhaps Merabu has exaggerated the story regarding the forcible sexual intercourse as a result of afterthought – again there is no medical evidence

regarding the sexual intercourse. I come to the conclusion that Merabu might have been indecently assaulted by the accused who entered the house by breaking the reed door, and she might have struggled, got free and she raised the alarm after being free . . .

I am satisfied that accused broke Merabu's reed door, entered the house and indecently assaulted her at night and ran away. I would not give any opinion regarding the alleged forcible sexual intercourse in the absence of proof, medical evidence and other sufficient evidence.

In view of what is stated above, I find as a fact that the prosecution has proved its case beyond reasonable doubt as regards breaking the door, entry into the house of Merabu Namono with intent to commit felony under s. 281 (1) and I convict the accused accordingly under both the sections, s. 281 (1) and s. 122 (1)."

I have taken the trouble to set out in extenso these passages of the learned trial magistrate's judgment for the purpose of spot-lighting the wholesale contradictions contained in the judgment. Even without any comment on my part anyone reading the above passages could not fail at once to appreciate the extent to which the learned trial magistrate comprehended the case he was trying.

The above passages of the judgment indicated quite clearly that the prosecution had failed to establish beyond reasonable doubt that the appellant had committed the offence with which he was charged. It is therefore a matter for surprise that the learned trial magistrate, despite the above passages of his judgment, should have convicted the appellant not only of indecent assault contrary to s. 122 (1) of the Penal Code but also of burglary contrary to s. 281 (1) of the Penal Code, the offence of which he had originally acquitted the appellant.

By all standards, the judgment of the learned trial magistrate was an extraordinary one. It is the worst I have yet come across. For after having acquitted the appellant of burglary and stealing, which formed the offence charged in the first count, he himself then invented a new and separate count of burglary contrary to s. 281 (1) and thereupon convicted the appellant of an offence for which he was never charged. The charge before the magistrate was never amended to include a special count on burglary as an offence by itself.

Then there is this important point of law to which the learned trial magistrate had failed to direct his mind, even if the offence disclosed by the evidence was indecent assault (which it was not). The trial magistrate failed to consider the question of corroboration. As was said by Avory, J., in *Thomas Finch* (1) – "non-direction may amount to a misdirection", and so it is in the instant case. The only witness who gave evidence of the sexual intercourse was Merabu Namono. The learned trial magistrate never even mentioned in his judgment the question of corroboration; nor did he say that he accepted the evidence given by Merabu Namono because he found her to be an honest and truthful witness.

In *Thomas James Jones* (2) it was laid down, as a rule of practice, that the correct direction on a charge of indecent assault is that it is not safe to convict on the uncorroborated evidence of the prosecutrix, but that the jury, if they are satisfied of her veracity, may, after paying attention to that warning, nevertheless convict.

Quite apart from what has been said above, the evidence of the prosecution, if believed, had disclosed not indecent assault but rape contrary to s. 118 of the Penal Code. On the evidence, it is not merely that sexual intercourse had taken place between the appellant and Merabu Namono, but that the said sexual intercourse had taken its full course and was completed. In which case,

there was not only penetration, which is the essential element to constitute the offence of rape. There was also emission of seed.

It is patently clear that the learned trial magistrate, in view of the offence disclosed by the evidence, had no jurisdiction to have tried the appellant at all, having regard to the provisions of s. 10 (1) (a) of the Magistrates' Courts Act, as amended by the Magistrates' Courts (Amendment) Act, 1966, the provisions of which are in the following terms:

- "1. The Magistrates' Courts Act is hereby amended;
 - (a) by substituting for s. 10 thereof the following: –
 - '10(1) Subject to the provisions of this or any other enactment a Magistrate's Court presided over by: –
 - (a) a Chief Magistrate or a Magistrate Grade I may try any offence, other than the offences of murder, manslaughter or rape, offences under the provisions of ss. 25, 27, 28, 29 or 31 of the Penal Code, or attempts to commit, or aiding, abetting or inciting the commission of any such offence'."

The provisions of s. 10 (1) of the Magistrates' Courts (Amendment) Act, 1966 came into effect in terms of the provisions of s. 2 of the Act on the 1st day of July, 1966; and were therefore in operation when the offence in this case was committed and the appellant tried by the magistrate.

For the reasons stated above, this appeal is allowed. The conviction of and sentence imposed on the appellant are quashed. The appellant is acquitted and discharged.

Order accordingly.

Accused not represented.

For the respondent:

Attorney-General, Uganda

A. G. Deobhakta (Senior State Attorney, Uganda)

City Council of Kampala v Mukibi [1967] 1 EA 368 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	7 April 1967
Case Number:	456
Before:	Sir Udo Udoma CJ
Sourced by:	LawAfrica

[1] *Costs – Successful plaintiff awarded no costs – Landlord refusing to accept rent when tendered*

subsequently suing for mesne profits.

[2] Landlord and tenant – Covenant not to assign sublet or part with possession – Tenant not giving up possession of keys – Whether occupants were sub-tenants or licensees.

[3] Landlord and tenant – Unregistered tenancy agreement – Agreement not in statutory form – Lease from year to year – Whether enforceable – Registration of Titles Act, 1922, s. 51 (U.).

Editor's Summary

The plaintiff council had entered into a tenancy agreement with the defendant in terms of which the defendant was to be leased premises at an annual rental on a year to year basis, but terminable by either party giving one month's notice in writing. The premises were let subject to certain covenants which provided inter alia that the tenant should use the premises only for the business of hairdressing, and that he should not assign or sublet or part with possession of the premises, with a right of re-entry to the plaintiff in the event of breach of any of the covenants. It was alleged by the plaintiff that the defendant had sublet the premises and the plaintiff sued for vacant possession of the premises and for mesne profits. The defendant's counsel in the course of the hearing amended his defence by adding that the tenancy agreement was required by law to be registered and that as no registration had taken place, no cause of action could arise from it. The material facts believed by the court were that the defendant allowed others on daily payments to him to use the premises for their businesses of barbers and hairdressers but the defendant retained possession of the key of the premises which he opened in the mornings and locked at nights. The court accepted that the defendant was also employed as a rent collector by the Standard Bank and that this fact was known to the plaintiff when the tenancy agreement was entered into. The defendant was in no place described in the agreement as barber or hairdresser. The defendant had tendered rent to the plaintiff which the plaintiff had refused to accept.

Held –

- (i) the tenancy agreement, although not in statutory form and bearing no endorsement with a certificate of registration, was enforceable against the defendant as an agreement to grant a lease;
- (ii) the persons working on the premises were licensees, not tenants, and were not in exclusive possession of the premises, so that the defendant had not sublet, assigned or parted with possession of the premises, and was not in breach of the covenant;
- (iii) the plaintiff, having refused to accept rent tendered to it, should not have its costs.

Order for vacant possession refused. Judgment for the plaintiff for mesne profits.

Cases referred to in judgment:

- (1) *Popatlal Hirji v. I. H. Lakhani & Co.* (E.A.) Ltd. [1960], E.A. 437.
- (2) *Gray v. Spyer*, [1922] 2 Ch. 22.
- (3) *Vasanji Khimji v. Abdulhussein Ismail Hassam* (1957), (unreported) (Civil Appeal No. 92 of 1957).

- (4) *Stening v. Abrahams*, [1931] 1 Ch.D. 470.
- (5) *Abrahams v. MacFisheries Ltd.*, [1925] 2 K.B. 18.
- (6) *Roe d. Dingley v. Sales*, (1813); E. & E. Digest, Vol. 31 (Repl.), p. 412, para. 5421.
- (7) *Chaplin v. Smith*, [1926] 1 K.B. 198.
- (8) *Hancock v. Austin* (1863), 14 C.B. (N.S.) 634; 143 E.R. 593.
- (9) *Errington v. Errington and Another*, [1952] 1 All E.R. 149.
- (10) *Russell v. Beecham*, [1923] All E.R. Rep. 318.
- (11) *Peebles v. Crosthwaite* (1896), 13 T.L.R. 37.
- (12) *Jackson v. Simons*, [1923] 1 Ch. 373.

Judgment

Sir Udo Udoma CJ: This suit has been instituted by the Kampala City Council, described in the plaint as the local authority for Kampala (hereinafter to be referred to as the plaintiff). The plaintiff is the proprietor of the premises known as shop No. 10 South Street, Market Site, Kampala (hereinafter to be referred to as the premises), of which the defendant is tenant.

The claim is for recovery of vacant possession of the premises from the defendant. It is, in other words, an action for the forfeiture of the lease granted to the defendant on the ground that the defendant has committed a breach of one of the covenants contained in the agreement. There is also a claim for mesne profits at Shs. 266/- per mensem from January 1, 1966, until vacant possession is given.

By an agreement in writing dated October 6, 1962, made by and between the plaintiff and the defendant, the premises were let to the defendant from year to year at the annual rental of Shs. 2,976/- payable by the defendant in advance by twelve monthly instalments on the first day of every month.

The term so granted was determinable by either party giving the other one month's notice in writing. On October 8, 1964, by a supplemental agreement the rental was increased to Shs. 3,192/- per annum. The premises were to be used only as a hairdresser's shop.

In pursuance of the agreement aforesaid and in consideration of the rent therein reserved, the defendant entered into and took possession of the premises aforesaid and equipped and furnished the same with basic furniture requisite to a barber's shop by installing, for example, chairs, cupboards, mirrors, washhand basins and towels and a machine in at least one of the shops.

The premises were let to the defendant subject to certain terms, conditions and covenants, among which were covenants contained in cll. 2 (11), (12) and (14) of the agreement, the terms of which were:

- "2. The tenant hereby agrees with the Council as follows:
 - (11) To keep the premises open for the business of a hairdresser during the hours permitted by any ordinance enacted for the said purpose from time to time.
 - (12) Not to use the premises for any purpose other than the business of a hairdresser without the written consent of the Council.
 - (14) Not to assign underlet or part with the possession of the premises or any part thereof."

There was also a proviso for re-entry in the event of non-performance or non-observance of any of the covenants or “stipulations” in the agreement.

The case of the plaintiff is that the defendant has committed a breach of the covenant contained in cl. 2 (14) of the agreement by assigning and sub-letting

part of the premises to various persons as sub-tenants; and that by reason of that breach the plaintiff is entitled to re-enter and recover vacant possession of the premises. The defendant has denied having committed any breach of any of the covenants. He has maintained that he is still in possession of the premises; and that he has neither let nor assigned nor parted with the possession of the same to anyone else.

In or about December, 1965, as a result of allegations and complaints against some of the tenants of some of the property of the plaintiff situate in South Street, Market Site, Kampala, including shop No. 10 South Street, Market Site, Kampala, the subject-matter of this action, the plaintiff set up a committee comprising five members, of which Silvester Papakokodi Okurut, the Assistant Town Clerk, was Chairman, and Charles Serwadda, the Market and Managing Superintendent, a member, to investigate and enquire into the allegations and complaints aforesaid.

The complaint against the defendant in particular was specific. He was charged with having committed a breach of the covenant contained in cl. 2 (14) of the agreement in that he had sublet the premises of which he is tenant to sub-tenants.

On the strength of that complaint a letter dated January 3, 1966, was addressed to the defendant. Therein he was notified of the allegations against him, and vacant possession of the premises was demanded, failing which action was to be instituted for its recovery.

As a follow-up to that letter and acting on the authority and the terms of their appointment, the committee set out to accomplish its task. It visited, among other shops, the premises of the defendant. That was on January 14, 1966.

On arrival at the premises the defendant was found there. There were also seen on the premises six male hairdressers, one of whom was Stephen Kayondo, in occupation of the front shop of the premises; and two hairdressers, of whom Mrs. Rhoda Musoke was one, in occupation of the shop at the back of the premises.

All the barbers and hairdressers were busy. They were seen to be engaged in cutting and dressing respectively the hair of their customers.

When the members of the committee found that two shops in the premises were in the occupation of barbers and hairdressers they, through Charles Serwadda, who acted as their spokesman, interrogated the defendant as to who the barbers and hairdressers were. In answer the defendant informed the committee that all of them were his employees, that he had engaged each of them to work for him at a daily rate of pay; and that each of them was paid daily by him personally at the close of business every evening.

Members of the committee then turned to the barbers and the hairdressers for the purpose of verifying the truth of the explanation given to them by the defendant. They interviewed the barbers and hairdressers in the presence and in the hearing of the defendant.

In the course of the interview the barbers, through their spokesman Stephen Kayondo, told the committee that each of them was self-employed; that they were all tenants of the defendant, who had sublet to them the front shop for the purpose of their trade as barbers; and that each of them was paying rent to the defendant for the use and occupation of the premises at the daily rate of Shs. 3/50.

Stephen Kayondo went on to explain that when they first rented the premises from the defendant the agreed rental between each of them and the defendant was Shs. 5/- per diem but that in 1964 the

defendant reduced the rent from

Shs. 5/- to Shs. 3/50 per diem; that he himself had been a tenant of the defendant since 1961; and that the clippers, brush, combs and a shaving machine found in the shop which was in use by him, were his personal property. In support of this information Stephen Kayondo is said to have produced for the inspection of the members of the committee a book in which he recorded his daily takings from customers and the daily rent which he paid to the defendant as his landlord.

It should be noted at this juncture that the book purported to have been produced to, and examined by the committee members, by Stephen Kayondo was never produced before this court during the trial of this case, even though Stephen Kayondo was one of the principal witnesses for the plaintiff.

Members of the committee, it is said, then turned to Mrs. Rhoda Musoke who also maintained that she and another hairdresser Mohamed Muwange, then in occupation of the shop at the back of the premises, were also tenants of the defendant.

It is the case of the plaintiff that Mrs. Rhoda Musoke had told them that each of them as hairdressers was paying Shs. 6/50 daily to the defendant; that each of them was running a separate hairdressing business; that she herself had been a tenant of the defendant since 1963; that when the shop was first "let" to her in 1963 she was paying only Shs. 5/- per diem but that later the defendant increased the rent to Shs. 6/50 per diem; and that all the materials used by her in her hairdressing business were her property.

All the occupants of the premises, it is said, were unanimous that none of them was an employee of the defendant. They however also told the committee that there was only one key for the premises, and that that key was in the exclusive possession of the defendant. It was the practice of the defendant, they said, to open the premises for all of them in the morning and later in the evening to collect his daily rent from them and thereafter lock the premises and go away with the key. It was further said that even on occasions when the defendant was not able personally to open the shop himself, it was his practice to give the key to one of the tenants to open the premises, and to go to the premises in the evening both to collect his daily rent and to lock up the premises, at the same time taking the key home with him.

When the defendant was confronted with the explanations given to the members of the committee of the plaintiff Council, the defendant was still insistent that all the barbers and hairdressers found in the premises were his employees and that what they told the members of the committee was not true.

Thereupon the committee requested the defendant to produce his muster roll, which ought to be kept by him containing the names and the wages of each of the employees. The defendant was unable to produce any such record. He however explained that his muster roll had been stolen by thieves when another premises belonging to him were broken into and since then he had ceased maintaining a muster roll but had alternatively entered into agreements in writing with each of the tenants, in which each of them was described as his employee.

After their enquiries the members of the committee reported back to the plaintiff Council and this action resulted.

In this court these stories by the barbers and the hairdressers have been repeated on oath by both Stephen Kayondo and Mrs. Rhoda Musoke. Both of them have sworn also that neither of them nor any of the other barbers and hairdressers had ever signed any employment agreement with the defendant during the whole of the period they had been in occupation of the premises.

They said further that their signature appearing on two of the "employment

agreements” were obtained from them when the paper in each case was completely blank, and that they were induced to sign the papers by the defendant who represented to them that their names as well as those of their companions were required by the plaintiff. Both Stephen Kayondo and Mrs. Rhoda Musoke said that they have since been ejected from the premises because they had refused subsequently to sign a muster roll at the request of the defendant.

The defendant, as already stated, has denied having assigned, sublet or parted with the possession of the premises or any part thereof. He has sworn in this court that all the barbers and hairdressers were his employees and that for that purpose all of them had entered into written employment agreements with him. Elaborating on this evidence the defendant said that in particular he was paying daily to Stephen Kayondo when the latter was with him as his employee the sum of Shs. 4/50 per diem and that Lawrence Wampoma was still in his employ at the daily wage of Shs. 5/50.

It is also the defendant’s case that at the time he executed the agreement, and took possession of the premises now in dispute, he was working for the Standard Bank as a rent collector for vehicles hired out to customers by the Bank under hire-purchase agreements. He denied that he was present during the conversation between the members of the committee and his employees. He said also that at the time the members of the committee visited the premises he had shown them the employment agreements.

It should be pointed out that Charles Serwadda, one of the principal witnesses for the plaintiff, did admit that he was in fact shown these employment agreements during the time of their visit to the premises. That piece of evidence was however denied by the other members of the committee who had visited the defendant.

It is the defendant’s case that he was always in possession of the key of the premises; that none of his employees had access to any of the shops unless he himself admitted them; that he did maintain a muster roll with the help of a clerk since he himself was illiterate both in English and in Luganda; and that it came as a surprise to him when in 1966 he tendered to the Council his usual monthly rent but the latter refused to accept it.

In the course of the hearing of this case, counsel for the defendant, sought and obtained leave of the court, plaintiff’s counsel not objecting, to amend and did amend his defence by adding thereto another paragraph, No. V, which reads as follows:

“V. The defendant pleads that the plaint is bad in law as the agreement referred to in paragraph two of the plaint is required by law to be registered and as the said is not registered (sic) no cause of action can arise from such unregistered documents.”

The averment contained in the additional para. V above quoted was argued as an objection in point of law. I therefore propose to deal with it first.

In support of his objection counsel for the defendant submitted that in law a lease from year to year is a lease for at least three years and therefore ought in law to be in statutory form and registered, and that failure to comply with these requirements renders any registrable agreement void in law. No valid contract therefore could subsist between the plaintiff and the defendant since the agreement was neither registered nor in the requisite form. For this proposition counsel cited and relied upon *Popatlal Hirji v. I. H. Lakhani & Co. (E.A.) Ltd.* (1).

Although in his submission counsel did not refer the court to the relevant section of the Registration of Titles Act which provides for the compulsory registration of agreements, from a perusal of the

judgment in *Popatlal Hirji v.*

I. H. Lakhani & Co. (E.A.) Ltd. (1) it is obvious that the submission was based on s. 51 of the Registration of Titles Act, the relevant passage in which is:

“51. No instrument until registered in manner herein provided shall be effectual to pass any estate or interest in any land under the operation of this Act or to render such land liable to any mortgage, etc., etc.”

In s. 2 of the Act “instrument” is defined as including “any document in pursuance of which an entry is made in the register”; and “land” is defined as including “messuages, tenements and hereditaments corporeal or incorporeal; and in every certificate of title, transfer and lease issued or made under this Act, such word also includes all easements and appurtenances appertaining to the land therein described or reputed to be part thereof or appurtenant thereto.”

In *Popatlal Hirji v. I. H. Lakhani & Co. (E.A.) Ltd.* (1) in arriving at his decision Bennett, J., gave due consideration not only to s. 51 but also to ss. 108 and 110 of the Act. The argument in that case was that since the requirements of ss. 108 and 110 of the Act had not been complied with the agreement then under consideration was void and of no effect as a sublease. In his judgment Bennett, J., referred to the decision of Warrington, L.J., in *Gray v. Spyer* (2) which contained the proposition that an agreement for a lease which is annually renewable at the option of the tenant was to be construed as a lease for a term exceeding three years. He therefore held that the agreement therein mentioned ought to have been in statutory form and to have been registered.

Bennett, J., then referred to the decision of this court in *Vasanji Khimji v. Abdulhussein Ismail Hassam* (3) and held that on the strength of the latter case (which incidentally was an appeal also heard by him), a sublease for a term exceeding three years which is in non-statutory form and unregistered is enforceable as an agreement to grant a lease in the statutory form. He therefore decided that the plaintiff in that case was bound by the terms of the agreement however onerous or inconvenient they might be. With that decision I respectfully agree although I am not necessarily bound by it.

In view of that decision, it is not clear why this authority was cited and relied upon by counsel for the defendant as I am of the opinion that the decision in that case is of no assistance to him. Accepting that decision as I do, I hold that the agreement even though not in statutory form and bearing no endorsement with a certificate of registration, is enforceable against the defendant as a binding contract between him and the plaintiff in the instant case. The objection is therefore over-ruled.

It is common ground that on the evidence as a whole no question as to the defendant having assigned the premises or any part thereof to anyone arises. The real question for consideration and decision by this Court is as to whether on the evidence it has been satisfactorily established that the defendant did underlet or part with the possession of the premises or any part thereof to anyone in a manner to constitute a breach of the covenant contained in cl. 2 (14) of the agreement.

In considering this question it is to be borne in mind that when the premises were let to the defendant he was not a hairdresser or barber by trade but was working for the Standard Bank as a rent collector for vehicles given out under hire-purchase agreements. That fact must have been known to the plaintiff. Significantly he was nowhere in the agreement described as a hairdresser or barber but in sub-cl. (11) of cl. 2 of the agreement, the defendant had merely covenanted to keep the premises open for the business of a hairdresser during the hours permitted by any ordinance enacted for the said purpose from time to time.

On that state of affairs, who was to use the premises as a hairdresser? Was it

the defendant who was well-known not to be a hairdresser or barber, and who on the evidence has never at any time cut anybody's hair? I think not.

Counsel for the plaintiff submitted that the evidence of the plaintiff and its witnesses should be accepted and that the evidence clearly establishes that the defendant did sublet and part with the possession of the premises by putting the hairdressers into possession of the same and charging each of them rent daily thereby; that the hairdressers were therefore his tenants although there was no written agreement between them. Counsel further urged the court to find that the so-called employment agreements were not genuine.

In his submissions counsel referred the court to *Stening v. Abrahams* (4); *Abraham v. MacFisheries Ltd.* (5); *Roe d. Dingley v. Sales* (6) and *Chaplin v. Smith* (7); and contended that the defendant should be ordered to give up vacant possession of the premises and to pay to the plaintiff the mesne profits claimed.

Counsel for the defendant on the other hand submitted that, even if the court should come to the conclusion that the hairdressers were permitted the use and occupation of the premises at a daily rent payable to the defendant, such hairdressers were licensees. They had neither interest nor estate in the premises because the defendant was all the time in full possession of the premises and kept the key of the said premises himself; that that being so the defendant has not committed any breach of the covenant contained in the agreement.

In support of his submission counsel cited and relied on *Hancock v. Austin* (8); *Errington v. Errington and Another* (9) and *Russell v. Beecham* (10), at p. 321.

Before dealing with the authorities to which both counsel have referred the court it is necessary to look at the facts established by the evidence.

Having given consideration to the evidence as a whole, I am satisfied and have no hesitation in accepting the evidence of the plaintiff and its witnesses. I was favourably impressed by their evidence, particularly by the evidence given by Silvester Papakokodi Okurut, Rhoda Musoke and Stephen Kayondo, who struck me as witnesses of truth. I believe their evidence and find as a fact that all the eight hairdressers (six barbers and two hairdressers) were permitted the use and occupation of the premises known as shop No. 10 South Street, Market Site, Kampala, of which the defendant is tenant.

I prefer the evidence of Rhoda Musoke, Stephen Kayondo and Lawrence Wampoma to the evidence of the defendant and find as a fact that all the hairdressers were paying rent daily for the use and occupation of the premises to the defendant.

The defendant has failed to establish to my satisfaction that the so-called employment agreements were genuine and that they were freely entered into by the signatories thereof. The said agreements are dubious. The defendant admitted freely that he himself is not literate either in English or Luganda and therefore was himself unable to read the contents of the so-called agreements.

It is the defendant's case that he knew of the contents of the employment agreements because the writer of the same had told him of the contents thereof. That of course is hearsay. The mysterious writer of these agreements was never produced at the trial; and what is worse, the defendant does not even know the name of the mysterious writer.

Being himself illiterate the defendant was not in a position to have kept or maintained the so-called "muster roll", and the labour cards. Whoever had kept these records was never produced at the trial and I

therefore attach no importance to them.

The real question for decision by the court is whether by permitting the hairdressers the use and occupation of the premises of which the defendant is



tenant, those hairdressers, who were paying rent daily for such occupation to the defendant, could be properly described as tenants. Counsel for the plaintiff has urged the court to find that they were tenants properly so-called even though there were no written agreements and the rents fixed were paid to the defendant daily, and that the court should hold that the defendant had committed a breach of the tenancy agreement.

In *Abraham v. MacFisheries Ltd.* (5) a lease of two adjoining messuages and shops contained a covenant by the lessees that they would not assign, transfer, underlet, or part with the possession of the said premises or any part thereof other than an underletting for residential purposes only without the consent of the lessor, not unreasonably withheld. The lessees agreed with a company of wine merchants to grant them an underlease of one of the messuages and shops subject to the consent of the lessor. A draft underlease was being prepared; the lessees allowed the wine merchants to occupy the premises and therein to execute repairs and to instal and carry on their business. The lessor later refused consent to the underlease when applied for. It was held that the lessees had committed a breach of the covenant not to part with the possession of any part of the premises.

In *Stening v. Abrahams* (4) it was held that a lessee's covenant not to "part with the possession of the demised premises or any part thereof" was broken only if the lessee entirely excludes himself from the legal possession of part of the premises; and that on the particular facts and documents in the particular case a seven years exclusive licence to erect an advertisement hoarding against the front wall of the lessee's house followed by its erection was not a breach of the covenant.

In *Roe d. Dingley v. Sales* (6) where a lease contained a proviso for re-entry in case the tenant should demise, lease, grant or let the demised premises, or any part or parcel thereof, or convey, etc. to any person whomsoever, for all or any part of the term, without the licence of the lessor in writing; and the defendant, without such licence, agreed with a person to enter into partnership with him, and that he should have the use of the back-chamber and some other parts of the premises exclusively and of the rest jointly with the defendant, and accordingly let him into possession of the said premises. It was held that the lessor was entitled to re-enter.

In *Chaplin v. Smith* (7) a lessee had covenanted with his lessor that he would not assign or underlet or part with possession of the demised premises or any part thereof. He assigned his business, that of a motor garage proprietor, to a company of which he was the managing director and in which he held a controlling interest. He carried on the business of the company on the premises which were stated to be its registered address and on which the name of the company was exposed. He kept the key of the premises in his possession. The company agreed to indemnify him in respect of the rates and taxes. The company appeared in the valuation lists for the parish as the occupier of the premises for the purpose of poor rate. Subsequently a second company was formed of which the lessee was the managing director and which took over the business, assets, and liabilities of the first company. In negotiating for this transfer the lessee stipulated that he should remain in possession as actual tenant of the demised premises. It was held that no interest in the demised premises had passed to the companies or either of them and that there had been no breach of the lessee's covenant not to part with possession of the premises or any part thereof.

The decision in *Chaplin v. Smith* (7) was based on the statement of the law which was affirmed by the Court of Appeal in *Peebles v. Crosthwaite* (11) to the effect that a lessee who retains the legal possession of premises does not

commit a breach of covenant against parting with possession by allowing other people to use the said premises.

This principle was brought out quite clearly in his judgment in the case by Bankes, L.J., when he said at p. 207:

“In the present case there was no agreement to sell the demised premises. In that respect it is more favourable to the tenant. And if the true facts are, as I think they are, that the appellant and the successive companies came to terms on the basis that he neither could nor would part with possession, but would at all costs remain in possession himself and allow the company’s business to be conducted on the premises while he remained in possession of them, then in my view of the authorities there was no parting with possession. The lessee of a double-fronted shop with a door in the middle and a counter on either side, who has covenanted not to part with possession of the demised premises or any part thereof, may surely agree to allow a licensee to carry on a business in one part while the lessee himself remains in possession of the whole premises and carries on his own business in the other part. In that case there is no parting with possession, and I see no distinction between that case and this.”

It is noteworthy that in the course of arguments in that case Scrutton, L.J., at p. 204 asked the question: “But was the occupation exclusive?” and continued: “Generally an occupation or use which is not exclusive is not evidence of de facto possession” (quoting Pollock and Wright on Possession, p. 35).

It seems to me that of the cases cited and relied upon by the counsel for the plaintiff only the decision in *Abraham v. MacFisheries Ltd.* (5) and *Roe d. Dingley v. Sales* (6) would appear to support the case of the plaintiff on the issue of a breach of the covenant contained in the agreement. It is also clear that the decisions in *Stening v. Abrahams* (4) and *Chaplin v. Smith* (7) are in my view more in favour of the defendant. Be that as it may it seems quite plain that the facts found in the cases other than *Chaplin v. Smith* (7) and *Roe d. Dingley v. Sales* (6) are quite different and distinguishable from the facts and circumstances of the instant case.

In *Abraham v. MacFisheries Ltd.* (5) the lessee had in fact divested itself of the possession of the said messuages by actually getting a sublease drafted and permitting the wine merchants to enter into possession of the messuage and therein to effect repairs and alterations suitable for the purpose of their business, on the assumption that the lessor would not withhold his consent. Furthermore, the key of the second messuage was handed over to the wine merchants, which is a strong evidence that the lessee had parted with the possession of that part of the premises. On the evidence in that case it was found by the court that the wine merchants refused to give up possession when demanded and had to be ejected therefrom by force.

In *Roe d. Dingley v. Sales* (6) the lessee concerned had actually parted with a part of the premises and the prospective tenant had exclusive use of that part of the premises.

In view of these facts and circumstances, I am not satisfied that these authorities are applicable to the case of the plaintiff under consideration. And, as already pointed out, rather than support the case of the plaintiff *Chaplin v. Smith* (7) in my view fully supports the case of the defendant.

On the facts of the instant case, I am rather inclined to the view that the hairdressers were mere licensees. They were not tenants in the proper legal sense of the term. They were not in exclusive possession of the premises and I so hold. A point of great importance which supports the case of the defendant that he never at any time parted with the possession of the premises is the fact

that he was always in charge of the key. It was his practice always to open the premises in the morning and to admit the hairdressers and at the close of business in the evening after collecting his own dues to lock up the premises and retain the key with him.

It is clear from the evidence that the hairdressers could only make use and occupy the premises with the leave and licence of the defendant, who could turn them out at any time. By the use and occupation of the premises the hairdressers did not in any way acquire any estate or interest in the premises.

I am not however satisfied that the facts and circumstances present in *Hancock v. Austin* (8), relied upon by counsel for the defendant, is on all fours with the facts present in the instant case.

I think that the case of *Jackson v. Simons* (12) does support the defendant. In that case the defendant was a lessee of a ground floor shop under a lease granted by the plaintiff. The lease contained a covenant by the defendant “not to assign or underlet, or part with the demised premises or any part thereof, or part with or share the possession or occupation thereof or of any part thereof with any other person”. The lease also contained the usual power of re-entry. The defendant, without the plaintiff’s consent or knowledge, agreed, for the sum of £7 per week, to allow the proprietor of a night club carried on in a basement beneath the shop to use the front part of the shop between the hours of 10.30 p.m. and 2 a.m. for the sale of tickets of admission to the club. The part so used was the front of the shop, entered through the front door, and was partitioned off from the centre and rest of the shop by a movable screen erected every evening at the close of the shop hours and removed the following morning when the shop reopened. The screen when fixed was secured in its position by a padlock, the key of which was retained by the defendant. This arrangement continued from July, 1920, until March, 1922, when the plaintiff, without serving any preliminary notice under s. 14 (1) of the Conveyancing Act, 1881, commenced an action to recover possession of the premises for breach of the covenant. It was held that the arrangement conferred no estate or interest in the demised premises but was a mere privilege or licence to use a portion thereof, the defendant retaining the legal possession of the whole, and did not therefore constitute a breach of the covenant not to assign, underlet or part with the demised premises or any part thereof.

In *Russell v. Beecham and Another* (10) by a covenant in a lease for thirty years, the lessee undertook that he would not “assign or part with this lease or the premises hereby demised or any part thereof” without the licence and consent in writing of the lessor or his trustees.

The lease contained a proviso for re-entry for breach of covenant by the lessee. In November, 1921, the lessee, without the consent of the original lessor or his trustees, sublet part of the demised premises for a term of three years without giving the lessee notice under s. 14 (1) of the Conveyancing and Law of Property Act, 1881.

The trustees of the original lessor brought an action against the lessee to recover the demised premises on the ground that the lessee had committed a breach of the covenant not to part with the premises or any part thereof.

It was held inter alia that in the construction of the covenant the words “part with” mean “part with entirely or completely” and do not apply to parting with possession of only a part of the lessee’s interest in the premises which was what the lessee had done, and where, as here, a covenant which entailed a forfeiture was in ambiguous language it would be construed strictly.

On the principle established in *Russell v. Beecham* (10) as regards the strict interpretation of the covenants in a lease which entails a forfeiture, it is to be noted that the covenant contained in cl. 2 (14) of

the agreement is not in the

usual terms. It is practically prohibitive in form. There is no provision that the consent of the lessor may be given, if sought by the lessee and such consent not to be unreasonably withheld to either sublet or assign the premises to a third party. Therefore it must be very strictly construed as against the plaintiff, and the background that to the knowledge of the plaintiff the defendant was not a hairdresser or barber by trade at the time when the premises were demised to him.

On the principles enunciated above and on my findings that the defendant did not at all material times in fact and in law divest himself of the possession of the premises or any part thereof, I have come to the conclusion that the order for vacant possession must be refused. There will be therefore judgment for the defendant in respect of the recovery of vacant possession with costs.

On the issue of mesne profits, on the presumption that the mesne profits claimed are the amount of rent in arrears and which had been tendered but refused according to the evidence, and since neither counsel had addressed me on the point in regard to the quantum and the defendant not having disputed the amount, I will enter judgment for the plaintiff for mesne profits at the rate of Shs. 266/- per mensem as claimed on the plaint form, January 1, 1966, until judgment. There will be no order as to costs against the defendant in view of the fact that the rent had been duly tendered but rejected by the plaintiff.

Order for vacant possession refused. Judgment for the plaintiff for mesne profits.

For the plaintiff:

Haque and Gopal, Kampala

Z. Haque

For the defendant:

J. S. Shah, Kampala

Republic v Anael
[1967] 1 EA 378 (HCT)

Division:	High Court of Tanzania at Arusha
Date of judgment:	17 December 1966
Case Number:	100/1966
Before:	Bannerman J
Sourced by:	LawAfrica

[1] *Criminal law – Compensation – Whether compensation should be awarded to employer of person injured by offence – Criminal Procedure Code, s. 176 (1) (T.).*

[2] *Criminal law – Expenses of prosecution – Fare of prosecution witness – Whether accused should be ordered to pay – Criminal Procedure Code, s. 173 and s. 176 (1) (T.).*

[3] Criminal law – Sentence – Suspension from driving – First offender – Whether suspension should be ordered – Traffic Ordinance, s. 24 and s. 47 (3) (T.).

[4] Criminal law – Sentence – Careless driving and failing to stop – Maximum sentences imposed to run consecutively – Whether sentence correct – Traffic Ordinance, s. 47 (1) (a), s. 61 and s. 70 (T.).

Editor's Summary

The accused was convicted of careless driving and of failing to stop after an accident; and was sentenced to three months' imprisonment on each count to run consecutively. He was also suspended from driving for a period of two years. He was further ordered to reimburse the government a sum of money

as compensation, part of which was the fare of a prosecution witness and the balance compensation for the loss of the services of a police constable injured in the accident giving rise to the charge. On revision:

Held –

- (i) the offences were so closely linked together that the order for the sentences to run consecutively and not concurrently made those sentences unduly harsh and oppressive, and they should run concurrently;
- (ii) the order for suspension from driving was illegal and must be set aside;
- (iii) there were no exceptional or special circumstances shown justifying ordering the accused to pay any part of the expenses of the prosecution;
- (iv) compensation under s. 176 (1) of the Criminal Procedure Code should be awarded to persons who have directly suffered material loss or personal injury in consequence of the offence committed and not to third parties; and the government is in no better position than any private person in this respect.

Sentences ordered to run concurrently. Order for suspension from driving and order for payment of compensation and expenses set aside.

Cases referred to in judgment:

- (1) *Municipal Council of Dar-es-Salaam v. Almeida*, [1957] E.A. 244.
- (2) *Hunter and Grieg v. The Revenue Authority, Kampala* (1938), 5 E.A.C.A. 65.
- (3) *Johnson v. R.*, [1904] A.C. 817.
- (4) *Lejzor Teper v. R.*, [1952] A.C. 480.

Judgment

Bannerman J: The accused was convicted of (1) careless driving contrary to ss. 47 (1) (a) and 70 of the Traffic Ordinance and (2) failing to stop after an accident contrary to ss. 61 and 70 of the Traffic Ordinance. He was sentenced on each count to three months' imprisonment to run consecutively. In addition, he was suspended from driving for a period of two years and was further ordered "to reimburse Government Shs. 276/80 by way of compensation and expenses or distress in lieu". The said amount of Shs. 276/80 was made up as follows:

	"1.	Fare of witness (P.W.1)
Shs. 156/80.		
	2.	
Compensation to the Tanzanian Government for the loss of Mr. Severini's services whilst in hospital. Twelve days at Shs. 10/- per day		
<u>Shs. 120/00.</u>		
	Total:	<u>Shs. 276/80."</u>

The prosecution case, as accepted by the learned magistrate, was that on December 26, 1965, the accused drove a VW Kombi bus fast on the wrong side of a road and knocked down a man who was then walking

in the opposite direction. He failed to stop and was not traced till July, 1966, when he was arrested and charged. The man, who happened to be a police constable, was off duty and in plain clothes and he was walking in the direction of the “police lines” off the left hand side of the road with a friend. After being knocked down he sustained bruises on the right forearm and the right side of the chest and was taken to hospital where he received treatment.

Although the accused was a first offender, the learned magistrate decided to impose the maximum penalty of three months’ imprisonment on each count, giving as a reason that “the court is aware that the number of accidents of this type is greatly on the increase throughout Tanzania. These accidents brought about by negligence and careless or drunken driving very often result in the deaths of innocent members of the public. This type of crime must be reduced”.

I have no quarrel with the views expressed by the learned magistrate. The sentences of imprisonment without the option of a fine were in themselves quite severe, but the order that they should run consecutively and not concurrently, when the offences were so closely linked together, made them unduly harsh and excessive in my opinion. The accused person was committed to prison on October 7, 1966, and has already served a major part of his sentence. I therefore order that the two sentences shall run concurrently and not consecutively.

As regards the order suspending the accused from driving for a period of two years, I am satisfied that this was against the express provision of s. 47 (3) of the Traffic Ordinance, and the learned magistrate had no power to disqualify the accused from holding or obtaining a driving licence either under that section or under s. 24 of the Traffic Ordinance, since the accused admittedly had no previous convictions of any sort. The said order was illegal and is hereby set aside.

I do not know under what law the learned magistrate sought to order the accused to reimburse the government the sum of Shs. 276/80 by way of compensation and expenses. The expenses incurred by a witness may be regarded as costs of the hearing and may be ordered to be paid by the convicted person under s. 173 of the Criminal Procedure Code. The principles governing the award of costs against a convicted person were discussed in the case of *Municipal Council of Dar-es-Salaam v. Almeida* (1). Lowe, J., in the course of his judgment, said (at p. 246, H):

“Counsel for the applicant has asked the court for guidance as to when costs should be allowed in such cases and how they should be calculated. He referred to the common law principle that costs should not normally be given to or against the Crown except in exceptional circumstances. That principle is, of course, subject to the provisions of s. 173 of the Criminal Procedure Code and sub-s. (1) of that section is as follows:

‘It shall be lawful for a judge of the High Court or any magistrate to order any person convicted before him of an offence to pay to the public or private prosecutor, as the case may be, such reasonable costs as to such judge or magistrate may seem fit, in addition to any other penalty imposed: provided that such costs shall not exceed Shs. 1,000/- in the case of the High Court or Shs. 500/- in the case of a subordinate court.’

The intention of the legislature therefore is clearly expressed but it has been an almost invariable rule of practice in this territory not to allow costs to or against the Crown except in exceptional circumstances. When any prosecution is brought whether by a public or a private prosecutor the proceedings are in fact brought on behalf of and in the name of the Crown and as the case is then in effect prosecuted at the instance and on behalf of the Crown the common law principle should in practice be applied to s. 173 of the Criminal Procedure Code and unless exceptional circumstances can be shown no costs should be allowed.

In *Hunter and Greig v. The Revenue Authority, Kampala* (2), it was held that in an exceptional case where the public as well as the individual concerned had benefited by a decision of the Court of Appeal on a somewhat confused provision of law, in legislation which intimately concerns the Crown and the subject, the subject should not be put to the hardship of not being allowed costs if he succeeded in appeal and the case of *Johnson v. R.* (3) was cited with approval. In that case it was decided that the Privy Council would adhere to the practice of the House of Lords and that the rule as to costs in cases between the Crown and a subject would be that the Crown neither pays nor receives costs unless the case is governed by some

legal statute or there are exceptional cases justifying a departure from the ordinary rule. The principle enunciated in *Johnson's* case (3) was cited with approval in the case of *Lejzor Teper v. R.* (4).”

In the instant case, there were no exceptional or special circumstances given by the learned magistrate for ordering the accused to pay costs or expenses of the prosecution, and I can find nothing in the whole of the proceedings to show why the fare of a police officer called as a witness for the prosecution (viz. Shs. 156/80) should be ordered to be paid by the accused person. As regards the amount of Shs. 120/- ordered to be paid to the Tanzanian Government for the loss of the services of the police witness, Mr. Severini, while he was in hospital after having been injured by the accused's vehicle, I do not think the power of the court to award compensation, under s. 176 (1) of the Criminal Procedure Code, can be stretched so far as to include compensation to an employer of a person injured for loss of services. The person who sustained the injury may be compensated under the section for the “material loss or personal injury” suffered in consequence of the careless driving of the accused, and if he had lost his salary or wages while in hospital the court might well have considered awarding him compensation for such loss as indeed for the personal injury suffered and for his medical expenses. The compensation in this case was clearly not intended for the injured person but for the employer who happened to be the Tanzanian Government.

In my judgment, compensation under the said s. 176 (1) should be awarded to persons who have directly suffered material loss or personal injury in consequence of the offence committed and not third parties against whom the accused may have a defence in a civil suit for damages. The Tanzanian Government is in no better or more favourable position than any private person in this respect. The order of payment of compensation and expenses is hereby set aside.

Order accordingly.

Neither party appeared or was represented.

Achelis (Kenya) Ltd v Nazarali & Sons Ltd and another
[1967] 1 EA 382 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	3 May 1967
Case Number:	322/1967
Before:	Trevelyan J
Sourced by:	LawAfrica

[1] *Transfer of business – Receiver and manager – Business of company transferred by a receiver and manager under a debenture – Whether within Transfer of Business Act, s. 3 (K.).*

[2] *Debenture – Capacity in which receiver and manager acts when selling assets of a debtor company – Whether sale within Transfer of Business Act, s. 3 (K.).*

Editor's Summary

A receiver and manager appointed by a bank under a debenture sold the assets of a business carried on by the first defendant (hereinafter called "the debtor") to the second defendant (hereinafter called "the transferee"). Prior to the sale of the assets but after the issue and registration of the debenture the plaintiff company supplied goods to the debtor. The plaintiff claimed the price of the goods from the debtor and from the transferee. Judgment was entered against the debtor in default of appearance. The plaintiff's claim against the transferee was based upon the provisions of the Transfer of Business Act, s. 3 (1) of which reads:

"whenever any business or any part of any business is transferred . . . the transferee shall, notwithstanding any agreement to the contrary, become liable for all the liabilities incurred in the business by the transferor, unless due notice in accordance with this section shall have been given and shall have become complete at the date of the transfer."

Under s. 4 of the Act certain particulars have to be contained in the notice and the notice becomes complete upon the expiration of two months from the date of publication in the Gazette and of publication in certain prescribed newspapers. No notice under s. 4 of the said Act was given. The transferee denied liability on three main grounds: (a) the intention of the Transfer of Business Act was to protect commercial creditors but by reason of the debenture the plaintiff was not protected; (b) the registration of the debenture was sufficient notice to the plaintiff and thus no notice under the Act was required; (c) the sale and transfer of the assets by the receiver and manager was for the benefit of the bank and not for the benefit of the debtor and in effecting the transfer he acted as the bank's agent and not as the agent of the debtor.

Held –

- (i) the transferee was liable because in accordance with the plain and unambiguous meaning of the provisions of s. 3 of the Act a business or part of a business had been transferred and the necessary notice had not been given. Registration of the debenture could not constitute the necessary notice;
- (ii) it was irrelevant in what capacity the receiver and manager transferred the business and for whose benefit. Agency would be relevant only if the validity of the transfer was in issue;
- (iii) in any event the receiver and manager when transferring the assets of the debtor acted as the agent for the debtor.

Judgment for the plaintiff against the transferee with costs.

Cases referred to in judgment:

- (1) *Colonial Printing Works v. Main* (1955), 22 E.A.C.A. 266.
- (2) *Oriental General Stores Ltd. v. Patel and Others*, [1957] E.A. 77.
- (3) *Patel v. Patel*, [1959] E.A. 642.
- (4) *Gosling v. Gaskell*, [1897] A.C. 575.

- (5) *Owen v. Cronk*, [1895] 1 Q.B. 265.
- (6) *Re Vimbos*, [1900] 1 Ch. 470.
- (7) *Re B. Johnson & Co. (Builders) Ltd.*, [1955] Ch. 634.
- (8) *R. v. Board of Trade*, [1964] 2 All E.R. 561.

Judgment

Trevelyan J: The first defendant company (which I will call “the debtor”) borrowed money from a bank and by way of security issued a debenture in its favour. Between eighteen and twenty-one months later the plaintiff company (which I will call “the creditor”) supplied goods to the debtor. Shortly thereafter the bank, acting under powers conferred by the debenture, appointed a receiver and manager who sold the debtor’s assets to the second defendant company (which I will call “the transferee”). Payment for the goods not having been made, the creditor sued the debtor and the transferee for the price thereof, basing its claim against the former upon the contract for the sale and purchase of the goods, and its claim against the latter upon the provisions of the Transfer of Business Act (Cap. 500). It was open to the creditor to make such claims but it cannot, if successful, recover, in all, more than the price of the goods, and costs: *Colonial Printing Works v. Main* (1). Judgment has been entered against the debtor.

Section 3 (1) of the Act provides that:

“Whenever any business or any part of any business is transferred . . . the transferee shall, notwithstanding any agreement to the contrary, become liable for all the liabilities incurred in the business by the transferor, unless due notice in accordance with this section shall have been given and shall have become complete at the date of the transfer.”

The notice required must contain the particulars specified in s. 4 of the Act, which also provides for the manner of its giving.

It is not, I think, really challenged that there was a transfer of the debtor’s business to the transferee within the meaning of s. 3 aforesaid. In any event such transfer has been proved in the circumstances of the case: *Oriental General Stores Ltd. v. Patel and Others* (2). It is conceded that all the debtor’s assets were sold to the transferee. It is also conceded that no notice under the Act has been given.

The debenture is in the usual form. By its seventh paragraph:

“At any time after the principal moneys hereby secured become payable . . . the bank may appoint . . . a receiver and manager of the property hereby charged . . .”

and by its eighth paragraph:

“A receiver and manager so appointed shall be the agent of the company and the company alone shall be liable for his acts and defaults and he shall have authority and be entitled to exercise the powers hereinafter set forth . . . (b) to sell . . . any property hereby charged . . . carry any such sale into effect . . . in the name and on behalf of the company or otherwise . . .”

The creditor says that its claim against the transferee cannot effectively be challenged. But the transferee says that it is not liable to pay for three reasons. First that if one looks at the purport of the Act it will be seen that it is for the protection of commercial creditors and here, by reason of the debenture, the creditor was beyond protection; secondly that no notice under the Act was required because the creditor was already put on guard by the registration, statutorily required, of the debenture; and thirdly that the

transfer was not made by the receiver and manager for the benefit of the debtor but for the

benefit of the bank as debenture holder so that, in effecting the transfer, he was the bank's agent and not the debtor's.

With great respect I think the case can be decided on a narrow plane. Section 3 (1) of the Act says no more than this that if a business or any part of a business is transferred, the transferee is liable as therein specified unless the necessary notice has been given and is complete. In the instant case there was a valid transfer of the business to the transferee and no notice under the Act has been given. To my mind that disposes of the case. But the matter of agency was canvassed and I shall be dealing with it in a moment. I will now content myself with saying that it is my view that what must be ascertained is simply whether "a business is transferred", so that it matters not if it is transferred by the owner, his agent, or under a power of sale which someone else has enabling the transfer to be made. Agency is only for consideration in regard to the issue of the validity of the transfer. It can make no difference to a commercial creditor whether the transfer benefits the transferor of the business or its debenture holder. But as, when I mentioned the point, learned leading counsel thought that this might be an oversimplification and I arrive at the same result upon the arguments proffered, I need not rely upon this.

The fundamental rule for the interpretation of statutes is that legislation is to be expounded "according to the intent of them that made it". But if the words used are in themselves precise and unambiguous no more is needed than to expound those words in their natural and ordinary meaning for the words themselves best declare the legislature's intention. It must be assumed that the words mean what they say and one cannot depart therefrom if the words admit of no other meaning. Indeed where the language is plain and admits of but one meaning the task of interpretation can hardly be said to arise. *Absoluta sententia expositore non indiget*. In other words the rule of construction is "to intend the legislature to have meant what they have actually expressed". It matters not what the consequences may be. When once the meaning is plain, it is not the province of the court to scan its wisdom or policy. Thus, in summary form, the views expressed in *Maxwell on the Interpretation of Statutes* (11th Edn.) with which I am, with respect, in agreement. There is no ambiguity in s. 3 of the Act. Learned leading counsel fairly conceded that "if one takes the plain words of the section they mean what they say". But, in any event, the Act is referable to the circumstances of the case. At the instigation of the bank the transferee took over the assets of the debtor and its business. All the directors of the debtor became directors of the transferee. The latter continued to trade at the same premises, running what, from the general public's point of view, was the same business under a new name. Whatever rights the bank has, whatever other action it may have, is not what occurred simply this, that the assets of the debtor were removed out of the reach of commercial creditors by the transfer of the debtor's business to the transferee? Is not that exactly the sort of transaction at which the Act is aimed? Banks as debenture holders have, and no doubt need, wide powers to recover what they have loaned; but the sort of transaction that we have in this case can act very harshly against commercial creditors, for which reason alone the Act is a very necessary legislative safeguard to them. There is support for this in the headnote of the *Oriental General Stores Ltd.* case (2) which says:

"The object of the Ordinance is to protect commercial creditors against removal of assets beyond their reach when such removal is effected by transferring to a third party the business operated by the debtor."

Counsel suggested that "by the debtor" is to be read with "removal of assets", but if that was intended the headnote would have read "when such removal is effected by the debtor transferring the business operated by him to a third party". I believe that "by the debtor" refers to "the business carried on". In

Patel v. Patel (3) ([1959] E.A. at p. 647), the court concurred with the view expressed by the trial judge that:

“Its only effect is to provide that the transferee as well as the transferor shall be responsible for the liabilities of the business which has been transferred.”

The suggestion that the statutory notice is not needed because the debenture must be registered is untenable in the light of the clear wording of ss. 3 and 4 of the Act.

Learned senior counsel argued that the receiver and manager appointed under the debenture was agent of the debenture holder. I was referred to various English authorities. In *Gosling v. Gaskell* (4) Lord Davey says ([1897] A.C. at p. 595):

“In my opinion there can be no doubt that at the date of his appointment the receiver, though remunerated by the mortgagees became, both in fact and in law, the agent of the mortgagor, i.e. the company. That he was so by the express terms of the power under which he was appointed is undisputed. The purpose for which he was appointed was in order to make provision for payment of the company’s mortgage debts, which was, in my opinion, a purpose of the Company.”

And in *Owen v. Cronk* (5) Rigby, L.J., says ([1895] 1 Q.B. at p. 275):

“The deed provides that the receiver, though appointed by the mortgagees shall be deemed to be the agent of the mortgagors. It is said that this applies only as between the mortgagors and the mortgagees; but I do not think it can be so limited.”

Re Vimbos (6) is to be distinguished from these two cases, for the deed did not provide that the receiver should be the agent of the company and the arrangements he was to make were for the benefit of the debenture holders. *Re Johnson* (7) does not assist the transferee. Certainly, as here, the receiver was to be the agent of the company with power to sell, but the issue in the case was whether, as such receiver, he was an “officer” or “manager” of the company for the purpose of determining whether his conduct could be the subject of examination under s. 333 (1), the misfeasance section, of the Companies Act, 1948, whilst, in the instant case, we are concerned to know whether, as receiver and manager of the property of the debtor, he could, by selling that property, be said to have transferred the latter’s business to the transferee. *R. v. Board of Trade* (8) shows the limit of the decision in the *Johnson* case (7); e.g. Winn, J. ([1964] 2 All E.R. at p. 571) says:

“Whilst the point does not arise on this motion, I feel that it may be convenient to express a view, albeit of a tentative character since the matter has not been explored before this court, that the receiver and manager appointed in the present case would be an agent of the applicant company within the meaning of s. 167 (1) of the Act, though not a manager or officer of the company within the meaning of s. 333 (1). Vide *Re B. Johnson & Co. (Builders) Ltd.* (7).”

In so far as the issue of agency falls to be decided in this case, there can be no doubt that when the receiver and manager of the debtor’s property sold the assets to the transferee, he did so as agent of the debtor and such sale is a transfer within the meaning of the Act. Whether for some purposes and in some way he was also agent for the bank concerns us not. The eighth paragraph of the debenture is quite clear.

I give judgment for the creditor as prayed.

Judgment for the plaintiff.

For the plaintiff:

Shah and Shah, Nairobi

Ramnik Shah

For the second defendant:

Hamilton Harrison and Mathews, Nairobi

Clive Salter, Q.C. and J. D. M. Silvester

Onyango v Uganda
[1967] 1 EA 386 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	29 May 1967
Case Number:	289/1967
Before:	Sir Udo Udoma CJ
Sourced by:	LawAfrica

[1]*Criminal law – Possession of property reasonably suspected to have been stolen – Failure to produce receipt not necessarily a good ground for suspicion – Penal Code, s. 299 (U.).*

[2]*Criminal Law – Practice – Previous conviction – Cross-examination by prosecution on previous conviction – Wrongful admission of this evidence by magistrate – Evidence Act, s. 52 (U.).*

[3]*Criminal law – Practice – Sentence – Appellant sentenced to fifteen months' imprisonment and twelve strokes – Offence a misdemeanour – Maximum sentence two years' imprisonment – Penal Code, s. 24 (U.).*

Editor's Summary

The appellant was convicted of being found in possession of a radio which was reasonably suspected of having been stolen and he was sentenced to fifteen months' imprisonment and twelve strokes. The case against the appellant was that he offered the radio for sale to one Fabio Ib watt for Shs. 450/-. The appellant told Ib watt that he had bought the radio and had a receipt for it and the appellant's companion confirmed that the radio belonged to the appellant. Ib watt then left the appellant and reported the offer of sale to Det. Const. Obuku, on the ground that he had come to the conclusion that the radio was stolen. Obuku went back with Ib watt to the appellant and asked that the appellant produce the receipt given to him when he bought the radio. The appellant stated that the receipt was at his home and Obuku went with the appellant to his house to search for the receipt. The appellant was unable to find the receipt and Obuku then arrested him on the ground that he suspected that the appellant had stolen the radio. During the trial, the appellant was cross-examined as to a previous conviction and the magistrate relied on this evidence as showing that the appellant was an unreliable and worthless witness.

Held –

- (i) a mere failure to produce a receipt could not in itself afford a reasonable ground for suspicion that the radio was stolen;

- (ii) the explanation offered by the appellant that he had bought the radio in Kisumu was sufficiently reasonable to have warranted its acceptance as satisfactory;
- (iii) the magistrate wrongfully admitted and relied upon the evidence of the appellant's previous conviction;
- (iv) the admission of this evidence was sufficiently prejudicial to occasion a miscarriage of justice;
- (v) the sentence of imprisonment and corporal punishment was incompetent as the maximum penalty for the offence under s. 24 of the Penal Code is two years' imprisonment.

Appeal allowed. Conviction and sentence quashed.

No cases referred to in judgment.

Judgment

Sir Udo Udoma CJ: The appellant was convicted of being in possession of property suspected of being stolen contrary to s. 299 of

the Penal Code. He was sentenced by a magistrate Grade I, Magistrate's Court, Mengo, to fifteen months' imprisonment with twelve strokes of the cane. The appeal is against conviction and sentence.

The particulars of the charge as laid were:

"That you John Onyango on the 30th day of December, 1966 at Mengo Kisenyi in the Mpigi Division, when stopped and searched by a police officer, namely No. 137 Detective Constable Obuku, acting in exercise of the powers conferred by s. 20 of the Criminal Procedure Code, was found in possession of one Philips radio No. 9568 valued at Shs. 280/- which may reasonably be suspected to have been stolen or unlawfully obtained."

The case of the prosecution in support of the charge was that on December 30, 1966 at about 2.30 p.m. Fabio Ib watt was at Mengo Kisenyi near the market when the appellant offered him a Philips radio transistor to buy. Fabio Ib watt then asked the appellant the price at which he was prepared to sell the radio. The appellant replied Shs. 450/-. Thereupon Fabio Ib watt enquired from the appellant if he had with him the receipt issued to him when he bought the radio. The appellant answered in the affirmative, and further told him that if he, Fabio Ib watt, bought the radio and paid for it, he would issue him with a receipt. Fabio Ib watt immediately left the appellant. He told him to wait for him there and that he was going for the money to pay for the radio.

Fabio Ib watt, contrary to what he had told the appellant, reported the matter to Det. Const. Samweri Obuku that there was somebody who was trying to sell him stolen property. He said he had come to the conclusion that the radio was stolen because the appellant was not able to produce to him a receipt to prove that he had, in fact, bought the radio.

Detective Constable Samweri Obuku accompanied Fabio Ib watt back to the appellant. On arrival Det. Const. Samweri Obuku interrogated the appellant. He asked him whether he was the owner of the radio. The appellant answered in the affirmative. Detective Constable Samweri Obuku then asked the appellant to produce for his inspection the receipt given to him when he bought the radio.

The appellant informed Det. Const. Samweri Obuku that the receipt was at his home. Detective Constable Samweri Obuku then insisted on going with the appellant, accompanied by two other persons, to the house of the appellant for the purpose of seeing the receipt which the appellant said he was given when he bought the radio.

At the appellant's house Det. Const. Samweri Obuku with his two companions, remained outside while the appellant entered the house, but came back to report that he was unable to trace the receipt and that it was lost. Detective Constable Samweri Obuku, according to him, immediately suspected that the appellant had stolen the radio. He there and then arrested the appellant and informed him that he had stolen the radio since he could not produce a receipt issued to him when he bought it.

Detective Constable Samweri Obuku brought the appellant to the police station and there charged him with being in possession of property suspected to have been stolen. He seized the radio from him and the same was tendered in court; and it is marked Exhibit A in the proceedings.

Under cross-examination Det. Const. Samweri Obuku said that he had arrested the appellant because he was unable to produce a receipt in support of his claim that the radio was his; and that the appellant's failure to have produced such a receipt when demanded by him made him suspicious that the appellant had stolen the radio.

When Fabio Ib watt was also cross-examined he admitted that, when the appellant offered the radio to him to buy, there was another person with the appellant, who confirmed that the radio was the property

of the appellant.

In his defence the appellant swore that the radio was his own and that he had bought the same at Kisumu in Kenya in 1962.

The appellant was then cross-examined as to his previous conviction. In his answer the appellant told the court that the only conviction against him was in respect of the offence of wandering for which he was sentenced to eighteen months' imprisonment.

In his judgment the trial magistrate said that Det. Const. Samweri Obuku and Fabio Ib watt were truthful witnesses and that he accepted their evidence.

The learned magistrate then said:

"Although there is a slight discrepancy in the evidence of Obuku and Ib watt as regards meeting Obuku is concerned, Obuku states that he met two people who informed him that the accused wanted to sell them a radio whilst Ib watt states that he went and informed Obuku that the accused wanted to sell him a radio. This discrepancy in my opinion is very minor. As considered the evidence as a whole I have come to the conclusion that it was Ib watt who informed Obuku that the accused wanted to sell him a radio."

It is not clear why the trial magistrate preferred the evidence of Fabio Ib watt to the evidence of Det. Const. Samweri Obuku on this point. No reason has been advanced for the preference; which suggests by implication that Det. Const. Samweri Obuku lied on that point. And yet the magistrate found him a truthful witness.

The trial magistrate then continued:

"Although on that day he (meaning the appellant) was with his friend he did not call him to support his story that he was not selling the radio to Ib watt that day. Also by his own admission of being convicted for an offence in Kampala in 1961 and sentenced to eighteen months' imprisonment. He has proved himself a completely unreliable and worthless witness. I reject his defence as being totally untrue."

The above quoted portion of the magistrate's judgment, as poorly worded as it is, since it contains incomplete sentences, is a serious misdirection in law. In the first place, although it is correct to say that in criminal proceedings a person charged giving evidence may be asked any question in cross-examination tending to incriminate him, such cross-examination must be limited to the offence with which he is charged. In my view the evidence concerning the previous conviction of the appellant was completely irrelevant at that stage of the proceedings.

The evidence of the previous conviction of the appellant for the offence of wandering was not admissible in the instant case. It should not have been admitted by the trial magistrate as the evidence was highly prejudicial to the appellant and certainly influenced the trial magistrate in his decision in this case. It is an elementary rule of evidence that in a criminal trial an accused person must be presumed innocent until the contrary is proved and that the evidence of his previous bad character is irrelevant.

There is a provision in our rules of evidence on this point and it is to be found in s. 52 of the Evidence Act, which states:

- "52: In criminal proceedings, subject to the provisions of sub-s. 2 of s. 214 and s. 290 of the Criminal Procedure Code, the fact that an accused person has a bad character is irrelevant unless:
- (a) evidence has been given or a question or questions asked by him or his advocate for the purpose of showing that he has a good character;
 - (b) to prove that he has committed or been convicted of another offence is admissible evidence to show that he is guilty of the offence with which he is charged;

- (c) the nature and conduct of the defence is such as to involve imputations on the character of the complainant or the witnesses for the prosecution; or
- (d) he has given evidence against any other person charged with the same offence as that with which he is charged.”

There is nothing in the proceedings of the trial of the appellant to have justified the admission by the learned trial magistrate of the evidence of his previous conviction for wandering in the proceedings of this case. The appellant did not cross-examine the witnesses for the prosecution for the purpose of establishing his own good character; nor was the conduct of the appellant’s defence such as to involve imputations on the character of the complainant or the witnesses for the prosecution; nor was the evidence concerning the previous conviction of the appellant’s concerned in any way with the charge against him, for which he was being tried.

The trial magistrate having admitted and relied upon legally inadmissible evidence against the appellant it is impossible to hold that the admission of such prejudicial evidence was not such as to have occasioned a miscarriage of justice.

On the evidence given by the witnesses for the prosecution, it is plain that no case had been made out against the appellant to answer, and he should not have been called upon for any explanation. A mere failure to produce a receipt for a radio which, on the uncontradicted evidence of the appellant, he had bought at Kisumu in Kenya in 1962, cannot in itself afford a reasonable ground for suspicion that the radio was stolen. And, having been called upon by the learned magistrate for his defence, the explanation given by the appellant as to how he had come by the radio was sufficiently reasonable to have warranted its acceptance by the trial magistrate as satisfactory, particularly as the appellant was never cross-examined on the issue of the receipt during his trial.

On the evidence there was nothing shady about the offer of the radio to Fabio Ib watt to buy. It was an open transaction. When the police Det. Const. Samweri Obuku appeared, the appellant did not even attempt to run away, but willingly took him to his house to look for the receipt. Surely that could not be conduct inconsistent with honesty.

In the particulars of the charge, it is alleged that the appellant was stopped by a police officer in the exercise of the powers conferred by s. 20 of the Criminal Procedure Code, the relevant provisions of which are in the following terms:

“20(1) Any police officer may stop, search or detain any vessel, boat, or craft or vehicle in or upon which there shall be reason to suspect that anything stolen or unlawfully obtained may be found and also a person who may be reasonably suspected of having in his possession or conveying in any manner anything stolen or unlawfully obtained, and may seize any such thing.”

On the evidence of the prosecution in this case it would, in my view, be unreasonable to hold that the action of Det. Const. Samweri Obuku in arresting the appellant was as a result of the exercise by him of the powers conferred on the police by the provisions of s. 20 of the Criminal Procedure Code as set out above.

The radio which was seized from the appellant by Det. Const. Samweri Obuku was not the result of stopping, searching or detaining the appellant in consequence of any suspicion entertained by Det. Const. Samweri Obuku himself. The initiative did not come from him. He acted on the report made to him by Fabio Ib watt.

It was wrong therefore in law to have based the charge on the provisions of s. 20 of the Criminal

Procedure Code.

Before I am done with this case, I would like to observe that the offence prescribed under s. 299 of the Penal Code is classified as a misdemeanour. Under s. 24 of the Penal Code the maximum penalty for a misdemeanour is two years' imprisonment. The trial magistrate in this case, having convicted the appellant, sentenced him to fifteen months' imprisonment coupled with twelve strokes of the cane. There is no authority for the corporal punishment imposed on the appellant, who was described in the charge as being twenty-one years of age, by the magistrate. The sentence is illegal and must be set aside.

For the reasons given in this judgment this appeal is allowed. The conviction and sentence imposed upon the appellant are quashed. If the appellant is serving his term of imprisonment in the prison he must be forthwith discharged and his radio returned to him. Order accordingly.

Appeal allowed.

The appellant did not appear and was not represented.

For the respondent:

Attorney General, Uganda

A. M. Khan (State Attorney, Uganda)

Uganda v Mulala
[1967] 1 EA 390 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	18 May 1967
Case Number:	200/1967
Before:	Sir Udo Udoma CJ
Sourced by:	LawAfrica

[1] *Criminal law – Magistrates' powers – Sentence – Magistrate Grade III transferring case to magistrate Grade II for sentence – Only Chief Magistrate competent to impose increased sentence – Magistrates' Courts (Amendment) Act 1966, s. 10 (4) (U.).*

[2] *Jurisdiction – Magistrates Grade II and Grade III – Increase in sentence for assault causing bodily harm – Magistrates' Courts (Amendment) Act 1966, s. 10 (4) (U.).*

Editor's Summary

The accused was charged with assault causing bodily harm contrary to s. 228 of the Penal Code and convicted by a magistrate Grade III. The trial magistrate considered that as the complainant was maimed as a result of the assault he was not competent to impose a sufficiently severe sentence and he forwarded the case to a magistrate Grade II for sentence.

Held –

- (i) the conviction was competent as the offence under s. 228 of the Penal Code was not included in the Fourth Schedule contained in the Magistrates' Courts (Amendment) Act 1966;
- (ii) the case was wrongly committed to a magistrate Grade II for sentence and should have been committed to the Chief Magistrate under s. 10 (4) of the Magistrates' Courts (Amendment) Act 1966.

Sentence set aside. Case remitted to Chief Magistrate.

Judgment

Sir Udo Udoma CJ: This is an application by the Chief Magistrate, Ankole Magisterial area, for an order of this Court to set aside the conviction and sentence imposed upon the accused. The grounds for this application are that:

- (1) The magistrate Grade III has no jurisdiction to try a case of assault causing actual bodily harm contrary to s. 228 of the Penal Code; and
- (2) There is no provision for transferring a case by a magistrate Grade III to a magistrate Grade II for sentence.

The Director of Public Prosecutions supports the conviction of the accused by the magistrate Grade III. He maintains that the magistrate was competent to have tried the accused. He, however, agrees that it was incompetent for the magistrate Grade III to have sent the case to a magistrate Grade II for sentence; and that the case should have been sent to the Chief Magistrate instead of to the magistrate Grade II.

The accused was charged with assault occasioning actual bodily harm contrary to s. 228 of the Penal Code. He was tried, found guilty, and convicted by a magistrate Grade III in the Magistrates' Court, Ankole, sitting at Ndaija.

The trial magistrate concluded his judgment in the following words:

"I find the accused guilty of assault causing actual bodily harm and I convict him as charged contrary to s. 228 of the Penal Code."

Then there followed the allocutus, when the prisoner pleaded for leniency and begged the magistrate not to send him to prison.

After having considered the plea for leniency by the accused, the trial magistrate made the following observations:

"This case is too serious, the complainant has become lame of his hand. I therefore forward this case to the magistrate Grade II for bigger sentence than what I can impose."

These observations were rightly made by the magistrate Grade III for, on the evidence, the case was a serious one. The bone of the complainant's palm was said to have been cut according to the medical evidence. As a result it was necessary for the complainant to spend one month in a dispensary on an admission for treatment. The complainant's hand appears to have been maimed.

According to the order made by the magistrate Grade III, the case came before a magistrate Grade II for sentence. The accused was fined Shs. 100/- and ordered to pay Shs. 200/- by way of compensation to the complainant.

I agree with the submission of the Director of Public Prosecutions that the magistrate Grade III was competent to have tried the accused. An offence under s. 228 of the Penal Code is not included in the Fourth Schedule contained in the Magistrates' Courts (Amendment) Act 1966.

I also agree that, in view of the observations made by the trial magistrate, the case should have been committed to the Chief Magistrate of the Ankole Magisterial area for sentence under s. 10 (4) of the Magistrates' Courts (Amendment) Act, 1966, the relevant provisions of which are as follows:

- "(4) Where a Magistrates' Court presided over by a magistrate Grade I, II or III, convicts a person of an offence and the Court is of the opinion that greater punishment should be imposed than the Court has power to impose under the provisions of sub-s. (2) of this section, the Court may commit him to a Magistrates' Court presided over by a Chief Magistrate for sentence."

In view of the above provisions, it was wrong in law for the magistrate to have committed the case for sentence to a magistrate Grade II. From the nature of the case, on the evidence, the maximum sentence a magistrate Grade III could have imposed would have been a fine of Shs. 500/- or six months'

imprisonment.

In my view, the fact that the case was in error committed for sentence to a magistrate Grade II is not sufficient to vitiate the proceedings, since the accused was properly tried, found guilty and convicted by a magistrate of competent jurisdiction on legal evidence.

On the other hand the magistrate Grade II had no jurisdiction to have imposed a sentence which he did as the case was committed to him in error. The sentence imposed by him is ultra vires his powers.

In the circumstances, I am of the opinion that no injustice would be occasioned by setting aside the sentence imposed and the compensation awarded by the magistrate Grade II, and ordering that the magistrate Grade III do forthwith order that the case be committed to the Chief Magistrate for sentence, as the sentence imposed by the magistrate Grade II was illegal.

If the fine and compensation have been paid the same to be refunded to the accused. Order accordingly. Magistrate Grade III to carry out this order.

Sentence and compensation set aside and case committed to Chief Magistrate for sentencing.

For the applicant:

Attorney General, Uganda

Neither party appeared or was represented.

Eastern Radio Service v Tiny Tots [1967] 1 EA 392 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	17 May 1967
Case Number:	43/1966
Before:	Sir Charles Newbold P, Sir Clement de Lestang VP and Spry JA
Sourced by:	LawAfrica
Appeal from:	The High Court of Kenya at Nairobi – Dalton, J.

[1] *Practice – Discovery – Failure to comply with order of court – Documents to be put in chronological order for inspection – Effect of failure – Civil Procedure (Revised) Rules 1948, O. X, r. 20 – Civil Procedure Act, s. 97 (K.).*

[2] *Practice – Discovery – Failure to comply with order for – When party failing should be precluded from pursuing claim or setting up defence – Whether “wilful disregard” of order necessary – Civil Procedure (Revised) Rules 1948 (K.).*

[3] *Jurisdiction – Dismissal of suit – Whether High Court can set aside final order already given on some issues in the suit.*

Editor’s Summary

The appellant had obtained a judgment for damages for wrongful distress against the respondent and the

Court of Appeal referred the matter back to the High Court for an estimation of the value of the goods distrained on so that such amount could be added to the general damages of Shs. 4,000/- awarded to the appellant. The appellant was required, as a result of this remission to the High Court, to prove the value of the goods. In this regard an application for inspection of documents was made and a consent order was made on May 19, 1964, requiring the appellant to give "inspection of the documents in his possession in chronological order within thirty days of the date of this order". Nothing was done to comply with this order and in July, 1965, the respondent applied under O. X, r. 20 and s. 97 of the Civil Procedure Act for the dismissal of the suit. The appellant filed an affidavit asking for an extension of time within which to put the documents in chronological order, was granted an extension and agreed to give inspection on November 24, 1965. On the respondent inspecting the documents as agreed, he found that they had not been arranged in

chronological order although they were in chronological order according to individual suppliers of goods, which the appellant was advised by his advocate was a sufficient compliance with the order. Several abortive attempts were made to obtain inspection as ordered and on June 22, 1966, the respondent applied for the dismissal of the appellant's suit on the ground that the appellant had not complied with the order of Court made in November, 1965 and the High Court dismissed the whole suit. The appellant appealed against this dismissal.

Held –

- (i) (per curiam) a litigant who has failed to comply with an order for discovery should not be precluded from pursuing his claim or setting up his defence unless his failure to comply was due to a wilful disregard of the order of the Court;
- (ii) (per Sir Charles Newbold, P. and Sir Clement De Lestang, V.-P., Spry, J.A. dissenting): the appellant had shown a wilful disregard of the order of the Court;
- (iii) a judge in a suit in which some issues remain for determination has no jurisdiction under O. X, r. 20 or under the inherent power of the court to set aside a final judgment already given by the High Court in respect of other issues in the suit;
- (iv) therefore, the order that the suit as a whole be dismissed with costs was made in excess of jurisdiction except as it related to matters still in issue, but in respect of those matters the judge had power to make the order.

Appeal partially allowed. Order of High Court varied.

Cases referred to in judgment:

- (1) *Jawandsingh Jwala Singh v. Krishnakumar Ganga Prasad Bajpai* (1950), 37 A.I.R. Nag. 8.
- (2) *Allahabad Bank Ltd. v. Ganpat Rai* (1930), I.L.R. 11 Lah. 209.
- (3) *Twycroft v. Grant*, [1875] W.N. 201.
- (4) *Republic of Liberia v. Imperial Bank* (1874), 9 Ch. App. 569.

Judgment

Sir Charles Newbold P: In 1959 the second respondent (hereinafter referred to as the bailiff) on the instructions of the first respondent (hereinafter referred to as the landlord) levied distress upon and sold the goods of the appellant (hereinafter referred to as the tenant). At that time the bailiff did not hold a certificate authorising him to act as a bailiff. In 1960 the tenant filed a suit against the landlord and the bailiff claiming damages against each of them, inter alia, for trespass and illegal distress.

When the suit came on for hearing by a judge of the High Court the tenant succeeded in obtaining judgment for general damages of Shs. 4,000/- against the bailiff, which amount did not include the value of the goods distrained upon, but the suit against the landlord was dismissed. The tenant appealed to this Court and in October, 1962, this Court held, first, that the tenant was entitled to damages against both the landlord and the bailiff jointly and severally; secondly, that the amount of such damages should include, in addition to the amount of Shs. 4,000/- already awarded, an amount equivalent to the value of the goods

distraigned on; thirdly, that the case be remitted to the High Court for determination, in such manner as the High Court might consider appropriate, of the value of the goods distraigned on; fourthly, that the costs in the High Court be awarded to the tenant and be paid equally by the landlord and the bailiff; fifthly, that the costs of the further proceedings in the High Court form part of the costs in the High Court unless the trial judge otherwise directed; and sixthly, that the decree of the High Court from which the appeal was brought be varied accordingly.

As a result of that order of this Court, the High Court was again seised of the matters in issue in the suit in so far as, but only in so far as, those matters consisted of the determination of the value of the goods distrained upon with a view to the addition of the amount of such value to the damages already awarded to the tenant. It fell, obviously, to the tenant to prove that value and it followed naturally that he could only add to the amount of the damages already awarded such further sum as he might prove to be the amount of that value. Subsequent to the remission of the matter to the High Court a Chamber summons for discovery was taken out in August, 1963, and an affidavit of documents was filed in September, 1963, by the tenant. An application for an order for inspection was filed in May, 1964, and by consent an order was made on May 19, 1964, requiring the tenant to give "inspection of the documents in his possession in chronological order within thirty days of the date of this order". Nothing seems to have been done by the tenant to comply with the terms of this order for some appreciable time and in July, 1965, the landlord applied, under O. 10, r. 20, and s. 97 of the Civil Procedure Act, asking that the tenant's suit be dismissed with costs on the ground that he had "disobeyed the terms of the order of this Court pursuant to consent in that behalf made on May 19, 1964". The tenant filed an affidavit in reply stating that he had given inspection of the documents to the landlord but that they were "in a chaotic condition" and because of intermittent suggestions for a settlement he had "inadvertently omitted to comply" with the order, that he had completed the task of arranging the documents in chronological order, and that he tendered his apologies for any inadvertent contempt which had been committed. At the same time the tenant applied for an extension of the time within which he should give to the landlord "inspection of documents in chronological order" on the ground that the omission to give such inspection was inadvertent and not a wilful disobedience of the order of the court. On this application the Court, on November 12, 1965, ordered that the time for giving the landlord inspection of documents by the tenant "in chronological order be and is hereby extended" so that the inspection should be given "within thirty days from the date of this order". As a result of this order the tenant gave notice that inspection of the documents could be had at a specified place and time on November 24, 1965. On that date and at that place and time the landlord, accompanied by a clerk in his advocate's office, attended for inspection and discovered that the documents had not been arranged in chronological order though they had been arranged in chronological order according to the suppliers of the goods. There was some discussion with the tenant in which it was alleged that the tenant agreed to put them into chronological order and fix a new date. On that same day, and following the visit of inspection, the landlord's advocate wrote to the tenant's advocate referring to the visit of inspection in the morning and stating:

"I regret the documents were not arranged in chronological order. This was pointed out both to your client and Mr. Panalal of your office. It was agreed that your client would put the documents in chronological order and a new date fixed by you for giving inspection."

No reply was ever received to that letter and no new date was fixed by the tenant for inspection for over six months. Some time at the end of May, 1966, a draft formal order was prepared in respect of the order made on November 12, 1965, and this was forwarded to the advocate for the tenant about the middle of June. About two days before this draft order was forwarded to the advocate for the tenant that advocate served a notice offering inspection on June 16, 1966. On June 22, 1966, an application was made under O. 10, r. 20, asking that the tenant's suit be dismissed with costs on the ground that the tenant had not complied with the order of this Court made on November 12, 1965, in that he had failed to give "inspection of the documents in chronological order within

thirty days from November 12, 1965". The tenant filed an affidavit in reply in which, so far from expressing any regret at his non-compliance with the order of the court, he accused the landlord of pursuing discovery with a view to having the balance of his claim for damages discontinued without allowing the tenant an opportunity of proving the value of the goods illegally distrained upon. In this affidavit the tenant stated that when the landlord arrived on November 24, 1965 to take inspection the landlord "suggested I should arrange all invoices in order of dates". The affidavit then contained the following two paragraphs:

"(7) I told them that that would take a long time and that I would consult my advocate.

....

(9) Having given inspection in terms of the order of November 12, 1965, within thirty days my advocate advised me that I could take my time in arranging the papers as the first defendant wanted."

When the motion for dismissal came before a judge of the High Court the judge set out briefly the history of the position and referred to the fact that while the tenant had not arranged the documents in chronological order he had arranged them in chronological order in respect of each of the suppliers of the goods in question. The judge then said this:

"Now it is immediately apparent that contrary to what is stated in para. 9 inspection was not given in thirty days in terms of the Order of the Court and it is equally clear that the arrangement of the invoices and cash sales documents in alphabetical order of sellers and in order of dates in each such alphabetical group is not in pursuance of the Order of the Court. The Order of the Court is quite unambiguous, the documents were to be put in chronological order and this was not done in the time specified in the order of May, 1964, or of the order of November, 1965. Mr. Nowrojee submitted that O. X, r. 20 confers very stringent powers on the Court, powers which should not be exercised lightly and he quoted authorities in support of his submission. I fully appreciate that the power should not be exercised lightly but the conduct of the plaintiff in relation to this order for inspection of documents to my mind shows a wilful disregard of the Order of the Court and such wilful disregard merits the dismissal of the plaintiff's suit."

Consequent upon this finding the judge dismissed the tenant's suit with costs to the landlord and to the bailiff and also ordered the tenant to pay the costs of the application.

From this order the tenant appealed. It is not, I think, in dispute that a litigant who has failed to comply with an order for discovery should not be precluded from pursuing his claim or setting up his defence unless his failure to comply was due to a wilful disregard of the order of the Court. Nor is it, I think, in dispute that wilful means intentional as opposed to accidental (see Case No. 46, 2 E.A.T.C. 275 at pp. 288 to 290). As a result the two main issues on the appeal were, first, whether on the facts the tenant by his action had shown a wilful disregard of the terms of the order of November 12, 1965; and, secondly, if so, whether the order of the High Court in dismissing the suit with costs was a proper order having regard to the prior order of this Court made on appeal from the judgment and decree of the High Court awarding Shs. 4,000/- together with costs against the bailiff.

On the first ground it was urged that there had, in fact, been substantial compliance with the terms of the order by reason of the fact that the documents had been arranged in chronological order in respect of each supplier, that it was unreasonable of the landlord to require anything more, and that the substantial compliance did not disclose a wilful disregard of the terms of the order of the Court. All these facts were considered by the judge of the High Court and he

nevertheless came to the conclusion that the actions of the tenant constituted such a wilful disregard of the terms of the order as merited dismissal of the suit. This conclusion, of course, is a conclusion of mixed fact and law based upon inferences of fact drawn by the judge from the various facts in the affidavits and this Court is in as good a position as a High Court to draw inferences of fact. Looking at the facts disclosed in the affidavits I see no reason whatsoever to disagree with this conclusion of the judge. It may well be that normally the arrangement of the very many documents in chronological order under the names of the suppliers would be as satisfactory as an arrangement in pure chronological order. But this is not what the parties agreed to as long ago as May 19, 1964. On that date, by consent, the tenant agreed to arrange the invoices in chronological order and he knew that that was what the landlord required and he knew that that was what he had to do. This is shown by his affidavit made in October, 1965, when he was seeking an extension of the time within which to do something he should have done over a year before that date. In that affidavit he stated that his failure to comply with the terms of the consent order in May, 1964, was inadvertently due to negotiations for settlement, and it may well be that that may provide some sort of excuse for his failure to comply with the terms of the consent order. Be that as it may, he obtained an extension of the time within which he was to give inspection in chronological order and he had to do so within thirty days of November 12, 1965. In fact he did not within that time comply with the terms of the order and there can be no doubt that he knew precisely what he was required to do by order of the court. When a complaint was made that he had failed to comply with the order he merely stated that it would take a long time to do so and that he would consult his advocate. In adopting this course of conduct the tenant did precisely what he intended to do, which was not to comply with the order. Furthermore, in spite of the letter of November 24, 1965, to which there was no reply, for a further six months the tenant did nothing until just before the landlord took steps again to ask for the dismissal of the suit. Surely there can be no other interpretation of the acts and words of the tenant than one showing an intention not to comply with the order. I cannot but find myself in entire agreement with the judge in coming to the conclusion that the tenant showed a wilful disregard of the order of the Court and such a disregard as merited condign punishment.

The second ground urged was that as the suit had been heard and determined by the High Court, and this determination had been followed by an appeal to the Court of Appeal which had remitted the matter to the High Court for the determination of the additional amount of damages to be awarded to the tenant, the judge had acted in excess of jurisdiction in dismissing the suit. It was further urged that as the High Court has to comply with an order of the Court of Appeal it did not lie within the competence of a judge of the High Court to make any order which in effect would preclude the High Court from complying with the order of the Court of Appeal. The fact that the High Court was again seised of the matter by reason of a order of the Court of Appeal does not, in my view, make any real difference. The essential question is whether a judge in a suit in which some issues remain for determination, has jurisdiction under this rule, or under the inherent power of the court, to set aside a final judgment already given by the High Court in respect of other issues in the suit. Such a position might arise, for example, where judgment has been given on admissions under O. 12, r. 6, or where judgment has been given on liability in advance of any consideration of the issue of quantum. I do not consider that a judge has any such jurisdiction. This lack of jurisdiction stems from the fact that, subject to what I may call the slip rule, as the court has already disposed of the particular issue in the suit by giving judgment on it, the court in respect of that issue is *functus officio*. It makes no difference whether that final decision is a decision of the High Court unaffected by any order on appeal, or whether it is a decision

which has been confirmed on appeal, or whether it is a decision resultant from an order of the Court of Appeal on appeal. The sole question is whether the court has given a final decision on a matter so that it is no longer a matter in issue in the suit and thus no longer a matter in respect of which any further decision of the High Court can be given.

There are, however, many occasions in which further matters remain for determination in the suit after final judgment has been given on one or more issues raised in the suit. If a litigant in the course of the proceedings for the determination of such further matters wilfully disregards an order of the court, the court must have an inherent jurisdiction to make an appropriate order. In addition to this inherent jurisdiction I consider that O. 10, r. 20, when it speaks of the liability of a plaintiff “to have his suit dismissed” must be construed in such circumstances as meaning a liability to have those issues which remain for determination in the suit dismissed. I see absolutely no difficulty in so construing that rule and every reason so to do. This being the position in law it is clear that the judge, in making the order that the suit as a whole be dismissed with costs, made an order in excess of his jurisdiction in respect of those matters which had already been finally determined. In so far, however, as his order related to the matters still for determination in the High Court he had power to make the order; and such an order would have been, in my view, an appropriate order in the circumstances of the case. I would therefore confirm the order of dismissal of the suit with costs in so far as it relates to the issue then before the High Court, that is the issue of the determination of the additional amount to be added to the damages of Shs. 4,000/- and the costs of the subsequent proceedings in the High Court. I would, however, set it aside in respect of the other matters which had already been determined. The result would be that the tenant would obtain a judgment for Shs. 4,000/-, but for no more, against the bailiff and landlord jointly and severally with costs up to the date of the original judgment in the High Court, to be paid equally by the bailiff and the landlord; but in respect of the proceedings in the High Court subsequent to the original judgment the tenant would have to pay the costs of the bailiff and the landlord.

As regards the costs of this appeal, the tenant has succeeded in reversing the order of the High Court in so far as it affected the original award but has lost in so far as it affected the issue of additional damages. I would accordingly allow the tenant only one half of the costs of this appeal to be paid jointly and severally by the bailiff and the landlord but as between themselves each to pay half of the court’s costs. As Sir Clement De Lestang, V.-P., agrees it is so ordered.

Sir Clement De Lestang VP: This is an appeal by a plaintiff from an order of the High Court of Kenya dismissing his suit against both defendants with costs under O. X, r. 20 of the Civil Procedure (Revised) Rules, 1948. The relevant portion of this rule for the purpose of this case provides that:

“where any party fails to comply with any order . . . for inspection of documents he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution . . .”

The authorities show, and there is no dispute about it, that a court ought not to impose the penalty of dismissing a suit except in extreme cases and as a last resort and should only do so where it is satisfied that the plaintiff is avoiding a fair discovery or is guilty of wilful default.

In the present case the learned judge, while appreciating that the power of dismissal under the rule in question should not be exercised lightly, was of the view that the conduct of the plaintiff showed “a wilful disregard of the order of the court” and merited the dismissal of his suit. Counsel for the appellant

contents that the learned judge was wrong in the view he took of the plaintiff's conduct because in his submission the plaintiff had in fact substantially complied with the order and at no time refused to give inspection.

The finding of wilful disregard is not one of primary fact but an inference which the learned judge drew from the facts and it is therefore open to this Court to decide whether the inference is right or wrong. To do so it is necessary to examine the facts which, as they have been fully stated in the judgment of Sir Charles Newbold, P., I will not repeat. Suffice it to say that the plaintiff in obedience to the order of the court filed an affidavit of documents on September 30, 1963. The first defendant wished to inspect some of these documents and found that as they were voluminous he could not properly do so unless they were put in chronological order. In January, 1964 the first defendant's advocate wrote to the plaintiff's advocate requesting that the documents be made available to him in chronological order failing which he would apply to the court for an order to that effect. The plaintiff's advocate replied that he had written to the plaintiff to arrange the papers in chronological order and would give inspection when that had been done. Nothing further seems to have happened until May 19, 1964 when an order by consent was made by the High Court requiring the plaintiff to give inspection in chronological order within thirty days. By July, 1965 inspection in the manner ordered had not been given and on July 20, 1965 the first defendant filed an application for, inter alia, the dismissal of the suit under O. X, r. 20. The plaintiff applied for an extension of time. There would appear to have been some excuse for the delay as negotiations for settlement, which had been going on in the meantime, may have led the plaintiff to believe that inspection was no longer required. Be that as it may on November 12, 1965 the court extended the time within which the plaintiff was to give inspection in chronological order by thirty days and in pursuance of that extension the plaintiff's advocate on November 19, 1965 invited the first defendant to inspect on November 24, 1965. By then the documents (which consisted of a large number of purchase invoices) had been arranged in sets in alphabetical order of suppliers, each set being arranged in chronological order as well. This had entailed a great deal of labour on the part of the plaintiff and at first sight would seem to be substantial compliance with the order of the court but the first defendant did not think so and abandoned the inspection insisting that the documents be arranged in strict chronological order. The plaintiff pointed out that it would take a long time to put the documents in chronological order in one batch and would consult his advocate. Nevertheless it would appear that on that day the plaintiff did agree that he would do the work and that a new date would be fixed for inspection. There was at that time nineteen days left to comply with the order of the court but the plaintiff was apparently advised that he had complied with the order of the court and could, therefore, take his time in rearranging the documents in the order desired by the first defendant. That this is so is in my view clear from the following paragraphs in the plaintiff's affidavit:

- "2. In pursuance of the Order of the Court dated the 12th day of November 1965, and in consultation and on advice of my Advocate E. P. Nowrojee, I arranged the Invoices and cash sales documents in alphabetical order of sellers' names and in order of dates in each such alphabetical group.
9. Having given inspection in terms of the Order of the 12th November, 1965, within the thirty days, my Advocate advised me that I could take my time in arranging the papers as the First Defendant wanted."

It will be noted that this affidavit was drawn and filed by the plaintiff's advocate who would certainly have contradicted para. 9 if it were not true and who admitted in his address to the court below that he did not fully appreciate the meaning of the expression "chronological order".

The plaintiff completed the task of re-arranging the documents in strict chronological order on June 8, 1966 and by a notice dated June 13, offered inspection to the first defendant on June 16. Meanwhile the first defendant had decided once more to seek the dismissal of the suit under O. X, r. 20 and filed an application to that effect on June 20, 1966 which as we know was successful. Can it be said in these circumstances that the plaintiff's conduct shows a "wilful disregard of the order of the court?" I have found the answer to this question very difficult. A party is in wilful default when he is wilfully not doing something which he ought to do. In law an act is done wilfully when it is done deliberately and intentionally, not by accident or inadvertence, but so that the mind of the person who does the act goes with it. Consequently if the default is due to a reasonable mistake or in certain circumstances to his acting on the bona fide advice of his advocate the default cannot be said to be wilful. There is support for this view in the Indian case of *Jawandsingh Jwala Singh v. Krishnakumar Ganga Prasad Bajpai* (1). In that case the plaintiff was ordered to make discovery of certain documents and acting on his counsel's bona fide opinion did not file an affidavit in pursuance of the order. An order made under O. XI, r. 21 of the Indian Civil Procedure Code (which is identical with Kenya O. X, r. 20) dismissing the suit was set aside on appeal on the ground that the plaintiff's default in the circumstances was not wilful. In his judgment Mudholkar, J., after referring to *Allahabad Bank Ltd. v. Ganpat Rai* (2) and other cases said:

"It is clear from the statement of the plaintiff's counsel that, in his opinion, it was not necessary to swear an affidavit and that a denial by the plaintiff in the witness box would meet the requirements of law. The view may be erroneous but it was entertained by counsel and the plaintiff acting thereon did not file an affidavit. Can it be said by any stretch of reasoning that this can be regarded as a 'wilful' default on his part to comply with the law? Clearly not. For, when the law goes so far as to say that a party shall not suffer for an error of the Court, it follows that he ought not to suffer for a counsel's error, provided, of course, the error is bona fide. Here, as r. 13 of O. 11 does not say that filing an affidavit is the only way of answering an order under r. 12, there was room for counsel to say that denial in the witness box – affording thereby an opportunity to the opponent to test the correctness of the statement – would be as efficacious."

That was, however, a much stronger case than the present one since in that case counsel's view was excusable whereas in the present case there is no room for mistake and there can be no reasonable excuse for counsel's advice to the plaintiff that he had complied with the order and could take his time. For these reasons I think, though not without hesitation, that there was evidence to support the learned judge's finding of wilful default and grave as the result may be for the plaintiff the exercise of the judge's discretion cannot, in the circumstances, be interfered with.

As regards the second argument of counsel for the appellant that O. X, r. 20 has no application in the particular circumstances of this case I am in respectful agreement with the judgment of Sir Charles Newbold, P., and cannot usefully add anything. I agree with the order proposed by him.

Spry JA: The facts out of which this appeal arises are fully set out in the judgments of Newbold, P. and De Lestang, V.-P.; I shall not repeat them.

The first question, in my opinion, concerns the jurisdiction of the High Court. The case had been remitted by this Court to the High Court to determine the value of certain articles, with power to make an order, if it thought fit, as to the costs of that determination. The value so determined was to form part of the general damages the liability for which and the quantum of part of which had

finally been decided. In these circumstances, I do not think the High Court could be said to be seised of the “suit” so as to have power to dismiss it under O. X, rule 20. That is, however, a technical point and perhaps not of very great importance because I am satisfied that the High Court, as a court of record, could achieve a substantially similar result, so far as concerns the matter before the Court, by the exercise of its inherent powers. Clearly the High Court could not make any order affecting those questions in the proceedings that had already finally been determined.

The question then arises whether the learned judge in the High Court ought to have made, not the order he did, which I think was clearly wrong, but an order which would have had the effect of precluding the appellant from pursuing his claim to an addition to the general damages awarded him. In considering this question, I think exactly the same principles should apply as in an ordinary case under O. X, r. 20.

I am not aware of any East African authorities governing the exercise of O. X, r. 20, or the corresponding rules of the other Territories. Rule 20, is however, derived from r. 21 of O. XI of the Indian Code of Civil Procedure, 1908, the terms of which it exactly follows, and the Indian rule was in turn derived from the English practice (now O. XXIV, r. 16, formerly O. XXXI, r. 21). It is well established that the power to dismiss a suit or strike out a defence is one only to be exercised in the last resort (*Twycroft v. Grant* (3); *Republic of Liberia v. Imperial Bank* (4)).

I observe also that it is the usual practice both in England and in India to make dismissal orders in the form of orders that the suit be dismissed unless the order for inspection be complied with by a stated date (Rules of the Supreme Court, 1967, 24/16/1 and P.F. 40; *Allahabad Bank Ltd. v. Ganpat Rai* (2)). I may remark that it is a practice which should, I think, be adopted here, save in exceptional cases.

As I understand it, the object of r. 20 is not to punish the person in default: if his conduct amounts to contempt of court he can be committed or fined. The object is to prevent the undue protraction of proceedings and to assist the other party to the proceedings in getting them concluded.

Applying these principles to the present case, I think the material dates are those of the order for inspection of November 12, 1965, the abortive inspection of November 24, 1965, the letter from the landlord’s advocate of November 25, 1965, the letter from the appellant’s advocate of June 13, 1966, offering inspection on June 16, 1966, and the application for dismissal of June 22, 1966. I do not think the earlier events are relevant, beyond showing that the appellant was extremely dilatory, as, indeed, the other parties appear also to have been. I think it must be accepted that on November 24, 1965, the appellant had taken substantial steps towards complying with the order for inspection and believed, wrongly, that he had complied with it. By November 25, 1965, the position must have been clear and it was then the duty of the appellant to arrange the documents in chronological order without delay. Once a reasonable time had elapsed and the work had not been done, it could, I think, be said, and I think the appellant’s own affidavit indicates, that he was in wilful disregard of the Court’s order, using the word “wilful” in its legal as opposed to its colloquial meaning.

I do not, however, think that the fact that there had been that wilful disregard necessarily justified the order that was made. I have already dealt generally with the object of r. 20. Up to June 13, 1966, I think the landlord could properly have applied to the Court to exercise its inherent jurisdiction, and it would then have been for the Court to consider making either a conditional or an absolute order. But once the offer of inspection on June 16, 1966, had been made, I

think the landlord's application of June 22, 1966 (apart from any question as to its form), was inappropriate and should have been refused. The object of the order made on November 12, 1965, had, at least prima facie, been achieved, however belatedly. Whether the conduct of the appellant called for punishment was an entirely different question.

It was argued before us that the learned judge had exercised a discretion, with which this Court ought not to interfere. I think, however, that the failure of the learned judge to consider the effect of the letter of June 13, 1966, or the object of r. 20, amounts to a sufficient non-direction to justify our looking at the matter afresh.

For these reasons, I would have allowed the appeal.

Order of dismissal confirmed in so far as it related to the issue then before the High Court but set aside in respect of matters already determined. Appellant to have half his costs of the appeal.

For the appellant:

Daly and Figgis, Nairobi

A. E. Hunter

For the first respondent:

S. Gautama, Nairobi

For the second respondent:

Kaplan and Stratton, Nairobi

W. S. Deverell

Athuman v Republic
[1967] 1 EA 401 (HCK)

Division:	High Court of Kenya at Mombasa
Date of judgment:	14 March 1967
Case Number:	168/1966
Before:	Sir John Ainley CJ and Chanan Singh J
Sourced by:	LawAfrica

[1] *Criminal law – Obtaining money by false pretences – Witch-doctor claiming to cure patients – Whether conviction proper – Penal Code, s. 313 (K.).*

[2] *Witch-doctor – Conviction of obtaining money by falsely pretending to be a witch-doctor – Whether conviction proper – Penal Code, s. 313 (K.).*

Editor's Summary

The appellant was charged with obtaining money "by falsely pretending that he was a witch-doctor . . .". The prosecution evidence was that he had said that a woman was possessed by devils and that he would cure her. The appellant gave no evidence himself, and was convicted. On appeal:

Held – although an honest witch-doctor may exist, the facts before the court below made it right to find in this case that the appellant knew that what he was saying was false.

Appeal dismissed.

No cases referred to in judgment.

Judgment

Sir John Ainley CJ, read the following judgment of the Court: In this case the appellant, Athuman bin Ali, was convicted of obtaining Shs. 418/- from one Aloisi s/o Katembo by false pretences, contrary to s. 313 of the Penal Code. The particulars of the offence read:

"Athuman bin Ali, on a day unknown in January, 1966 at Majengo ya simba, Mombasa, within the Coast Province, with intent to defraud, obtained from Aloisi s/o Katembo Shs. 418/- by falsely pretending that he

the said Athuman bin Ali was a witch-doctor and that he had power to remove devils (Majini) from the wife of the said Aloisi Katembo called Masika w/o Aloisi.”

It was proved at the beginning of the year 1966, Masika, the wife of Aloisi, suffered from pains in her head, stomach and left eye, and that Aloisi went to the appellant, with one Yaa, and asked his help. Aloisi’s account of what occurred is no doubt true. He swore that he and Yaa told the appellant about Masika’s illness and that the appellant said that she was possessed by “Majini” or evil spirits. He said that he would cure Masika. He asked for Shs. 418/- as payment for the treatment, and received that sum (or possibly Shs. 400/- and two yams) over a period of months. The fact that the particulars appear to assert a lump sum payment has to our minds no bearing on the validity of the conviction. To continue, in September of 1966 the appellant asked for a goat and was given one by Aloisi. Very shortly after this the appellant announced that he would not undertake the treatment of Masika and he returned the goat, but not the money. Aloisi went to the police and complained. He did not, fairly clearly, regard the matter in quite the same way as it was regarded by the police and by the court below. Very understandably he regarded the affair as a swindle, but to his mind no doubt the swindle lay in this, that the appellant, who could have done the work he promised to do, refused to do it after pocketing a fat fee. The prosecution has not, of course, sought to impose that view on the courts. The contention of the prosecution has always been that the appellant falsely asserted that he was possessed of magical powers and was able, by means of those powers, to cure the unhappy Masika of her devils. Now taking due account of Yaa’s intervention there is yet not the slightest doubt but that the appellant, by behaviour and words, made that assertion of an existing state of facts to Aloisi, and that by joining that assertion to a promise as to the future he won some £20 from the pocket of Aloisi.

That assertion appears to us to be properly covered by the particulars. The statement in those particulars that the appellant “pretended that he was a witch-doctor” could perhaps be criticised, since the phrase may imply that there are such things as genuine witch-doctors, but we think that nothing can be made of that which aids the appellant. Taken as a whole the particulars clearly charge that the appellant was laying claim to magical or supernatural powers which he did not possess, and knew that he did not possess. It is apparent, of course, that the appellant laid claim to more than is set out in the particulars. He professed an ability to diagnose Masika’s trouble without even seeing her. He must have given Aloisi to understand not only that pains in the stomach and eye can be caused by “Majini” but that he was able to say without seeing or hearing Masika that her particular pains were so caused.

To our way of thinking there is really only one matter worth consideration in this case and that is whether the appellant’s assertions of existing facts can with reasonable certainty be said to have been false to his knowledge. In short, the question is whether the appellant was a fraud, or whether he was as big a fool as Aloisi.

The learned magistrate was convinced that the appellant knew that what he was saying was false, and if his finding was correct the conviction, which was based on that finding, was beyond doubt proper. We think that the learned magistrate’s finding was quite obviously right. It is probably true, though no evidence was adduced by the defence on the point, that very many men and women in the area where the appellant and Aloisi live, firmly believe in the magical power of these so-called witch-doctors. Is it not possible, it may be asked, that honest though strangely deluded witch-doctors exist, and that the appellant may be one of them?

We may be forgiven for saying that there probably are witch-doctors and witch-doctors. There may well be men who undertake the cure of ailments for reward and have a honest belief in the efficacy of rituals, incantations and the like. Common sense leads us to suppose that those who practise medicine with the aid of such arts are likely to have lost much, if not all, of their faith in those arts by reason of hard experience. But we do not deny the possibility of the existence of an honest witch-doctor. Yet in the present case the absurdity of the appellant's pretensions coupled with his refusal, when the money was in his pocket, to do anything at all raised a very strong prima facie case that he was a fraud. That case could perhaps have been met, but the appellant who was represented by learned counsel made no effort to meet it. He said nothing and he called no witnesses. We are casting no onus on the appellant. On the facts before the court below it was most reasonable to find that the appellant knew that his pretensions were rubbish, and that he was a rogue. We say simply that the appellant did nothing whatever to minimise the damning nature of those facts and, in our view, he was properly convicted. The sentence was eminently sensible.

Appeal dismissed.

For the appellant:

Ram Hira, Mombasa

For the Republic:

Attorney General, Kenya

J. R. Hobbs (Senior State Counsel, Kenya)

Sakila v Republic
[1967] 1 EA 403 (HCT)

Division:	High Court of Tanzania at Mwanza
Date of judgment:	25 February 1967
Case Number:	928/1966
Before:	Platt J
Sourced by:	LawAfrica

[1] *Criminal law – Appeal – Alteration of finding on appeal – Defilement not to be altered to rape – Observations on power to alter generally – Criminal Procedure Code, s. 319 (1) (a) (ii) (T.).*

[2] *Criminal law – Appeal – Conviction for rape may not be substituted where a conviction for defiling a girl under twelve years of age under s. 136 (1) Penal Code (T.) is quashed – Criminal Procedure Code, s. 319 (1) (a) (ii) (T.).*

[3] *Criminal law – Evidence – Child witness – Tests to be applied before taking evidence of – Criminal Procedure Code, s. 152 (T.).*

[4] Evidence – Child – Evidence of witnesses of tender years – Tests to be applied – Criminal Procedure Code, s. 152 (T.).

Editor's Summary

The District Court of Ukerewe, Tanzania, on the evidence of the complainant and two other school girls, convicted the appellant of defiling a girl under the age of twelve years under s. 136 (1) Penal Code and imposed a sentence of two years' imprisonment. The District Court recorded that the complainant was between twelve and thirteen years of age. On appeal the Republic submitted that the High Court was empowered under s. 319 (1) (a) (ii) of the Criminal Procedure Code to substitute a finding of guilty of rape under s. 131 of the Penal Code.

Held –

- (i) no alteration to a finding of guilty of rape should be made, because the accused was not charged with it and had had no opportunity to put forward a defence to it;

- (ii) the procedure adopted by the trial court in admitting evidence of witnesses of tender years was wrong. A trial court should examine a witness to satisfy itself that:
 - (a) the witness is possessed of sufficient intelligence and understands the duty of speaking the truth;
 - (b) understands the nature of an oath. If satisfied as to (a) but not as to (b) the evidence may be received but not on oath; if satisfied as to (a) and (b) evidence should be taken on oath.

Appeal allowed. Conviction and sentence quashed.

Cases referred to in judgment:

- (1) *Kibangeny Arap Kolil v. R.*, [1959] E.A. 92.
- (2) *Nyasani s/o Bichana v. R.*, [1958] E.A. 190.
- (3) *Fransio Matovu v. R.*, [1961] E.A. 260.
- (4) *Oloo Gai v. R.*, [1960] E.A. 86.

Judgment

Platt J: The appellant was convicted of defiling a girl under the age of twelve years contrary to s. 136 (1) of the Penal Code and sentenced to two years' imprisonment.

The first issue raised on appeal concerned the clear finding of fact by the learned resident magistrate that the complainant was between twelve and thirteen years old. That being so, no offence was made out under s. 136 (1) of the Penal Code. Despite this obvious flaw the appellant was, nevertheless, found guilty of this offence. The Republic, however, submitted that under s. 319 (1) (a) (ii) of the Criminal Procedure Code, this Court could alter the finding to one of guilty of rape contrary to s. 131 of the Penal Code. It was conceded that no alternative verdict was open to the learned magistrate under ss. 185 and 181 of the Criminal Procedure Code. But it was argued that s. 319 was wide enough to give this Court power on appeal to alter the finding and so convict an accused of an offence for which he was not charged.

With respect, I decline to accept such a proposition. The purpose of a charge is to inform an accused what it is that he is alleged to have done which contravenes the law. If the prosecution fails to prove that charge, although it might successfully prove another charge, the accused is entitled to be acquitted. During the hearing of the case, if it appears to the court that the charge is defective either in substance or form, the court may make an order for the alteration of the charge either by way of amendment of the charge or by the substitution or addition of a new charge (see s. 209 of the Criminal Procedure Code). The prosecution may apply to withdraw the charge and re-commence the hearing on a proper charge (see s. 86 (a) of the Criminal Procedure Code). All these provisions are designed to see that justice may be done both to the Republic and to the accused. If, therefore, neither the prosecution nor the court see that a trial is properly carried out, and in the end a finding is made which clearly excludes the accused's complicity in the crime charged, then in my opinion it is the duty of the court to acquit the accused.

The words relied upon in s. 319 (1) (a) (ii) of the Criminal Procedure Code, namely, "alter the finding" are not, in my opinion, thereby rendered useless and of no meaning. Apart from the provisions of the law for alternative verdicts, examples may be found of the successful application of this section

where alternative charges are put forward so that on appeal a finding may be altered. The section may also be operated in cases where there has been some error which, though curable, requires the finding to be altered. In the present case the appellant was unsuccessfully prosecuted for defilement not because of any error in the charge but because the evidence did not support that charge, although it might

have supported the charge of rape. In my view, it would be unjust to read the words “alter the finding” as being wide enough to enable the Court on appeal to alter the finding from guilty of defilement to guilty of rape, since that would involve convicting the accused of an offence with which he was not charged and, therefore, had no opportunity to put forward a defence. It follows that the appeal must be allowed as the charge preferred against the appellant was not proved.

I should also note that the procedure adopted in admitting the evidence of witnesses of tender years during the trial left much to be desired. The complainant and two other witnesses were school-girls. When the complainant came to give her evidence the learned magistrate made the following comment:

“The witness is a girl of twelve years and the court explained to her the importance of evidence on oath.”

She was then sworn as a Christian. In the case of the witness Lucia the magistrate made this comment.

“The witness is informed of the importance of giving evidence on oath.”

She was found to be a young female person and sworn as a Christian. In the case of the witness Maleciana the learned magistrate observed “the witness was informed of the importance of giving evidence on oath and she knows to speak the truth”. She was found to be a young person and she was sworn as a Christian. It will be seen that the *voire dire* examination of these witnesses was almost, if not entirely, non-existent. The age of Lucia and Maleciana was never recorded and, though they may have been of about the same age as the complainant because the witnesses and the complainant had all reached a similar stage in their schooling, it was necessary for the learned magistrate to satisfy himself and to record whether or not they were persons of tender years. The learned magistrate described the witnesses as “young persons”. This is a phrase defined by the Children and Young Persons Ordinance, Cap. 13, as being a person between twelve and sixteen years of age and was, therefore, not a sufficiently clear description of these witnesses. It was held in *Kibangeny Arap Kolil v. R.* (1) that in the absence of special circumstances a child of tender years could be taken to include a child of any age or apparent age of under fourteen years. It is difficult to say, therefore, whether the witnesses Lucia and Maleciana were children of tender years or not.

Assuming that the complainant and the two witnesses were all between the ages of twelve and thirteen years, then the record did not disclose that the learned magistrate directed an investigation to the particular question whether the witnesses understood the nature of the oath. In each case it appears that the learned magistrate “informed them of the importance of giving evidence on oath” which of course is the reverse of what he should have done. Perhaps I should direct the learned magistrate’s attention to s. 152 of the Criminal Procedure Code and in particular to sub-s. (3) which provides as follows:

- “152 (1) Subject to provisions of sub-s. (3) of this section, every witness in a criminal cause or matter shall be examined upon oath or affirmation, and the court before which any witness shall appear shall have full power and authority to administer the usual oath or affirmation.
- (2) . . .
- (3) Where in any criminal cause or matter any child of tender years called as a witness does not, in the opinion of the court, understand the nature of an oath, his evidence may be received, though not given upon oath or affirmation, if, in the opinion of the court, to be recorded in the proceedings,

he is possessed of sufficient intelligence to justify the reception of his evidence, and understands the duty of speaking the truth.

Provided that where evidence received by virtue of this subsection is given on behalf of the prosecution, the accused shall not be liable to be convicted unless such evidence is corroborated by some other material evidence in support thereof.”

It is well established that before the evidence of a person of tender years is admitted, a *voire dire* examination should be carried out in order that the court may satisfy itself that the witness is possessed of sufficient intelligence and that he understands the duty of speaking the truth in order to justify the reception of his evidence. And further that where it is clear that he understands the nature of the oath, his evidence may then be received on oath or affirmation. Where this procedure is not carried out and the evidence of a person of tender years is of a vital nature, it may be that the omission may occasion a miscarriage of justice (see *Kibangeny's case* (1) ([1959] E.A. at p. 95); *Nyasani s/o Bichana v. R.* (2), and *Fransio Matovu v. R.* (3)). These authorities show that where there is no other evidence other than that of the child of tender years who has not been properly examined the conviction cannot be sustained.

On the other hand, the Republic sought to rely upon the authority of *Oloo Gai v. R.* (4), where it was held that, although a *voire dire* examination was not conducted in an entirely satisfactory manner, nevertheless, the effect of the learned trial judge's findings was that he satisfied himself that the witness understood the nature of the oath. It was suggested that in the present case, what the learned magistrate recorded before each witness gave her evidence, and his acceptance of these witnesses as being truthful, was sufficient to justify this Court in holding that the learned magistrate had satisfied himself that the witnesses understood the nature of the oath. With great respect, I am unable to agree. The facts of the present case fall far short of the facts in *Oloo Gai's case* (4). I am unable to spell out anything more from the record than that the learned magistrate informed the witnesses of the importance of their giving evidence on oath and not that he satisfied himself that the witnesses themselves understood the nature of the oath. It seems to me that this appeal must be allowed on the additional ground of the learned magistrate's failure to direct himself properly during the *voire dire* examination of these witnesses since their evidence was vital and there was no other evidence which could corroborate the complainant's allegations against the appellant.

Accordingly, the appellant's conviction is quashed and the sentence imposed thereon set aside. The appellant is ordered to be set at liberty forthwith unless held for any other lawful cause.

Appeal allowed.

The appellant in person.

For the Republic:

Attorney General, Tanzania

B. A. Samata (State Attorney, Tanzania)

Republic v Telenga
[1967] 1 EA 407 (HCT)

Division: High Court of Tanzania at Mwanza

Date of judgment: 5 May 1967

Case Number: 20/1967

Before: Platt J

Sourced by: LawAfrica

[1] *Criminal law – Review – Whether High Court can review an acquittal – Criminal Procedure Code, s. 329 (T).*

[2] *Criminal law – Practice – Revisional jurisdiction of High Court – Whether Court can review acquittal – Criminal Procedure Code, s. 329 (T).*

[3] *Criminal law – Corruption – Effect of failure to obtain consent of Attorney-General to a prosecution – Corruption Ordinance, s. 14 (T).*

Editor’s Summary

On August 25, 1966, before the District Court at Musoma, Tanzania, the accused pleaded not guilty to an offence under s. 6 of the Corruption Ordinance. Evidence for the prosecution and for the defence was taken and the District Court then realised that the consent in writing of the Attorney-General had not been obtained as required by s. 14 of the Corruption Ordinance. On March 25, 1967, the prosecution applied under s. 86 (b) of the Criminal Procedure Code to withdraw the charge, which section entitled the accused to an acquittal as the defence had been entered into. The District Court in granting the application acquitted the accused. The Director of Prosecutions asked for revision by the High Court to set aside the whole proceedings including the acquittal.

Held – Section 329 (4) of the Criminal Procedure Code precludes the High Court from considering the revision of proceedings which result in an acquittal.

No cases referred to in judgment.

Judgment

Platt J: The accused, Ernest Telenga, was charged under s. 6 of the Prevention of Corruption Ordinance, Cap. 400. He pleaded not guilty to the charge and the trial commenced on August 25, 1966. The trial continued until the end of the defence when before judgment the learned magistrate realised that he had no jurisdiction to have heard the trial because of the provisions of s. 14 of Cap. 400. Section 14 provides as follows:

- “14. Where any person is charged before any court with an offence under s. 6, no further proceedings in respect thereof shall be taken against him without the consent in writing of the Attorney-General except such as the court may think necessary by remand (whether in custody or on bail) or otherwise to secure the due appearance of the person charged, so, however, that if that person is remanded in custody he shall, after the expiration of a period of twenty-eight days from the date on which he was so remanded be entitled to be discharged from custody on entering into a recognizance without sureties unless within that period the Director of Public Prosecutions has consented to such further proceedings as aforesaid.”

This section shows that learned magistrate was entitled to arraign the accused and make orders for his remand in custody or bail until the Director of Public Prosecutions had consented to further proceedings. It would not appear to be a case where learned magistrate had no jurisdiction ab initio but that the trial, by which I mean in this context the hearing of the evidence for the prosecution and the defence, was invalid without such consent, which had not in fact been given. The learned magistrate realised this position, as I have said, before

giving judgment whereupon he made several orders from time to time adjourning the proceedings and granting the accused bail. At length, and I suppose in desperation, on March 25, 1967 he entertained an application by the prosecutor who asked leave to withdraw the charge under s. 86 (b) of the Criminal Procedure Code. Section 86 (b) provides that if the withdrawal of a charge is made after the defence has been given the accused shall then be acquitted. The learned magistrate allowed the application and acquitted the accused.

Now this order embarrassed the Director of Public Prosecutions whom I am given to understand had still not finally decided whether to sanction earlier proceedings or not. He accordingly proposed that the record should be placed before this Court with a view to setting aside all proceedings after arraignment by way of a revisional order. The learned Director's embarrassment was that unless the proceedings were set aside he would be met by a plea in bar of autrefois acquit in any subsequent proceedings that he consented to, since it is only a withdrawal under s. 86 (a) of the Criminal Procedure Code that would not operate as a bar to such subsequent proceedings. At the same time he rightly contended that the proceedings ending with the acquittal of the accused were invalid. There was therefore every justification for the application to set aside these proceedings.

However that may be, and much as I would like to assist the learned Director, I find that I have no jurisdiction to entertain revisional proceedings against an order of acquittal. Section 329 (1) (b) provides:

"In the case of any other order other than an order of acquittal alter or reverse such findings."

Thus the High Court may revise any matter which comes to its knowledge (a) in the case of a conviction, (b) in the case of any other order except an order of acquittal. There follows a proviso which is not relevant. Subsection (4) then provides:

"Nothing in this section shall be deemed to authorise the High Court to convert a finding of acquittal into one of conviction."

Section 329 therefore precludes me from considering revision of the proceedings before me. Accordingly, I shall make no order.

I might hazard the opinion, obiter, that perhaps the learned Director might find a way out of his predicament by stating a case on the grounds that the order of acquittal was without jurisdiction. He will of course be by now out of time but that difficulty might be surmountable.

The accused did not appear and was not represented.

For the Republic:

Attorney General, Tanzania

For the prosecution:

G. B. Liundi (State Attorney, Tanzania)

Shallo v Maryam
[1967] 1 EA 409 (HCK)

Division:

High Court of Kenya at Mombasa

Date of judgment: 19 December 1966

Case Number: 312/1965 (59)

Before: Harris J

Sourced by: LawAfrica

[1] Costs – Successful party deprived of costs – Muslim husband successfully suing his ex-wife for transfer to him of property purchased by him in her name under “benami”.

[2] Costs – Transfer of “benami” property – Costs of transfer to beneficiary by “benamidar” to be paid by beneficiary as between advocate and client.

[3] Land – “Benami” – Whether Mohammedan law of “benami” applies in Kenya between Mohammedans – Purchase by Mohammedan husband in name of wife – Whether husband entitled to transfer to himself – Whether equitable presumption of advancement applies.

[4] Mohammedan Law – Applicability in Kenya – Whether Mohammedan law in East Africa is the same as in India.

[5] Mohammedan Law – “Benami” – Whether doctrine of “benami” applies in Kenya – Purchase by Mohammedan husband in name of wife – Whether presumption of “benami” or presumption of advancement applies.

[6] Trust and Trustee – Mohammedans – Resulting trust – Purchase by Mohammedan husband in name of wife – Whether Mohammedan law of “benami” applies in Kenya.

Editor’s Summary

The plaintiff brought an action against his ex-wife for an order declaring him to be the owner of certain premises in Mombasa which were purchased by the plaintiff in the name of the defendant during the subsistence of their marriage; he further claimed the transfer of the premises to himself. The parties were Muslims and the plaintiff claimed that he provided the purchase money for the premises and that the purchase in the name of the wife was a benami transaction; alternatively that there was a resulting trust of the property in his favour with no presumption of advancement to the defendant. The premises were purchased in 1957 at the cost of Shs. 15,000/- and there was a direct conflict of testimony as to the source of this money, the defendant contending that it was provided by her mother and the plaintiff maintaining that he provided the purchase money from compensation received by him from the Government for the compulsory purchase of other premises owned by him.

Held –

- (i) on the balance of probabilities the purchase of the premises was paid for by the plaintiff out of the proceeds of the compensation for the compulsory purchase of other premises;
- (ii) in general, Mohammedan law in East Africa is the same as in India; therefore the rebuttable presumption that the purchase of land by a person in the name of another creates the latter a benamidar applies between Muslims in Kenya as it does in India;
- (iii) that this presumption of benami in favour of the plaintiff was not rebutted by the evidence of the conduct of the parties in relation to the property subsequent to its purchase;

- (iv) there was therefore no resulting trust in favour of the defendant and the beneficial interest was in the plaintiff;
- (v) the plaintiff was entitled to a declaration of ownership subject to all existing incumbrances;

- (vi) the plaintiff should pay the costs of having the premises transferred to him as between advocate and client;
- (vii) the defendant should be reimbursed out of the property for her costs of the suit and the plaintiff should pay his own costs.

Declaration and order accordingly.

Cases referred to in judgment:

- (1) *Bishen Singh Chadha v. Mohinder Singh and Another* (1956), 29 K.L.R. 20.
- (2) *Sura Lakshmiah Chetty v. Kothandarama Pillai* (1925), 48 Mad. 605; 52 I.A. 286.
- (3) *Fatuma Binti Mohamed Bin Salim Bakhshuwen v. Mohamed Bin Salim Bakhshuwen*, [1952] A.C. 1.

Judgment

Harris J. (read by Wicks J): This is a claim by the plaintiff, who was formerly the husband of the defendant, for a declaration that he is the owner of certain premises at Mombasa, known as “plot 145 section IV Mombasa”, and for an order requiring the defendant to transfer the plot to him. As framed the plaintiff included a second claim for similar relief concerning an undivided half-share in another plot of land but it emerged during the hearing that the plaintiff had apparently been mistaken in thinking that the defendant had asserted any title to the latter plot and accordingly the second claim was not proceeded with.

The parties, who are Muslims, were married in June, 1948, and lived together as husband and wife until March, 1965, when the plaintiff divorced the defendant in accordance with Muslim rites and ceremonies. In his evidence he explained that she was his second wife, he having previously divorced his first wife because she had been unable to have children, and that he later divorced the defendant because she had interfered with his marital rights as a Muslim to take a third wife contemporaneously with being married to his second wife. It was common cause that the divorce of 1965 between the parties was legal and effective.

The premises were purchased by the plaintiff in the name of the defendant while she was still his wife, and the plaintiff, who maintains that he provided the purchase money, bases his claim primarily upon the doctrine of benami as applied to Kenya, and alternatively, if that doctrine should be held not to be applicable, then upon the principle of there being a resulting trust in his favour with no presumption of advancement available to the defendant. The principal issues in the case are therefore, first, as to whether the purchase was in fact effected out of his own moneys, as the plaintiff contends, or out of the defendant’s mother’s moneys, as the defendant contends; and, secondly, if the purchase money was in fact provided by the plaintiff, whether, despite the transfer of the premises into the defendant’s name, the plaintiff is entitled to claim them as his own. At the hearing, by the wish of both parties and on the footing that the defence amounted to a confession and avoidance, the defendant began.

The premises were purchased in 1957 at the cost of Shs. 15,000/- and there was a direct conflict of testimony as to the source of this money. The defendant, who gave evidence first and appeared to have little understanding of financial matters, said that it was provided by her mother, Uba Binti Abdulrehman, who raised it by the sale of property at Changamwe, in Mombasa, known as plot 392 of

section VI Mainland North, for a similar sum which, in the defendant's presence, she gave to the plaintiff in cash to place on deposit to her credit. This, the defendant said, he did and, subsequently, at her mother's request, he applied this money in the purchase of the suit premises, placing them, also at the mother's

suggestion, in the name of the defendant. In support of this the defendant put in evidence a copy (admitted by consent) of a transfer on sale by the mother for a sum of Shs. 15,000/- the payment of which was acknowledged in the transfer. This document was dated March 19, 1956, that is, approximately twelve months prior to the purchase of the suit premises.

In cross-examination the defendant agreed that, on the day she sold plot 392, her mother may have discharged a mortgage on a plot of land at Makadara, but maintained that, if she did so, the proceeds of the sale of plot 392 were not utilized for this purpose. By consent there were put in evidence copies of a charge dated July 9, 1954, for Shs. 13,000/- created by the defendant's mother over plot 392 and another plot known as plot 71 Makadara, and of a discharge dated March 19, 1956 of that charge. Faced with the inference that the proceeds of sale of plot 392 may have been applied in discharge of the debt of Shs. 13,000/- already due on that plot and plot 71, thereby rendering it impossible for that money to have been handed in its entirety to the plaintiff, the defendant said that her recollection of the position was that her mother had taken a loan on the security of the Makadara property which she discharged on the day she sold plot 392 but not out of the proceeds of that sale. She appeared to suggest also that this debt on plot 392 was discharged by her mother out of the proceeds of sale of a plot at Saragui, but there were put in evidence copies of a charge for Shs. 11,000/- created by the mother and dated May 26, 1953, on lands which, I understood counsel to agree, included the Saragui property and of a discharge of that incumbrance, together with a transfer on sale by the mother, both dated November 25, 1954. Even allowing for the handicap under which the defendant was labouring in dealing with matters occurring more than ten years ago and of which she may never have had an intimate knowledge, it would be impossible to say that she had established as a reasonable probability the fact that her mother gave to the plaintiff a sum of Shs. 15,000/- with which he bought the suit premises.

The plaintiff, on the other hand, maintained that he himself provided the sum of Shs. 15,000/- for the purchase of the suit premises primarily by the application to that purpose of a sum of Shs. 14,952/- received by him as compensation from Government for the compulsory acquisition of other premises owned by him and known as plot No. 131 section VI at Changamwe. He said that in March, 1957, the negotiations for the purchase of the suit premises were completed by him with an estate agent named Ebrahim Sumra, and that on 21st of that month he paid Sumra a sum of Shs. 3,750/- by cheque, representing a twenty-five per cent deposit in respect of the purchase price, which was followed on April 10, 1957, by a cheque for Shs. 10,000/- drawn in favour of his advocates, Messrs. Satchu and Satchu. Paid cheques for these sums, signed by the plaintiff and bearing these dates, were put in evidence, together with the relevant bank statements covering the period from December 20, 1956, to December 27, 1957, which shows that these two cheques had been paid by the bank on March 22 and April 12, 1957, respectively, and also shows a payment into his account of Shs. 14,952/- on March 22, 1957. On March 21, 1957, the plaintiff's bank account was in credit to the sum of only Shs. 95/37 and, whether for this or some other reason, when first presented on the following day the cheque for Shs. 3,750/- was not met, being marked "refer to drawer". Later on that day, however, possibly after the lodgment of the cheque for Shs. 14,952/-, the cheque for Shs. 3,750/- was cleared and the credit balance thus created enabled the cheque for Shs. 10,000/- to be met when presented on April 11.

The plaintiff's version of the transaction received support from the evidence of Mr. Sweet, a land and estate agent, who said that about the year 1956 he was appointed by Government to be the collector in connection with the compulsory acquisition of land at Changamwe, which included plot No. 131 section VI, the

registered owner of which was one, Mohamed Ahmed Shallo, to whom compensation amounting to Shs. 14,952/- was awarded, a cheque for that sum being sent to him by post on March 18, 1957.

Whatever may have been the true position as between the plaintiff and his mother-in-law in regard to the proceeds of sale of plot 392 in March, 1956, I must hold that, on the balance of probabilities based upon the evidence to which I have referred, the purchase of the suit premises in March, 1957, was in fact paid for by the plaintiff out of the proceeds of the acquisition of his plot number 131 at Changamwe. I make no finding in regard to the defendant's contention that the proceeds of the sale in 1956 of plot 392 were at some stage handed by her mother in cash to the plaintiff in the defendant's presence, for, even assuming that her contention is correct, no nexus has been established between that transaction and the purchase of the suit premises in March, 1957.

The next question is as to the effect of the conveyance of the suit premises, purchased by the plaintiff with his own moneys, into the defendant's name. Counsel for the plaintiff, relying upon the decision of O'Connor, C.J., in *Bishen Singh Chadha v. Mohinder Singh and Another* (1), submitted that, since the parties are Muslims, there arises a rebuttable presumption of *benami* in displacement of any presumption of advancement such as might have arisen from the application of the principles of equity derived from English law. In that case a preliminary issue was argued as to whether an equitable presumption of advancement arose in regard to a purchase by a Sikh father of an interest in land in Kenya in the name of his infant son, and the learned Chief Justice, in the course of his judgment, said (29 K.L.R. at p. 21):

"There is a long line of cases of unimpeachable authority to the effect that the presumption of intended advancement of a son which English Equity applies to a purchase by a father of property in the name of his son, is not part of the general law of India. In India, both among Hindus and Muslims the practice of purchasing property in the names of others is frequent. These transactions are called *benami* (i.e. 'without name' or 'fictitious name') transactions. The person in whose name the property is purchased is now known as the *benamidar*, and the result of a *benami* purchase is similar to the result of a purchase in England of property by A in the name of B out of moneys provided by A. Both in England and in India B holds the property as a trustee for A. The difference is that whereas in England, if B is the wife or son of A, there is an exception to the rule raising a resulting trust in favour of A, it being presumed that A intended to benefit his wife or son; in India there is no such presumption."

The principle of *benami* in regard to purchase is shortly stated in Mulla's Principles of Hindu Law (12th Edn.), p. 748, para. 604, as being that where a person buys property with his own money in the name of another person and without any intention to benefit that other person, the transaction is called "*benami*" and the person in whose name it is effected is called "*benamidar*". The learned author goes on to say:

"The *benami* system in India is not a specialty of Hindu law. Within its legitimate scope it accords with the ideas and habits of the people and the court recognises and gives effect to *benami* transactions on the principle that recognition should be given to the real and not the nominal title to property unless to do so would be contrary to any provisions or policy of law. *Benami* transactions among Mohammedans are more commonly known as *furzee*. The word *benami* is a Persian compound word, made up of *be* which means without and *nam* which means *name*. It means literally *without a name*, and denotes a transaction effected by a person without using his own *name*, but in the name of another. The practice of putting

property into a false name, that is, the name of a person other than the real owner, is not uncommon. This practice has arisen partly from superstition – some persons and some names being considered as lucky, and others as unlucky. Partly also the practice is due to a desire to conceal family affairs from public observation.”

In *Sura Lakshmiah Chetty v. Kothandarama Pillai* (2), the Judicial Committee consisting of Lord Sumner, Lord Blanesburgh, Sir John Edge, and Mr. Ameer Ali, dealt specifically with the position as between husband and wife as follows:

“There can be no doubt now that a purchase in India by a native of India of property in India in the name of his wife unexplained by either proved or admitted facts is to be regarded as a *benami* transaction, by which the beneficial interest in the property is in the husband, although the ostensible title is in the wife. The rule of the law of England that such a purchase by a husband in England is to be assumed to be a purchase for the advancement of the wife does not apply in India.”

Counsel for the defendant sought to distinguish the decision in *Bishen Singh's* case (1) on the ground that it decided merely that the system of holding land *benami* is applicable to members of the Sikh community in Kenya, and he contended that the system has no application to Muslims except in India and that the equitable principle of advancement as between husband and wife, which found no place in the law in India, formed part of the law of Kenya and should be applied in the present case. He was unable, however, to cite any authority in support of these propositions, and indeed, apart from *Bishen Singh's* case (1), where admittedly the views of the learned Chief Justice as to the application of *benami* to Muslims were to some extent obiter inasmuch as none of the parties was a Muslim, I have not been referred to any authority which either lays down that the principle of *benami* applies as between Muslims in Kenya or negatives that proposition. In *Fatuma Binti Mohamed Bin Salim Bakhshuwn v. Mohamed Bin Salim Bakhshuwn* (3), however, the Judicial Committee, affirming the decision of the Court of Appeal for Eastern Africa, accepted the position that, apart from certain differences which had no significance in that case and have not been shown to have any significance in the present case, Mohammedan law in East Africa is the same as in India. From this it follows that if, as would seem indubitably to be the case, the rebuttable presumption, that the purchase of land by a person in the name of another creates the latter a *benamidar*, applies as between Muslims in India, a similar position must be regarded as arising in Kenya. I should, perhaps, add that although, if the question had been *res integra*, I might, like O'Connor, C.J., have felt some doubt as to the correctness of treating this matter as falling within the ambit of the proviso to Article 4 of the Kenya Colony Order in Council, 1921, so far as the operation of that Order has been preserved, but the position appears to be too well settled and I must accept as correct the proposition, advanced here by the plaintiff, to the effect that, until displaced, there is a presumption in his favour that the purchase of the premises by him with his own money, albeit in the defendant's name, was intended to create her a *benamidar* only and not the beneficial owner.

It is now necessary to consider the conduct of the parties in relation to the property subsequent to its purchase as a guide in determining whether the presumption of *benami* may be said to have been displaced. In this connection it must be borne in mind that, although the plaintiff is familiar with it, the defendant is unable to read or write the English language, and the plaintiff, during their marriage, normally opened all her correspondence for her. Simultaneously with its purchase the property was charged by the defendant to secure a loan of Shs. 6,000/- which the plaintiff required. According to him the loan was raised

from a Mr. Janmohamed Kanji, and he, the plaintiff, told the defendant that he required the money to pay the conveyancing and registration fees in connection with the purchase of the premises and also for the purpose of effecting improvements to a property of his at Likoni near Mombasa. He identified the entry in his bank statement showing a payment-in of Shs. 4,250/- on May 25, 1957, as being the balance of this sum of Shs. 6,000/- after the deduction by his advocates of a sum of Shs. 1,750/- in respect of the foregoing fees. Finally he said that the loan of Shs. 6,000/- was paid off in three sums of Shs. 333/33 provided by him and one sum of Shs. 5,000/- obtained by means of a further charge on the plot for that amount, which still subsists and upon which he has paid and is still paying interest. The defendant's version of the matter is that she personally arranged to raise the loan of Shs. 6,000/-, which was given by a person named Shamsuddeen, and that, having obtained it, she gave the money to the plaintiff since he needed it. She said that she had obtained her mother's sanction to the transaction, which was given on the condition that the plaintiff should pay the interest on the charge and finally repay the loan, that she has not herself paid any interest on it and that the loan is still outstanding. She was unaware of the precise net amount realised by raising the charge for Shs. 6,000/- and did not know whether the plaintiff had lodged the sum of Shs. 4,250/-, portion of the sum realised, in his bank account. She remembered being asked to sign a mortgage instrument for money borrowed from Mr. Shamsuddeen, which she believed to be still outstanding and upon which the plaintiff is paying interest, but it was not made clear in evidence whether the charge which the plaintiff said was in favour of Janmohamed Kanji was the same as that which the defendant said was in favour of Shamsuddeen.

It was agreed by both parties that, when purchased and for the next two and a half or three years, the premises were let to occupying tenants from whom the plaintiff, as from that time, collected the rents, in addition to which he paid the rates and the cost of repairs. The plaintiff said he spent the moneys received for his own purposes, while the defendant said he brought the money home and they both spent it. It is clear that he never accounted to her for the rents, nor did she suggest that she had asked him to do so, and he said that he collected the rents solely on his own behalf as owner and issued receipts therefore in his own name but marked "a/c Maryam" because the property was in her name.

On the occasion of the divorce, in March, 1965, at which time they were living together, the defendant left the premises of her own accord in order, she said, to avoid a quarrel and because she felt that if she compelled him to leave it might have had an injurious effect on the children of the marriage. Two months later, however, she appears to have changed her mind, and by her advocate's letter of May 13, 1965, she demanded possession in no uncertain terms. This brought a rapid reply by letter dated May 20, 1965, from the plaintiff's advocates, asserting that the premises had been purchased by him out of his own moneys, that the defendant was holding the property as a trustee for him, and requesting that she should transfer it to him.

Taken as a whole, the evidence as to events since March, 1957 was inconclusive as to the question of beneficial ownership and, in my opinion, notwithstanding that the defendant appears genuinely to have believed that the property belonged to her, is insufficient to displace the presumption of benami upon which the plaintiff relies. The action, therefore, succeeds, and the plaintiff is entitled to a declaration that he is the owner of plot 145 subject to all existing incumbrances and to the order for costs mentioned below. From the evidence adduced it appeared that the defendant, at the instance of the plaintiff or with his knowledge, has executed one or more instruments of charge upon the property, which may be still subsisting and may well contain personal covenants by her, and I therefore direct that all covenants, burdens and liabilities attaching to

or affecting her in any way under or by virtue of every such instrument shall be released by or be transferred to the plaintiff, who shall execute in her favour a proper discharge or indemnity against the same. No order is made as to the undivided half-share in plot 550 which, it seems, need not have been included in the suit.

I have given careful consideration to the question of costs. It is clear that, since the plaintiff, for reasons of his own, caused the property to be conveyed, in the first place, into the name of the defendant and subsequently caused her to execute one or more instruments of charge thereon, he must himself bear the costs and expenses of having the property transferred to him, with a proper discharge and indemnity to the defendant as already mentioned. These costs will include those to be incurred by the defendant in having the necessary conveyancing instruments settled and approved by her advocate and, unless otherwise agreed, will be taxed as between advocate and client. What is not so clear is the question of how the general costs of the action should be borne. Section 27 (1) of the Civil Procedure Act preserves the discretion of the court to direct, for good reason, that costs shall not follow the event, and in my opinion there is adequate reason here for so directing. The position of a *benamidar* is closely analogous to that of a trustee, which, indeed, was the character in which the plaintiff initially contended that the defendant held the property. Furthermore, the assumption of that office by her appears to have been none of her choosing and to have occurred probably without her knowledge or consent, for the plaintiff, it would seem, at no time prior to his advocates' letter of May 20, 1965, apprised her of what he thought to be the position but, instead, perhaps unwittingly, permitted her, in her unsophisticated way, to believe that the trust property was her own. In these circumstances I consider it reasonable that the defendant be reimbursed out of the trust property (that is, the suit premises) in respect of her costs of the suit (other than the costs of or occasioned by the amendment to her defence made during the course of the hearing), to be taxed as between party and party and paid out of the trust property or otherwise prior to the transfer of that property to the plaintiff, and I so direct. The plaintiff will abide his own costs.

Declaration and order accordingly.

For the plaintiff:

Bryson, Inamdar and Bowyer, Mombasa

I. T. Inamdar

For the defendant:

A. Y. A. Jiwaji, Mombasa

Ayoob v Ayoob
[1967] 1 EA 416 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	12 May 1967
Case Number:	9/1967 (78)
Before:	Rudd J

[1] *Divorce – “Talak” – Whether divorce by “talak” effective to dissolve marriage contracted by Mohammedans under Marriage Act (K.) – Parties also married by Mohammedan law.*

[2] *Divorce – Mohammedans married by Mohammedan law and also under Marriage Act (K.) – Whether divorce by “talak” effective to dissolve marriage.*

[3] *Marriage – Marriage under Marriage Act (K.) – Followed by marriage by Mohammedan law – Whether can be dissolved by “talak”.*

[4] *Marriage – Various forms of and means of dissolving under Kenya law discussed.*

[5] *Mohammedan law – Divorce – “Talak” – Whether “talak” effective to dissolve marriage where parties married under Marriage Act as well as by Mohammedan law.*

Editor’s Summary

The petitioner and the respondent, both Mohammedans, were married under the Marriage Act of Kenya, and subsequently also went through a marriage according to Mohammedan law. The petitioner-husband later divorced the respondent by “talak”, which would have been a valid divorce according to Mohammedan law as regards a marriage recognised by Mohammedan law. The petitioner then brought this suit for a declaration that this “talak” divorce was also recognised by the law of Kenya as dissolving the marriage under the Marriage Act.

Held – A valid marriage effected under the Marriage Act can only be dissolved in Kenya under the law of Kenya by a judgment or decree passed under the Matrimonial Causes Act and the question of religion is wholly immaterial in such cases. Divorce by “talak” is not good divorce as regards such a marriage.

Petition dismissed.

Cases referred to in judgment:

(1) *Harvey otherwise Farnie v. Farnie* (1881), 6 P.D. 35.

(2) *Rattansey v. Rattansey*, [1960] E.A. 81.

Judgment

Rudd J: The petitioner, a Sunni Muslim domiciled in Kenya, on August 10, 1951, married the respondent, then a Shiite Muslim domiciled in Kenya, in the Marriage Registrar’s office, Nairobi, under and in accordance with the Marriage Act (Chapter 150 of The Laws of Kenya). There is one child of the marriage, a son, born on June 22, 1952. Subsequent to this civil marriage the parties went through a marriage according to the Mohammedan law, the respondent having adopted by then the doctrines of the Sunni sect instead of the Shia sect to which she had formerly belonged. On February 2, 1967, the petitioner pronounced in writing an irrevocable divorce by “talak” purporting to divorce the respondent. Under the Mohammedan Marriage, Divorce and Succession Act (Cap. 156), such a divorce would be a valid divorce according to Mohammedan law as regards a marriage recognised by Mohammedan law. By the present suit, instituted on the day of the “talak” divorce, the petitioner seeks a declaration that the

divorce pronounced by “talak” is recognised by the law of Kenya as dissolving the marriage between the parties under the Marriage Act.

Under the Mohammedan law a man is entitled to have as many as four wives at the same time. A Mohammedan marriage is, therefore, not a monogamous marriage. Further, a Mohammedan marriage is capable of being dissolved at the will of the husband by a “talak” divorce without the intervention of any court and without the necessity of any grounds existing to justify the divorce. I believe that the Mohammedan law, if it stood alone, would not recognise a marriage under the Marriage Act as a marriage which had the effect during its continuance of prohibiting the husband from taking another wife by way of Muslim marriage during the continuance of the marriage under the Marriage Act. Counsel for the petitioner said that he would not suggest that a marriage under the Marriage Act was a marriage which was recognised under Mohammedan law.

I am not convinced that that is so and, if the husband acquired a domicile in a country which applied pure Mohammedan law in such matters, I think that a marriage under the Marriage Act could in certain circumstances be recognised to some extent by Mohammedan law. There have been decrees for dissolution of such marriages or, at any rate, there has been judicial recognition of divorces of such marriages by “talak” in such countries. In this case the court is not concerned with any conflict of law between the *lex domicilii* of the parties and the *lex loci contractus* as in *Harvey otherwise Farnie v. Farnie* (1). In this case both these *leges* are the law of Kenya.

The effect of a marriage under the Marriage Act is quite different in its incidents from that of a marriage under Mohammedan law. I think it might be recognised as a Mohammedan marriage for some purposes, albeit many such marriages, including the one in question in this case, might be irregular marriages under the Muslim law. An irregular marriage is void under Shiite law but not necessarily void under Sunni law. It is unnecessary, fortunately, to consider that aspect in detail in this case, but the point is that a marriage which is merely a marriage recognised under Mohammedan law has quite different incidents from a marriage under the Marriage Act. I will call the former form of marriage a Mohammedan marriage and the latter form a marriage under the Act and I have no doubt but that a marriage under the Act is not a Mohammedan marriage in the ordinary sense. A marriage under the Act is a monogamous marriage, a Mohammedan marriage is not a monogamous marriage. This distinction is implicit virtually throughout the Act.

A Mohammedan marriage is merely a civil contract made with certain formalities which are not of a ceremonial nature and it can be dissolved by “talak”. There is no set form. A marriage under the Act is in set form and cannot be dissolved during the joint lifetime of the spouses except by a valid judgment of divorce. See s. 29 (2) (b). Under the Muslim law there are, in certain circumstances, requirements as regards the religions professed by the spouses. This is not so as regards marriages under the Act. Mohammedan marriages can be dissolved under the law of Kenya by “talak” and such a dissolution will be recognised by the law of Kenya in accordance with the Mohammedan Marriage, Divorce and Succession Act, but that Act only applies to Mohammedan marriages, that is marriages recognised as valid by Mohammedan law.

It is a mistake to introduce religious doctrines and beliefs into this matter further than is necessary because, although such doctrines and beliefs have a place as regards Mohammedan marriages and certain other marriages which are governed by principles of religion, they have no place as regards marriages under the Act. For example if a man and woman, who both profess the Roman Catholic religion, get married under the Act the marriage is valid in law though it is not valid or recognised under the Roman Catholic religion or under the canon law. This shows that religion does not affect the legal validity of marriage

under the Act. Any two persons, so long as there is no legal impediment to their marriage, can get validly married under the Act whatever religion either of them may profess and even if one or both profess no religion at all.

Such a marriage is valid by the law of Kenya. It might very well not be recognised in religion and in certain cases it would not be recognised as valid under Mohammedan law. Such a marriage has effect by virtue of the Act and not by virtue of any religion. It cannot be altered in effect at the will of the parties or by a change of religion. A marriage under the Act is monogamous, intended to last during the joint lives of the spouses, can only be dissolved by a judgment of divorce passed by a competent court and is recognised and prescribed as such by the law of the land. A Mohammedan marriage is not a monogamous marriage and can be dissolved by declaration of “talak” without the intervention of a court. It is true that a marriage under the Act can be altered in effect, as regards the possibility of divorce, by a change of domicile to the domicile of a country which does not recognise all these incidents of such a marriage in Kenya as applying to marriages in the country of the changed domicile, or where the laws of that country allow divorce from any marriage on particular grounds recognised as valid for the purpose in that country. But a change of religion would not affect a marriage under the Act by the law of Kenya because religion has no part in such a marriage. I have considered the case of *Rattansey v. Rattansey* (2), which is a Tanganyika decision and, with all due respect to the very learned judge who decided that case, I have some reservations as regards some of the dicta in that judgment. I do not put it stronger than that since I have not a detailed knowledge of all the provisions of laws which prevailed at that time in Tanganyika, as it then was. I am content to say that it appears that the provisions of the Kenya Marriage Acts differ in material respects from those of the Marriage Ordinance in Tanganyika. In Kenya these matters are governed by statute not by religion.

In my opinion divorce by “talak” is not good divorce under the Mohammedan Marriage Divorce and Succession Act as regards a marriage under the Marriage Act because such a marriage is not a Mohammedan marriage within the meaning of the Mohammedan Marriage Divorce and Succession Act. It is something more which is not recognised by the Mohammedan religion. It is true that apart from the reference in s. 29 (2) (b) to the fact that the marriage cannot be dissolved during the lifetime of the spouses except by a valid judgment of divorce, the Marriage Act does not deal with the question of divorce. The Act does, however, state that to effect a divorce in respect of a marriage under the Act a judgment of divorce by a competent court is necessary. This, of course, constitutes a difference from the Mohammedan law of marriage.

The law of Kenya recognises many kinds of marriages which have different incidents and effects. Under the tribal customary laws there are customary marriages governed by custom, both as to the form of their solemnisation, the incidents attaching thereto and the mode of divorce. There are African Christian marriages solemnised under the African Christian Marriage and Divorce Act (Chapter 151), and divorce in such cases is by s. 14, in effect, subject to the provisions of the Matrimonial Causes Act, save that jurisdiction is given to subordinate courts of the first class. Then there are Mohammedan marriages which are governed by Mohammedan law but recognised as the law of the land by the Mohammedan Marriage Divorce and Succession Act (Chapter 156) but such recognition only applies to marriages contracted in accordance with and recognised by Mohammedan law. See ss. 2 and 3. In the case of such marriages, but only such marriages, divorce is available in accordance with the Mohammedan law. See ss. 2 and 3.

By s. 5 it is provided that:

“Whoever contracts a Mohammedan marriage, being at the time married under the Marriage Ordinance or in accordance with the law of any Christian country and without having first obtained a lawful divorce, shall be guilty of an offence and liable to imprisonment for a term not exceeding five years and in such a case Mohammedan law shall have no application”.

Unless this section has no effect where the Mohammedan marriage referred to is merely a remarriage between the same parties, the section would seem to be conclusive against the possibility of divorce by “talak” and the better view would seem to be that there is no exception in the case of a mere remarriage and the Mohammedan marriage would, therefore, be illegal and void under the law of Kenya. A similar result was held to apply on more general principles in Tanganyika as it then was in the case of *Rattansey v. Rattansey* (2).

The law of Kenya recognises other marriages and divorce therefrom under the Hindu Marriage and Divorce Act (Chapter 157). Finally, there are marriages under the Marriage Act, which can be effected under the Act by any persons irrespective of race or religion. Such marriages effected in accordance with the Act are marriages which are voluntary unions of one man to one woman for life to the exclusion of all others and, as regards divorce, the provisions of the Matrimonial Causes Act (Chapter 152) apply. Such divorces require a decree of dissolution under the Act.

The plurality of different forms of marriage recognised in Kenya and the plurality of methods of divorce can be confusing and can lead to difficulty. That is why a Commission has been appointed to enquire into these matters and to report to Government. The reason for the different laws is that, apart from statutory enactments, the law of Kenya was certain English and applied Acts, African customary laws in the case of Africans to whom they applied, and English common law and the principles of equity. English common law only recognised marriages which were unions of one man to one woman for life and only allowed a limited form of divorce to be decreed in the case of such marriages. If there had been no statutory provisions recognising Mohammedan marriages and marriages within the Hindu Marriage and Divorce Act, such marriages would not be recognised by law as valid marriages, or at any rate there was a doubt as to that and decisions to that effect. I do not doubt but that the reason the legislature enacted laws recognising different forms of marriage and divorce was because it was desirable to settle by legislation the doubtful and anomalous positions that existed in the absence of such legislation. In each case, however, where a special and exceptional form of marriage was recognised, by virtue of a special Act, provision was made for divorce from such marriages, leaving the Marriage Act and the Matrimonial Causes Act to deal respectively with the solemnisation in Kenya and divorce as regards marriages which were marriages which would be recognised as such by the old common law of England.

It follows that as far as Kenya is concerned a valid marriage effected under the Marriage Act can only be dissolved in Kenya under the law of Kenya by a judgment or decree passed under the Matrimonial Causes Act and the question of religion is wholly immaterial in such cases.

This suit, however, is not a suit for a judgment or decree of divorce but a suit for a declaration. Such a declaration would conflict with the intention of the Marriage Ordinance and should not be granted. The question of religion simply is not a matter for consideration as regards marriage or divorce under the Marriage Act or the Matrimonial Causes Act. A change of domicile could give the courts of the new domicile the power to dissolve any marriage wherever contracted, according to the laws of that country, and in such case where the change of domicile was clear, the decree of the court of that country would no

doubt be recognised in Kenya. A change of religion has no such effect under the law of Kenya. The petition must be dismissed.

Petition dismissed.

For the petitioner:

Subodh Inamdar, Nairobi

Zus v Uganda
[1967] 1 EA 420 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	14 February 1967
Case Number:	781/1966 (90)
Before:	Sir Udo Udoma CJ
Sourced by:	LawAfrica

[1] Criminal Law – Stealing, contrary to s. 252 Penal Code (U.) – “Recent possession” – Whether applies where stolen bicycle found in accused’s possession after interval of seven months.

Editor’s Summary

The appellant was convicted of stealing a bicycle which had been found in his possession seven months after its owner had reported its loss to the police; the trial magistrate applied the doctrine of “recent possession” in the absence of a reasonable explanation from the accused of how he came by the bicycle. The appellant was also convicted of receiving the bicycle.

Held –

- (i) a period of seven months cannot be described as “recent” and the trial magistrate was wrong to apply the doctrine of “recent possession”; but
- (ii) the conviction of receiving was correct.

Appeal allowed, as against conviction of stealing only.

Cases referred to in judgment:

- (1) *R. v. Harris* (1860), 8 Cox C.C. 333.
- (2) *R. v. Cooper* (1852), 3 C. & K. 318; 175 E.R. 750.
- (3) *R. v. Thomas Henry Curnock* (1914), 10 Cr. App. Rep. 207.

(4) *R. v. Partridge* (1836), 7 C. & P. 551; 173 E.R. 243.

Judgment

Sir Udo Udoma CJ: The appellant was charged with stealing a bicycle contrary to s. 252 and punishable under s. 255A of the Penal Code; or alternatively with receiving or retaining the bicycle knowing the same to have been feloniously stolen or obtained contrary to s. 298 (1) of the Penal Code. He was tried by the Magistrate Grade I in the Magistrate's Court, West Nile and convicted of stealing contrary to s. 252 and punishable under s. 255A of the Penal Code. He was sentenced to fifteen months' imprisonment. The appeal is on the ground that the magistrate was wrong in law to have convicted the appellant of stealing as the bicycle was only found in the appellant's house, nobody having seen him steal the said bicycle. At the hearing of this appeal the appellant did not appear. He is serving his sentence in prison but was duly served with the hearing notice.

The facts of the case are simple and straightforward. It appears that on June 20, 1965, the complainant, Valerio Ogurubo, went with his bicycle to Arua. He locked and left the said bicycle, a Gazelle No. 2398437, outside leaning the same against the wall of a church building. He went inside the church for worship. After the church service and on coming out of the church, he found

that his bicycle had disappeared. He searched for it in vain. He immediately reported the loss to the police at the Arua Police Station. The police then mounted a search for the bicycle.

On February 3, 1966, the appellant was charged with having stolen a radio, the property of another person. Before the appellant was charged Det. Con. John Alia and Det. Con. Joseph Odongo conducted a search of the appellant's house in the presence and with the consent of the appellant and there found a Gazelle bicycle No. 2398437, which was later identified by Valerio Ogurubo as his lost bicycle. The appellant, after due caution, told the police that the bicycle was his and that he had bought the same at Kisumu. The appellant was brought together with the bicycle to the Police Station. On checking their Lost Property Report Book at the Police Station, Det. Con. No. 2358 John Alia found that the number and make of the bicycle recovered from the appellant's house corresponded to the number and make of the bicycle the loss of which had been reported to the police by Valerio Ogurubo as having been stolen on June 20, 1965.

At his trial the appellant swore that he did not know anything about the bicycle found in his house and that he only knew that he was arrested by the police because they said he stole a radio.

The learned trial magistrate accepted the evidence of the witnesses for the prosecution and found that the Gazelle bicycle No. 2398437 was the property of Valerio Ogurubo; that the same was stolen from outside the church building at Arua on June 20, 1965; that the bicycle was in fact found in the appellant's house; that after due caution, the appellant had told the police that the bicycle was his and that he had bought it at Kisumu but that on oath in court before him the appellant had merely told him that he knew nothing of the bicycle, thereby denying what he had even told the police as well as the ownership of the bicycle.

In those circumstances, the learned trial magistrate held that in the absence of any explanation on the part of the appellant as to how he had come to be in possession of the bicycle he must and did find the appellant guilty of having stolen the bicycle contrary to s. 252 and 255A of the Penal Code. He convicted and sentenced him as stated above on the doctrine of recent possession.

I agree with the submission of Mr. Kakembo, State Attorney, that, on the evidence, and in all the circumstances of the case, the learned trial magistrate was wrong in law to have found the appellant guilty of stealing contrary to s. 252 and punishable under s. 255A of the Penal Code.

The bicycle was stolen on June 20, 1965. It was found in the possession of the appellant on February 3, 1966 – that is after a space of seven months. That being so, I think the learned trial magistrate was wrong to have applied the doctrine of recent possession. A period of seven months cannot be described as recent.

In *R. v. Harris* (1), a prisoner was indicted for sheep stealing. The prosecutor lost the sheep in September, 1859. His sheep was found in the prisoner's possession in March, 1860. There was no other evidence of larceny than the possession. It was held that the period between the loss and the finding of the sheep was too long.

It should be noted that the space of time between the loss and the finding of the sheep was only six months. There was no alternative charge of receiving stolen property and so the issue of receiving or retaining stolen property was not considered by the court. See also *R. v. Cooper* (2).

But in *R. v. Thomas Henry Curnock* (3), the prisoner was convicted of feloniously receiving stolen property. He was sentenced to fifteen months. It was held that he was properly convicted because the

burden of giving a reasonable explanation was on the prisoner. In that case, when the prisoner was first

questioned by the police, he had said that he knew nothing about the hose pipe. The next day he said he found it by the Feeder Bridge. At his trial before the court he said he had picked it up at Brislington, which was a long way from Feeder Bridge.

It was held that in view of the three contradictory explanations, it could not be said that the prisoner had given any reasonable explanation as to how he had come to be in possession of the hose pipe. See also Langmead L. & C. 427.

In *R. v. Partridge* (4), the principle was laid down that the question of what is or what is not a recent possession of stolen property must be considered with reference to the nature of the articles stolen. There two ends of woollen cloth, the property of one John Figgins Marling, were lost; and, it appeared that the cloth was lost on January 23, 1836, it then being in an unfinished state, consisting of 20 yards each; and part of it was on March 21, 1836, left by the prisoner at the house of another person. On March 30, 1836, the prisoner sent the residue of it to be shorn, and he was found in possession of it two months after the theft, the property being still in the same state as when it was first stolen. It was held that it was possession sufficiently recent to call on the prisoner to show how he had come by the property.

In the instant case in order to convict under s. 298 (1) of the Penal Code, which was the alternative charge, the condition laid down must be, and was fulfilled having regard to the provisions of s. 298 (3) of the Penal Code, which are in the following terms:

- 298 (3) No person, save a person pleading guilty, shall be convicted of an offence under this section unless it shall first be proved that the property which is the subject-matter of the charge has in fact been stolen or feloniously or unlawfully taken, extorted, obtained, converted or disposed of.

On the evidence before the court, it was established that the bicycle was stolen outside Arua church and that the police had been searching for it. It was the duty of the appellant to have given to the learned trial magistrate an account of how he had come by the bicycle. To the police the appellant had asserted his right over the bicycle and had claimed to have bought it at Kisumu. But before the magistrate the appellant said he knew nothing about the bicycle. The bicycle having been found in his possession the presumption must be that he was either the thief or had received it from someone knowing the same to have been stolen.

In view of the long space of time between the loss and the finding of the bicycle, and holding, as I do, that the doctrine of recent possession would not apply, the learned trial magistrate should only have found the appellant guilty and convicted him of receiving or retaining property knowing or having reason to believe the same to have been feloniously stolen or obtained contrary to s. 298 (1) of the Penal Code.

The appeal is therefore allowed. The conviction of the appellant of stealing contrary to s. 252 and punishable under s. 255A of the Penal Code is set aside. The appellant stands convicted of receiving or retaining stolen property contrary to s. 298 (1) of the Penal Code.

The appeal as to sentence is dismissed. It is confirmed that the appellant do go to prison for fifteen months as from the date of his conviction by the magistrate.

Order accordingly.

Appeal allowed, as against conviction of stealing only.

The appellant did not appear and was not represented.

For the respondent:

Attorney-General, Uganda

F. W. Kakembo (State Attorney, Uganda) for the respondent.

D'Silva v Rahimtulla and others
[1967] 1 EA 423 (HCK)

Division: High Court of Kenya at Nairobi
Date of judgment: 12 May 1967
Case Number: 97/1964 (92)
Before: Rudd J
Sourced by: LawAfrica

[1] *Costs – Taxation – Instructions and getting-up fee – Successful counterclaim – Principles – Whether instructions fee on counterclaim to be allowed under item 1 (f) or 1 (l) of Sched. 6 of Remuneration of Advocates Order, 1962 (K.) – What principles to be applied under item 1 (l).*

[2] *Costs – Counterclaim – Instructions fee on – Basis for taxation – Remuneration of Advocates Order, 1962, Sched. 6, Items 1 (f) and 1 (l) (K.) – Which item to be applied – What principles to be applied.*

Editor's Summary

The plaintiff sued the defendants for the refund of money paid under a void agreement for the purchase of land. The defendants not only defended the suit but also, in the alternative, counterclaimed against the plaintiff for damages, possession and mesne profits. The plaintiff succeeded on his claim with costs; and the defendants also succeeded in part on their counterclaim and were awarded costs on their counterclaim, which costs were taxed as to instructions and getting-up fees on the basis of the minimum scale fee based upon the value of the property under item 1 (f) of Sched. 6 of the Remuneration of Advocates Order, 1962 (which in this case provided a minimum fee of Shs. 5,000/-). Against this taxation the plaintiff appealed, contending that Item 1 (l) (which provides a minimum fee of Shs. 500/-) of that Sched. and not Item 1 (f) applied.

Held –

- (i) Item 1 (f) of Sched. 6 to the Remuneration of Advocates Order, 1962, does not apply to a counterclaim. The only Item which can apply is 1 (l).
- (ii) (obiter) where there is a question of increasing the prescribed fee of Shs. 500/- under Item 1 (l) in the case of a counterclaim, the taxing master should apply the principles of the *Medway Oil* case (infra) i.e. the successful party on the counterclaim does not get his full costs as if the counterclaim were a complete new claim in a separate suit, but only gets the extra costs to which he is entitled.

Appeal allowed. Matter referred back for taxation.

Cases referred to in judgment:

(1) *Medway Oil and Storage Co. Ltd. v. Continental Contractors Ltd.*, [1929] A.C. 88.

Judgment

Rudd J: In this suit the plaintiff sued for the refund of money paid on an agreement for the purchase of land which had become void for all purposes as a result of his failure to take certain steps which he should have taken.

The defendants defended this claim on various grounds which, if they had been held to be good grounds, would have meant that the agreement for purchase was still in effect validly subsisting and in the alternative the defendants counterclaimed for damages, possession of the land which had been given to the plaintiff and for mesne profits.

The plaintiff succeeded fully on the claim with costs. The defendants succeeded in part on the counterclaim to the extent that they were awarded 1,000/- damages,

an order for possession and an order for future mesne profits if default was made by the plaintiff in giving up possession upon the repayment of the purchase price by the defendant. The plaintiff was given his costs on the claim and the defendant costs on the counterclaim.

The facts which enabled the defendants to succeed to the extent that they did on the counterclaim were all facts which they in fact disputed as regards the plaintiff's claim and to a great extent followed from facts and contentions on which the plaintiff succeeded and the defendants failed. The plaintiff, although he retained possession, did not dispute the defendants' right to possession, and the defendants, though counter-claiming for possession and mesne profits, did not desire either of these but wanted to retain the purchase price. There was an issue as to quantum of damages and quantum of mesne profits and as to the time from which they were to run.

The plaintiff had his costs of the claim taxed and there is no dispute as to that. The defendants had their costs of the counter-claim taxed and as to that there is a dispute regarding the amounts allowed on the items of instructions and for getting up. These costs were taxed on the basis of the minimum scale fee based upon the value of the property under item 1 (f) of Sched. 6 of the Remuneration of Advocates Order, 1962.

As I understand it, the plaintiff concedes that the defendant is entitled to some costs for instructions and getting up as regards the counter-claim, but he submits that these costs should be limited to the extra costs of those items which were involved in establishing the counter-claim, to the extent that it succeeded and that they should not extend to issues which were decided against the defendant and in respect of which the plaintiff was entitled to tax his costs in respect of the claim against the defendant.

The plaintiff contends that the item under which the defendant's costs for instructions should have been taxed was item 1 (l) of Sched. 6 of the Remuneration of Advocates Order, 1962. These costs were in fact taxed upon the basis of the scale figure prescribed in item 1 (f) of the said schedule, calculated upon the value of the purchase price of the property under the agreement for sale.

The plaintiff appeals from the taxation of this item and from the amounts taxed in respect of the defendants getting up fee in respect of the counter-claim which, of course, is 1/4 of the amount of the instruction fee.

For the defendant it was argued that the instructions fee was properly taxed on the basis of item 1 (f) of the schedule in relation to the purchase price of the land under the agreement and that under the said Remuneration of Advocates Order the taxing officer had no discretion to allow any less sum than that provided under the scale in item 1 (f). On this basis the minimum fee for instructions was 5,000/- which was the amount allowed on taxation. It is conceded that the only items in the schedule which possibly would govern the taxation of the instructions fee were items 1 (f) or 1 (l).

Item (1) of the schedule, so far as it is material, reads as follows:

- “(1) Instruction fees – The fee for instructions shall be as follows unless the taxing officer in his discretion shall increase the same –
 - (f) to sue or defend any other proceedings commenced by plaint or originated by notice of motion, summons or petition or to have an issue determined arising out of interpleader or other proceedings before or after suit or to present or oppose an appeal where the value of the subject matter can be determined from the pleadings or the judgment and such value exceeds 200,000/- (fee) 5,000/-. (l) To sue or defend in any case not provided for above – (fee) – 5,000/-. Provided that (1) the taxing officer in the exercise of his discretion shall take into consideration

the other fees and

allowances to the advocate (if any) in respect of the work to which any such allowance applies, the nature and importance of the cause or matter, the amount involved, the interest of the parties, the general conduct of the proceedings and all other relevant circumstances.”

The schedule does not in terms expressly refer to the instruction costs to be allowed upon a counter-claim and proceedings upon a counter-claim are not proceedings commenced by plaint or originated by notice of motion, summons or petition, nor is it a defence to such proceedings and the allegations on which this counter-claim was based were anything but a defence to the claim. In my view a counter-claim can only come within item 1 (f) if it is within the words “to have an issue determined arising out of interpleader or other proceedings before or after suit.” It does not arise out of interpleader. Its object is not to have an issue decided before suit or even to have an issue decided after suit.

The English rule as to costs on a counter-claim is laid down in the leading case of *Medway Oil and Storage Co. Ltd. v. Continental Contractors Ltd.* (1), which has been held to be the guiding authority on the matter. The rule is that the successful party on the claim gets his costs in the ordinary way, and the successful party on the counter-claim does not get his full costs as if the counter-claim were a complete new claim in a separate suit, but only gets the extra costs to which he is entitled and which arise on the counter-claim.

This is an eminently fair and reasonable rule but it is not consistent with the Remuneration of Advocates Order, 1962, if the matter is governed by item 1 (f) thereof. In certain circumstances, and this is one, the scale fee under that item can be very substantial and could greatly exceed the extra costs involved in the success of the counter-claim. It is to be noted that the opening words of item I only give the taxing officer a discretion to increase the prescribed fees, not to reduce them, and in my view the discretion referred to in the first proviso refers to that same discretion and is a discretion to increase, not to reduce, the scale fee, save possibly that the same advocate is not to have and may be deprived of double costs. If any item in the schedule applies the advocate must, in some way or other, be allowed the full fee prescribed and not less, though if he claims for two items involving the same work or part of the same work, that can be taken into consideration so that he can be refused the full amount of the two items but not less than at least the full prescribed amount of the fee for the larger item from the two items. That appears to be the limit of the taxing officer’s discretion and, of course, where the work of one item is wholly covered by the work on another item the whole fee on the item first referred to may be disallowed.

On the wording of item 1 (f) I hold that it does not apply to a counter-claim. It follows then that the only item that can apply to a counter-claim is item 1 (l) which carries a minimum fee of 500/- but which may, in the taxing officer’s discretion, be increased to any reasonable amount under the proviso by taking into account the matters stated in the first proviso.

Fortunately this is much less dangerous and less likely to cause grave injustice than what could occur if item 1 (a) or 1 (f) had to apply to a counter-claim.

Even so there could be anomalies where the counter-claim succeeded only in respect of a subject matter of low value. Item 1 (l) prescribes a fee of 500/- at least, but the fee under para. (a) could be as low as 250/- and that under para. (f) as low as 300/- where the value of the subject-matter exceeds 1,500/- and does not exceed 3,000/-. This is a matter which could be dealt with on application by a special order of the judge if he should think fit to do so, but is not apparently within the discretion of a taxing officer.

Now, as regards the present case, I find that the taxing officer erred in taxing the defendants' costs for instructions and getting up on the counter-claim on the basis of item 1 (f). He should have taxed them on the basis of item 1 (l).

The matter is referred back for taxation accordingly. The plaintiff will have the costs of the appeal.

I should add that where there is a question of increasing the prescribed fee of 500/- in the case of a counter-claim the taxing master should apply the principles of the *Medway Oil and Storage case* (1).

Appeal allowed. Matter referred back for taxation.

For the plaintiff:

J. M. Nazareth, Q.C., and U. S. Kalsi, Nairobi

For the respondent:

J. A. Mackie-Robertson, Q.C., and A. E. Hunter

For the defendants:

Daly and Figgis, Nairobi

Karimari Corner Bar & Restaurant v Embu Liquor Licensing Court [1967] 1 EA 426 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	12 May 1967
Case Number:	45/1966 (93)
Before:	Madan J
Sourced by:	LawAfrica

[1] *Licensing – Liquor licensing – Appeal to High Court against refusal to grant new liquor licence – Whether appeal lies – Liquor Licensing Act, s. 18 (K.).*

Editor's Summary

This was an appeal against the refusal of a liquor licensing court to grant the appellant a new liquor licence.

Held – No appeal lies against a refusal to grant a new licence (as opposed to a refusal to renew or transfer a licence).

Appeal dismissed.

No cases referred to in judgment.

Judgment

Madan J: This is an appeal against the refusal by the Embu Liquor Licensing Court to grant the appellant a new liquor licence described as a “Night Club Liquor Licence”. No licence of this description appears in the schedule to the Liquor Licensing Act (Cap. 121), which sets out licences of the several descriptions which may be granted under the Act. The appellant’s application was for the grant of a proprietary club liquor licence, as stated by his counsel.

The appeal is brought under s. 18 of the Act which reads as follows:–

- “18(1) Any applicant whose application to renew or transfer a licence has been refused may within twenty-one days of such refusal appeal against such refusal to the Supreme Court.
- (2) The Supreme Court on an appeal under this section may confirm the refusal or may grant the renewal or transfer in the same way as the licensing court could have granted it, and the judgment of the Supreme Court on such appeal shall be final.”

It will be immediately noted that there is no right of appeal against a refusal to grant a new licence. The right of appeal is restricted to appeals against a refusal to renew or transfer a licence. In my opinion no appeal lies to the High Court from a decision of a licensing court refusing to grant a new licence.

The appellant's learned counsel submitted that the court should entertain the appeal under its inherent powers; in the alternative, that s. 18 be interpreted to include a right of appeal against refusal to grant a licence. I am afraid not. The right of appeal is created by statute. The court may not go beyond the limited wording of s. 18. Had Parliament intended to confer or create such a right of appeal, it would have said so expressly; as for example in England where under s. 21 of the Licensing Act, 1964, a right of appeal is expressly given to any person aggrieved by a decision of the licensing justices granting or refusing to grant a new justices' licence. It is an omission in our law which I would say should be remedied. But until that is done by Parliament no appeal lies to this court from a refusal by a liquor licensing court to grant a licence.

Appeal dismissed with costs.

For the appellant:

B. D. Bhatt, Nairobi

For the respondent:

Attorney-General, Kenya

F. P. McLoughlin (State Counsel, Kenya)

Kagori v Republic
[1967] 1 EA 427 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	4 April 1967
Case Number:	26/1967 (94)
Before:	Rudd and Trevelyan JJ
Sourced by:	LawAfrica

[1] *Criminal Law – Demanding money with menaces with intent to steal – Meaning of “menace” – Whether test subjective to complainant or objective – Penal Code, s. 302 (K.).*

Editor's Summary

The appellant was convicted of demanding money with menaces with intent to steal, contrary to s. 302 Penal Code. The facts as found were that the appellant went to a restaurant, introducing himself as a representative of the Domestic and Hotel Workers Union. He alleged the staff was underpaid and was

allowed to inspect some records of the restaurant. The next day he alleged to the complainant, a director of the restaurant, that underpayments of the staff totalled Shs. 1,700/- during the previous year and if the restaurant settled for half that sum he the appellant would destroy the letter and its carbon copy containing the allegations of underpayment. The appellant was asked to return, ostensibly to receive payment. By arrangement with the police the complainant paid over some marked currency notes to the appellant and their conversation was recorded. The magistrate found that the appellant received the money as hush money to refrain from complaining that the staff were underpaid.

Held –

- (i) the ingredients of the offence of which the appellant was convicted – namely demanding money accompanied by a menace with intent to steal – were proved and the conviction and sentence should be confirmed.
- (ii) the test as to whether there was a menace is laid down in *R. v. Boyle* (4), and is objective.

Cases referred to in judgment:

- (1) *R. v. Fulabhai Jethabhai Patel and Another* (1946), 13 E.A.C.A. 179.
- (2) *R. v. Studer* (1915), 11 Cr. App. Rep. 307.
- (3) *R. v. Collister and Another* (1955), 39 Cr. App. Rep. 100.
- (4) *R. v. Boyle* (1914), 10 Cr. App. Rep. 180.
- (5) *R. v. Tomlinson* (1895), 1 Q.B. 706.
- (6) *Vaz v. R.*, [1961] E.A. 320.
- (7) *Haji Moledina v. R.*, [1960] E.A. 678.
- (8) *R. v. Walton and Another* (1863), Le. & Ca. 288; 9 Cox C.C. 268.

Judgment

Trevelyan J, read the following judgment of the court: The appellant was charged with demanding money with menaces with intent to steal, contrary to s. 302 of the Penal Code. On September 2 last year, introducing himself as a representative of the Domestic and Hotel Workers Union, he visited the complainant at a restaurant owned by a company of which the complainant is a director, alleging that staff were being underpaid. He inspected some records and went away. He called again on the following day with a letter and a copy thereof, told the complainant that the under-payments totalled Shs. 1,700/- during the previous year and went on “If you pay me Shs. 850/-, you will save Shs. 850/-. I shall then destroy both the letter and its carbon copy and no one will know about it.” The complainant, though he had no intention of paying anything to the appellant, asked him to return, notified the police, and a trap was set. When the appellant returned on September 6, the complainant was in possession of some marked currency notes which he handed over to him, and apparatus installed for the purpose recorded their conversation.

The appellant was represented at the trial, none of the prosecution witnesses was cross-examined and he remained silent when called upon to make his defence. However, he made an extra-judicial statement claiming that the money had been given to him as a donation for a dance, but the recording shows that this was not correct. The learned trial magistrate has commented “the recorded conversation reinforces the complainant’s testimony that the accused received exhibit 7 (i.e. the money) as hush money and handed over the carbon copy (exhibit 4) to refrain from exposing his allegation about the underpayment.” It is true that the main part in the recorded conversation was taken by the complainant, but it does, we think, go to “reinforce” his complaint.

The evidence to support a charge such as that laid against the appellant must show that: (1) the accused demanded a valuable thing; (2) he demanded it by menaces or force; and (3) he demanded it with intent to steal: *R. v. Fulabhai Jethabhai Patel* (1). Whether or not there is a demand is a question of fact; the language used may even be in the form of a request. Moreover the language used and the surrounding circumstances must be looked at: *R. v. Studer* (2) and *R. v. Collister* (3). It cannot be said that the magistrate had no evidence upon which to find that “If you give me Shs. 850/- . . .” was not, in all the circumstances, a demand.

It was argued that there was no “menace” within the section. As to whether there was or was not a menace cannot be divorced from the consideration as to whether or not there was a demand. There can be no doubt that there was a menace here, at least by the reference to the destruction of the letter and its carbon copy “and no one will know about it”: *R. v. Boyle* (4) (10 Cr. App. Rep. at p. 191) shows that an exhaustive definition of “menace” should not be sought; certainly the menace need not be expressed; *Collister* (3), *ubi supra*. We think, however, that it was expressed here, at least inferentially. On the authority of

R. v. Tomlinson (5) and *Boyle* (4), ubi supra, even a threat to accuse of misconduct not amounting to a crime can be a menace. There was, in our view, ample evidence upon which the magistrate could find that the demand was accompanied by a menace.

It was also argued that the complainant “was not ruffled”. What happened was that, far from being intimidated, the complainant became disgusted and notified the police. It was put forward that one must approach the issue as to whether or not there was a menace subjectively, looking not to the accused but to the complainant. This the learned magistrate rightly rejected. In *Boyle* (4), ubi supra, it is said (10 Cr. App. Rep. at p. 345):

“If the threat is of such a character that it is not calculated to deprive any person of reasonably sound and ordinarily firm mind of the free and voluntary action of his mind it would not be a menace within the meaning of the section. In our judgment when a man, with intent to steal, threatens either to do violence to the person of another, or to commit acts calculated to injure the property or character of another, it is a menace within the meaning of the section.”

This dictum was accepted and followed by the learned Chief Justice of Tanganyika in *Vaz v. R.* (6), though not referred to, in *Haji Moledina v. R.* (7), the learned Chief Justice of Uganda arrived at a similar conclusion. It is, of course, a question of fact in each case whether the accused’s conduct was of that nature: *R. v. Walton* (8). The fallacy of the argument lies we believe in the failure to appreciate that the nub of the test is whether the accused had an intent to steal. If he had such an intention and made a demand, the reaction of the person to whom it was made does not decide whether or not there was a menace; that depends on the test laid down in *Boyle* (4) supra. In the instant case there was undoubtedly an intent to steal. All the ingredients of the offence having been established, the appeal against conviction is dismissed. The appellant, whose character is not unblemished, received a sentence which in the circumstances was richly deserved. The appeal against sentence is, therefore, also dismissed.

Appeal dismissed.

The appellant was not present and was not represented.

For the respondent:

Attorney-General, Kenya

A. A. K

Mumir v Republic [1967] 1 EA 430 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	14 March 1967
Case Number:	1205/1966 (98)
Before:	Sir John Ainley CJ and Rudd, J.
Sourced by:	LawAfrica

[1] Criminal Law – Possession of food in diseased or unwholesome state without reasonable excuse – What constitutes reasonable excuse – Whether accused entitled to rely on official inspection – Public Health Act, s. 131 (1) (K.).

[2] Criminal Law – “Reasonable excuse” – Possession of food in diseased or unwholesome state without reasonable excuse – What constitutes “reasonable excuse” – Public Health Act, s. 131 (1) (K.).

[3] Public Health – Possession of food in diseased or unwholesome state without reasonable excuse – What constitutes reasonable excuse – Whether accused entitled to rely on official inspection – Public Health Act, s. 131 (1) (K.).

Editor’s Summary

The appellant was found in possession in his cold store of diseased meat which had been brought to him for storage. It was fresh when brought to him, and bore what the appellant supposed to be an official stamp appearing to show that it had been inspected. The appellant was convicted of being in possession of diseased food without reasonable excuse contrary to s. 131 (1) of the Public Health Act. He appealed.

Held – It is the duty of a man in the appellant’s position to take all reasonable steps to ensure that the meat he stores is free from disease; but in accepting possession of this meat the appellant behaved reasonably and his excuse for possessing it was reasonable.

Appeal allowed. Conviction quashed.

No cases referred to in judgment.

Judgment

Rudd J, read the following judgment of the court: The appellant was convicted of an offence contrary to s. 131 (1) of the Public Health Act. The subsection in question makes it an offence for a person to have in his possession without reasonable excuse any food for man in a tainted, adulterated, diseased or unwholesome state.

The appellant is the proprietor of a concern known as the Kenya Meat Supply. He has cold storage premises in Nairobi. On August 16 last year a Health Inspector employed by the Nairobi City Council found in the appellant’s cold store two fore-quarters of beef which on inspection showed viable cysts, an immature state of the tape worm. These cysts did no doubt render the forequarters, which were clearly “food for man”, unwholesome, or diseased. The appellant’s possession of the forequarters was undisputed. However the appellant had an excuse for his possession and the important question before the magistrate was whether this excuse was reasonable.

The appellant swore, and what he said was not disputed, that the two quarters were brought to him by one Kangera for storage. Kangera supported this story swearing that he brought the meat on August 16. He was not cross-examined. The appellant also swore, and what he said was not controverted, that when Kangera brought the quarters they bore what he at any rate supposed to be the City Council inspector’s stamp “City Council of Nairobi. Inspected”. It may

be mentioned that the meat was quite fresh, and that though the prosecution made some attempt to show that the stamp was bogus their evidence on the point was very far from conclusive, and the magistrate realised that. He decided the case, clearly enough, on the basis that the stamp was genuine. Now the presence of the stamp would, we think, lead a reasonable man to suppose that a properly authorised City Council inspector had examined the meat, and had passed it as being free from disease; free at any rate from the forty odd diseases including cysts (or cystecerosis) which are listed in the Public Health (Meat Inspection) Rules. It seems fairly clear that the particular disease affecting this meat would not develop after the death of the animal and really whether the excuse was reasonable or otherwise depends on this, whether the appellant was entitled to rely on what he had good reason to believe was an official inspection, or whether he should have made his own inspection. The magistrate said "The court considers that it is the duty of a person storing meat for human consumption to ensure at all times when the said meat is under his control, that the meat is not unwholesome. The circumstances of the storage as described in this judgment the court does not consider a reasonable excuse, but matters which should be taken into consideration when passing sentence. The court therefore finds the accused guilty as charged and convicts accordingly".

We agree that it is the duty of a man in the appellant's position to take all reasonable steps to ensure that the meat he stores is free from disease, but if the magistrate meant to say that an absolute liability exists we do not agree. If the appellant had asked a City Council expert round to examine the meat and that expert had passed it, we think the appellant would have done all he could be expected to do, and would have had a reasonable excuse if a second inspector had found cysts. It is true the court is asked to take a further step here, but it is not a long step. The appellant had before him good evidence that an expert of the council had passed the meat and in accepting possession of the meat we think he behaved reasonably and that his excuse for possessing it was reasonable.

For this reason we allow the appeal, quash the conviction and set aside the fine, which if paid must be refunded.

Appeal allowed. Conviction quashed.

For the appellant:

Satish Gautama, Nairobi

For the respondent:

Attorney-General, Kenya

J. R. Hobbs (Senior State Counsel, Kenya)

Juma v Republic
[1967] 1 EA 432 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	2 May 1967
Case Number:	129/1967 (111)

Before: Saidi J
Sourced by: LawAfrica

[1] *Criminal Law – Possession of property suspected of having been stolen – Meaning of “possession” – Whether includes property found during search of house – Penal Code, s. 312 (T.) – Criminal Code, s. 24 (T.).*

Editor’s Summary

The appellant was convicted of being in possession of property suspected of having been stolen or unlawfully obtained, contrary to s. 312 of the Penal Code. The property was found in the appellant’s house by a police inspector during a search, and the evidence showed that the property had been there for a considerable period.

Held – “Possession” in s. 312 of the Penal Code must be read ejusdem generis with “conveying” and the possession must be possession in the course of a journey (*R. v. Msengi* (1) applied).

Appeal allowed. Conviction quashed.

Cases referred to in judgment:

- (1) *R. v. Msengi s/o Abdallah* (1952), 1 T.L.R. 107.
- (2) *Hadley v. Perks* (1866), L.R. 1 Q.B. 444.
- (3) *R. v. Huku bin Katega*, 1 T.L.R. (R) 16.
- (4) *R. v. Fisher*, 32 N.S.L.T.R. 23.

Judgment

Saidi J, delivered the following reasons for allowing the appeal: The appellant was charged before the District Court of Iringa with having in his possession property suspected to have been stolen or unlawfully obtained contrary to s. 312 of the Penal Code, the particulars of the charge alleging the offence that:

“The person charged on the 6th day of December, 1966, at about 10.00 hours, at Jamat Street within the Township and District of Iringa, Iringa Region, was detained by P.S.I. Millinga acting under the exercise of the powers conferred upon him under s. 24 of the Criminal Procedure Code, was found in possession of one Transistor Radio No. 96864/22064 make Erres, two jackets and one cigarette lighter which were suspected to have been stolen or unlawfully obtained. Total value of property Shs. 900/00.”

The facts are simple. On December 6, 1966, Inspector Millinga went to search the house of the appellant. He had a search warrant. He recovered from that house one transistor radio, one sports jacket and one sports shirt. At the time of the search the appellant told him that he had bought the radio for Shs. 900/- in 1965 in Kampala and the jacket and shirt in Iringa. However, upon his failure to produce purchase receipts he was arrested and charged. At his trial the appellant repeated exactly what he had told Inspector Millinga. He called two witnesses who supported his story about the jacket and shirt. One of these, Hamisi Hussein, had actually witnessed the purchase of the jacket and the payment of Shs. 25/- for

it by the appellant. The appellant was known to be a

professional tailor. The learned resident magistrate was not satisfied with the account of possession by the appellant and convicted him as charged.

There is confusion in these proceedings. It is not clear whether Inspector Millinga recovered these articles while acting on the authority of the search warrant or s. 24 of the Criminal Procedure Code. It has been repeatedly held by this court that “possession” within the meaning of s. 312 of the Penal Code is to be read ejusdem generis with “conveying”, that is to say, the possession must be possession in the course of a journey (see *R. v. Msengi s/o Abdallah* (1)). In the present case there was no “conveying” involved. There is no evidence showing that the articles were being conveyed from one place to another. The evidence there is, in fact, establishes that the articles had been in the house occupied by the appellant for a considerable period. The appellant again lives in that house and carries on the business of tailoring in the locality. It would therefore appear that the provisions of s. 24 of the Criminal Procedure Code are not applicable to the instant case. This section is intended to enable police to search and detain persons who, if left alone, would get out of the way and disappear. Shee, J. in *Hadley v. Perks* (2), gave as the reason for the powers of a police officer to detain and search, as in our s. 24, that if the person

“were not apprehended at once he might get out of the way and evade detection altogether.”

In *Msengi's* case (1) the court said:

- “12. From the above it follows that the decision of *R. v. Huku bin Kataga* (3) is too restricted where it sets out that s. 296 of the Penal Code (now s. 312) has no application in the case of a person having in his possession in a building property suspected of having been stolen or unlawfully obtained. It does so apply if the possession was in a building in the course of a journey. Further, in *R. v. Fisher* (4), it appears that a police constable received certain information about an individual whom he saw and followed, and upon the individual leaving the road and entering a house he was there arrested, and in that case it was held that the section applied. In this case, be it noted, the constable saw the suspect on the road and it is possible that the section would not apply where the suspect is seen on a road by a person other than a constable but searched and detained within a house by a constable acting on information. It is clear, however, that the section will not apply, for example, to property found in a building solely as the result of the execution of a search warrant or other similar process.”

It is evidently clear that s. 312 of the Penal Code would not apply to the facts of the instant case and it was for this reason I had allowed the appeal and quashed the conviction.

Appeal allowed. Conviction quashed.

The appellant did not appear and was not represented.

For the respondent:

Attorney-General, Tanzania

S. K. Laxman (State Attorney, Tanzania)

Rattan Singh v The Commissioner of Income Tax [1967] 1 EA 434 (PC)

Division: Privy Council

Date of judgment: 2 February 1967

Case Number:	14/1964 (16)
Before:	Lord Guest, Lord Upjohn and Lord Pearson
Sourced by:	LawAfrica
Appeal from	The Court of Appeal for Eastern Africa – Civil Appeal No. 17 of 1962 on appeal from the Supreme Court of Kenya

[1] Income Tax – Assessments – Additional assessments imposed in respect of fraudulent returns for years 1946/1953 – East African Income Tax (Management) Act, 1952, ss. 40, 72, 74 and 78 – Whether transitional provisions in Fifth Sched. to East African Income Tax (Management) Act, 1958, ss. 101, 151, 152, applies to such assessments.

[2] Income Tax – Pending proceedings – Meaning of in proviso (a) to para. 1 of the Fifth Sched. to the East African Income Tax (Management) Act, 1958.

[3] Income Tax – Penalties – Whether penalties imposed for fraudulent returns under East African Income Tax (Management) Act, 1952, in respect of years of assessment, 1946/1953 still outstanding in 1958 affected by provisions of East African Income Tax (Management) Act, 1958.

Editor's Summary

On May 28, 1958, the respondent Commissioner of Income Tax made additional assessments upon the appellant a taxpayer for the years of income 1946/1953 inclusive, on the grounds that for each of these years of income the taxpayer was guilty of fraud or wilful neglect. The taxpayer could have been charged with an amount of tax equal to treble the difference between the tax as calculated from the returns and the tax properly chargeable after including the amounts omitted. The Commissioner exercised his discretion and, under the East African Income Tax (Management) Act, 1952, remitted parts of such treble tax in respect of each year and in fact, averaging over the period 1946/1953, the taxpayer was not charged as much as twice the basic tax by way of additional tax. The taxpayer lodged notices of objection to the additional assessments but on December 4, 1958, the Commissioner refused to amend the assessments. By notice dated December 31, 1958, the taxpayer appealed to a judge, and on July 31, 1961, the judge dismissed the appeal. The taxpayer appealed further to the Court of Appeal and the appeal was dismissed. The Court of Appeal upheld the finding that fraudulent returns had been made in each of the years of assessment 1946/1953. The East African Income Tax (Management) Act, 1958, was published in the *Gazette* on December 30, 1958, the main variations of which from the 1952 Act relevant to this appeal were that:

- (i) additional assessments in respect of fraudulent returns may be charged with an amount of tax equal to double the difference between the normal tax chargeable in respect of the income returned by him and the normal tax chargeable in respect of the taxpayer's total income; and
- (ii) no longer on appeal had the judge power to vary the amount of the remission of the Commissioner if the returns were held to be fraudulent.

Subject to transitional provisions in the Fifth Schedule of the 1958 Act the 1952 Act was repealed. On appeal by the taxpayer to the Privy Council the main ground was the effect of the first paragraph of the Fifth Schedule on the assessments made upon the taxpayer which were still outstanding when the 1958 Act was published on December 30, 1958.

Held –

- (i) by para. (1) of the Fifth Schedule the legislature introduced certain parts of the 1958 Act into the 1952 Act (thereby repealed). The intention was that these parts of the 1958 Act should retrospectively supersede and, where inconsistent, control and override the former provisions of the 1952 Act, unless legal proceedings were pending on December 30, 1958.
- (ii) legal proceedings were not pending on December 30, 1958.

Appeal dismissed.

No cases referred to in judgment.

Judgment

Lord Upjohn delivered the following judgment: On May 28, 1958, the respondent, acting under the powers conferred upon him by s. 72 of the East African Income Tax (Management) Act, 1952 (1952 Act) which was then in force, made additional assessments upon the appellant for the years of income 1946/1953 inclusive. The appellant challenges the correctness of those assessments.

Section 72 provided that where it appeared to the respondent that a taxpayer had been assessed at a less amount than that which ought to have been charged he might, within seven years after the expiration of the year of income, raise additional assessments upon him. But there was a proviso in these terms:

- “(a) where any fraud or wilful default has been committed by or on behalf of any person in connection with or in relation to tax for any year of income, the Commissioner may, for the purpose of making good to the revenue of the Territories any loss of tax attributable to the fraud or wilful default, assess that person at any time;”

Section 40 of the same Act provided that any person who omitted from his return for any year of income any amount which should have been included should be charged with an amount of tax equal to treble the difference between the tax as calculated in respect of the total income returned by him and the tax properly chargeable after including the amount omitted. Sub-sections (2) and (3) of s. 40 were in these terms:

- “(2) If the Commissioner is satisfied that the default in rendering the return or any such omission was not due to any fraud, or gross or wilful neglect, he shall remit the whole of the said treble tax and in any other case may remit such part or all of the said treble tax as he may think fit.
- (3) The additional amounts of tax for which provision is made under this section shall be chargeable in cases where tax has been assessed by the Commissioner under the provisions of s. 72 as well as in cases where such income or any part thereof is determined from returns furnished.”

The respondent made the additional assessments upon the footing that for each of the relevant years 1946/1953 the appellant was guilty of fraud or gross or wilful neglect, and so he claimed treble tax in respect of each year. However exercising the discretion vested in him by sub-s. (2) of s. 40 he remitted parts of such additional tax in each year. The rate of remission varied from year to year but it is material, for the reasons which will appear later in their Lordships’ judgment, to note that he never charged as much as twice the basic tax by way of additional tax; the overall average additional tax for the relevant years was 152 per cent of the basic tax.

The appellant under s. 74 (2) of the 1952 Act, lodged notices of objection against these additional assessments but by a notice dated December 4, 1958, the

respondent, acting under s. 74 (4) refused to amend the assessments or any of them and from such refusal the appellant, by notice dated December 31, 1958, appealed to the judge under s. 78 (1). Subsection (6) of that section provided that the judge might confirm, reduce, increase or annul the assessment.

The appeal came on for hearing before Mayers, J. on June 6, 1960: it lasted nineteen days spread over many months and in a reserved judgment delivered on July 31, 1961, he reached the clear conclusion that the appellant had made fraudulent returns in respect of each of the relevant years of assessment and he dismissed the appeal. The appellant appealed to the Court of Appeal (Gould, Ag. P., Crawshaw, Ag. V.-P. and Edmonds, J.) who dismissed the appeal, with an immaterial variation in respect of some years of income. The learned trial judge's finding of fraud was challenged in the Court of Appeal but the Acting President, who delivered the leading judgment of that court, expressly upheld the judge's finding of fraud in each and every relevant year, and this finding has not been challenged before their Lordships.

Had the matter rested there two points of construction of the 1952 Act would have arisen, neither of them, as their Lordships think, of great difficulty; to these points their Lordships will briefly return later. But the major difficulty has been created by the provisions contained in a new Income Tax Act entitled the East African Income Tax (Management) Act, 1958 (the 1958 Act) and published in the *Gazette* on December 30, 1958. Their Lordships must refer to a number of sections and to the Fifth Sched. to that Act.

Section 101 (1) (a) provided that on default in making a return the taxpayer should be charged with double the normal tax. Section 101 (1) (b) corresponded with s. 72 proviso (a) and was in these terms:

“Any person who . . .

- (b) omits from his return of income for any year of income any amount which should have been included therein shall, where such omission was due to any fraud or to any gross neglect, be charged for such year of income with an amount of tax equal to double the difference between the normal tax chargeable in respect of the income returned by him and the normal tax chargeable in respect of his total income;”

Section 101 (5) is in these terms:

- “(5) Notwithstanding anything in Part XIII, where in any appeal against any assessment which includes additional tax one of the grounds of appeal relates to the charge of such additional tax, then the decision of the local committee or judge in relation to such ground of appeal shall be confined to the question as to whether or not the failure, default, or omission which gave rise to the charge under sub-s. (1) was due to any fraud or to any gross neglect; and where it is decided that such failure, default or omission was not so due, then the whole of the additional tax so charged shall be remitted.”

It is to be noted, and is the chief reason for this appeal, that while under the former s. 78 (6) the judge could, in effect, vary the remission by the respondent of the treble tax, no longer has he such power under this sub-section, and that in that respect the decision of the respondent is final.

Section 151 of the 1958 Act is important:

- “(1) The transitional provisions contained in the Fifth Schedule shall, notwithstanding anything in this Act, have effect for the purposes of the transition from the provisions of the enactments repealed by this Act to the provisions of this Act.

- (2) If any difficulty should arise in bringing into operation any of the provisions of this Act or in giving effect to such provisions, the High Commission may by Order amend the Fifth Schedule in such respect as appears necessary or expedient for the purpose of removing such difficulty:

Provided that no Order under this section shall be made later than December 31, 1959, and every such Order shall be laid before the Assembly at the next meeting after the publication of such Order.”

By s. 152, subject to the Fifth Sched., the 1952 Act (inter alia) was repealed.

This brings their Lordships to the provisions of the Fifth Sched. which gives rise to the great difficulty in this case.

- “1. Subject to this Schedule, the repealed enactment shall, notwithstanding its repeal, continue to apply to income tax chargeable, leviable, and collectable, under such enactment in respect of the years of income up to and including the year of income 1957, as if such enactment had not been repealed:

Provided that, as from the date of the publication of this Act in the *Gazette*, the provisions contained in Parts X to XVII inclusive of this Act shall apply as if such provisions had been contained in the repealed enactment, so, however –

- (a) that no party to any legal proceedings by or against the Commissioner which are pending on the date of such publication shall be prejudicially affected by this paragraph;
- (b) that Part XIII of the repealed enactment shall, in relation to any act or omission which took place before the date of such publication, continue to have effect to the exclusion of Part XV, other than s. 135, of this Act.”

In the courts below the major issue was that of fraud, which does not arise here, and before their Lordships the main arguments were addressed to the effect of para. 1 of the Fifth Schedule on the assessments made upon the appellant which were still outstanding when the 1958 Act was published on December 30 of that year.

Two distinct points arise:

- (1) What is the effect of the proviso that the provisions contained in Parts X-XVII of the 1958 Act should apply “as if such provisions had been contained in the” 1952 Act?
- (2) Can the appellant claim the benefit of sub-para. (a) on the footing that legal proceedings were pending on December 30, 1958?

As to the first point, it seems to have been assumed in the courts below that the necessary consequence of the incorporation of the stated provisions of the 1958 Act into the 1952 Act was to override the provisions of the latter Act where there was any inconsistency and only the second point was seriously argued. Before their Lordships, however, it was strenuously argued that the 1952 code remained in existence and continued to run parallel to the 1958 code, and that the latter was a supplement only to fill in any gaps in the former code. Some examples were referred to, the first three by way of argument or illustration only for they do not arise for decision in this case, and the last being directly in point, to show that the legislature cannot have intended retroactively to have affected the vested rights of the taxpayers under the Act in force during the relevant years of income. First, under the 1952 Act the taxpayer had 60 days within which to appeal from a refusal of the respondent to amend an assessment; under the 1958 Act he only had 45 days; secondly, there was no power under the 1958 Act corresponding to the provisions of s. 77 (5) of the 1952 Act which

entitled the taxpayer, in cases where the tax involved was 200s. or under, to elect to treat the hearing before the local committee as final. Thirdly, the additional tax chargeable under the 1958 Act was double tax compared to treble tax under the 1952 Act (incidentally an alteration to the taxpayer's benefit). Finally, while under the 1952 Act the judge was entitled to exercise his own discretion as to the remission of additional tax, it is perfectly clear that he has no such power under the 1958 Act. Minor inconsistencies were also relied on which their Lordships do not think it necessary to mention. It was said that these inconsistencies and injustices to the taxpayer made it necessary to treat the provisions of the 1952 Act as remaining applicable to assessments made in respect of years of income up to 1957 inclusive.

Their Lordships cannot agree with this argument. In the first place, although the drafting may be inelegant, the legislature in introducing by para. 1 of the Fifth Schedule certain parts of the 1958 Act into the 1952 Act thereby repealed, must have intended that they should supersede and where inconsistent, control and override the former provisions, for in that way only is it possible to give sensible effect to the scheme of legislation. Furthermore, it seems clear that the legislature realised that such retroactive alterations to the 1952 Act in respect of past years of income might prejudice and act unfairly to taxpayers where their tax affairs remained unsettled on December 30, 1958. This is evident from the terms of s. 151 of the 1958 Act and particularly sub-s. (2) which has already been set out. This system of legislating is not new to Kenya for it copied the same procedure when the 1952 Act superseded the Kenya Ordinance Cap. 204 of 1940. This is further supported by the provisions of sub-para. (a) of para. (1) which clearly contemplated that the introduction of the 1958 Act provisions might prejudicially affect taxpayers retroactively where their tax affairs remained outstanding on December 30, 1958, for an exception was made to such prejudice if legal proceedings were then pending; finally, sub-para. (b) made it quite plain that the new scales of penalties were not to apply to offences committed during the pre-1958 years of income.

In their Lordships' judgment, therefore, in respect of pre-1958 assessments outstanding on December 30, 1958, the provisions of the 1958 Act introduced by para. 1 of the Fifth Schedule supersede, override and control the corresponding provisions in the 1952 Act, unless the taxpayer can claim the protection of sub-paras. (a) or (b) of that paragraph. Accordingly, their Lordships agree that in the courts below it was rightly held that there was no discretionary power of remission of additional tax any longer vested in the trial judge.

However, before turning to consider the second point their Lordships would mention that (though it does not arise for decision now) as they are at present advised, the relevant provisions of the 1958 Act which are incorporated into the 1952 Act must act both in favour of and against the Crown; thus, had the respondent charged the appellant with additional tax of more than double tax for any of the relevant years of income, such charge could not have stood in respect of assessments outstanding on December 31, 1958. Their Lordships did not understand counsel for the respondent to dissent from this general proposition.

As to the second point, the appellant appealed on December 31, 1958, against the refusal of the respondent to amend the relevant assessments. The question their Lordships have to consider is whether there were any legal proceedings by or against the Commissioners which were properly described as "pending" on December 30, 1958. Their Lordships have some sympathy with the appellant for had he appealed one day or at any rate two days earlier undoubtedly there would have been pending proceedings though they do not overlook the fact that Mayers, J. would have had power had the 1952 Act remained

operative not

merely to remit but also to increase the additional tax. It was argued that for the purposes of this paragraph proceedings could properly be described as pending, either from the service by the appellant of Notice of Objection under s. 74 (2) of the 1952 Act or, at latest, from the refusal by the notice given on December 4, 1958, whereby the respondent refused to amend his assessments. It was not seriously suggested that the negotiations and correspondence between the appellant's advisers and the respondent were technically legal proceedings for, clearly, they were not. As Gould, Ag. P. pointed out in his judgment the respondent was then merely finalising the assessment. It was argued, however, that in a broader sense which should be adopted in justice to the taxpayer whose liabilities were being retroactively affected they were pending in the sense that legal proceedings were then imminent and that the next step would initiate legal proceedings, that is an appeal from the refusal of the respondent, and this was the inevitable consequence of the negotiations and correspondence down to date. A number of authorities were cited to their Lordships but they do not really touch on this short point.

Their Lordships have reached the clear conclusion that it cannot be said with any sense of legal accuracy that there were legal proceedings pending on December 30. Upon this point they agree with the judgments given in both courts below and do not think that they can usefully add anything thereto.

Though counsel for the appellant did not dispute or challenge the finding of fraud in the courts below, he raised one point where he said the trial judge misdirected himself for he said that it was the duty of the judge to make up his mind as a separate question in relation to each year of income what was a proper estimate of the appellant's income of that year and then to consider whether the discrepancy between the figures return by the appellant and the figures which the judge thought to be a fair estimate of his income was sufficient to infer fraud, and the onus it was said, was upon the respondent to prove that in respect of each year. As the learned judge did not do this, therefore, the matter must go back to him to reconsider the whole matter. This argument seems to be based upon a fallacy. If the respondent wants to reopen an otherwise time barred year of income the onus is upon him to prove fraud or gross or wilful neglect (s. 105 (1) of the 1958 Act). This question is not to be determined upon making estimates of income but upon the facts of each particular case which the judge assesses as a jury question; was the taxpayer in respect of the relevant year fraudulent or not. The respondent discharged this onus in respect of each relevant year. Then that tax year being reopened for consideration the usual rule applies; the onus is upon the taxpayer to show that respondent's assessment is excessive. This he signally failed to do in any year of income.

It only remains to notice two points argued before their Lordships arising under the provisions of the 1952 Act but which in fact are now academic as they do not arise under the incorporated provisions of the 1958 Act. First it was said that under s. 72 of the 1952 Act tax lost could only be recovered once and not three times. Their Lordships think that this point is fully answered in the concise judgment of Mayers, J. where he said that the argument was fully disposed of by the provisions of s. 40 (3). Their Lordships do not desire to add anything to that. Then it was said that under s. 72 an additional (post 6 year) assessment is confined to income fraudulently omitted, though it is conceded that this is not so under the relevant provision of the 1958 Act where the words upon which the argument was founded, namely "for the purpose of making good any loss to tax attributable to the fraud or wilful default" do not occur.

But even if s. 72 was still operative the onus would be upon the appellant to prove that some income was omitted innocently from his return and this he failed to do. Accordingly their Lordships do not have to consider had the facts

been otherwise, whether upon the true construction of s. 72 he would have escaped any assessment in respect of any sum innocently omitted.

For these reasons their Lordships will dismiss the appeal. The appellant must pay the cost of the appeal.

Appeal dismissed.

For the appellant:

T. L. Wilson and Co., London

Peter Rowland and Basil Webb (both of the English Bar)

For the respondent:

Charles Russell and Co., London

H. H. Monroe, Q.C. (of the English Bar) and *M. G. Muli* (Assistant Legal Secretary, E.A.C.S.O.)

Lubogo and others v Uganda [1967] 1 EA 440 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	4 April 1967
Case Number:	204/1966 (62)
Before:	de Lestang VP, Duffus JA and Spry JA
Sourced by:	LawAfrica
Appeal from:	The High Court of Uganda – Saldanha, Ag. J.

[1] *Criminal Law – Evidence – Corroboration – Whether a hearsay statement can amount to corroboration – Evidence Act, s. 155 (U.).*

[2] *Criminal Law – Evidence – Unsworn statement by accused – whether proper for judge to comment on – Trial with assessors.*

[3] *Criminal Law – Onus of proof on an accused person – Unsworn statement by accused – Evidence Act, s. 155 (U.).*

Editor's Summary

The four appellants were convicted of the murder of Florence the daughter of Kamanya. The chief prosecution witnesses were Kamanya and his wife Sana who claimed to be eye-witnesses to the attack and identified the four appellants. The defence case was an alibi and although witnesses were called to establish this defence, it was rejected at first instance by the learned judge and the assessors. The grounds

of appeal were (i) a misdirection by the learned judge as to the creditworthiness of the evidence of one of the defence witnesses (ii) misdirections as to the facts (iii) a misdirection on the onus of proof and (iv) an irregularity in the evaluation of an unsworn statement by an accused person. The evidence of one of the prosecution witnesses was objected to by prosecuting counsel who asked for her to be declared a hostile witness in order that he might cross-examine her. The learned judge, in granting the application, made a statement to the effect that the defence should not benefit from the evidence of a witness who was unworthy of credit. At this stage, the case for the prosecution was still proceeding. Kamanya gave evidence to the effect that Sana, his wife, had a lamp by the light of which she identified the appellant, although her previous statement to the police appeared to conflict with this evidence. The learned judge regarded her evidence as corroborated by a statement made by an independent prosecution witness who said that Kamanya made a report to him to the effect that Sana had a lamp. The learned judge rejected the explanation of one of the appellants as to the presence of human bloodstains on his shorts although this explanation was consistent with his earlier statement to the police. No medical evidence was called to rebut the appellant's statement that the blood-stain came from a wound on his left knee. The assessors in their opinions considered that the appellants had failed to show that the prosecution witnesses were lying and the learned judge made no attempt to correct this view

as to the onus of proof. Further, the learned judge himself, in his judgment stated that three of the appellants had not dared to give evidence but had merely made unsworn statements from the dock.

Held –

- (i) the learned judge erred in rejecting at an early stage in the trial the evidence of the prosecution witness which would have benefited the defence;
- (ii) the learned judge went beyond what was intended by s. 155 of the Evidence Act in allowing a hearsay statement to be used to corroborate the prosecution case;
- (iii) the learned judge erred in rejecting the evidence of the second appellant as to the reason for bloodstains on his shorts;
- (iv) the learned judge misdirected the assessors by failing to point out their mistake as to the onus of proof on an accused person;
- (v) the learned judge apparently considered that the appellants' exercise of their statutory right not to give evidence on oath was further proof of their guilt and this amounted to a misdirection.

Appeal allowed. Conviction and sentence quashed.

Cases referred to in judgment:

- (1) *Cyril Waugh v. R.*, [1950] A.C. 203.
- (2) *Omari s/o Hassani v. R.* (1956), 23 E.A.C.A. 580.
- (3) *R. v. Jackson*, [1953] 1 All E.R. 872; 37 Cr. App. Rep. 43.
- (4) *Wiston s/o Mbaza v. R.*, [1961] E.A. 274.

The following judgments were read:

Judgment

Duffus JA: This is an appeal by four appellants convicted on a joint charge of murder. The prosecution case is that the four appellants armed with pangas waylaid and attacked Yeseri Kamanya, on the night of December 14, 1965. The attack took place near Kamanya's home and when he raised an alarm, both his 12 year old daughter Florence and one of his wives, Sana, ran out to his aid. One of the four appellants then brutally slashed and killed the young girl Florence. Kamanya himself also suffered severe injuries. The four appellants were charged and convicted of the murder of Florence, and they now appeal to this court. The case against each appellant really depends on the evidence of the second and third prosecution witnesses, Kamanya and his wife Sana, who identified the four appellants as being the persons who carried out the attack. Sana avers that the deceased was killed by the first appellant but the learned trial judge accepted the prosecution's case that the four appellants acted together with the common intention to commit a crime involving violence and that the murder of Florence was a probable consequence of such a crime, and he found all the appellants guilty of murder. The defence of each of the appellants was an alibi and each of them called two or more witnesses to establish this defence. The judge and the assessors, however, rejected their defence and accepted the evidence of the two eye witnesses. There were considerable discrepancies and differences in the evidence of these two eye-witnesses but the trial

judge correctly directed himself on this aspect of the case.

The main grounds of the appeal are that both the trial judge in his judgment, and the assessors in delivering their opinions, misdirected themselves on the question of the onus of proof, and further that the learned trial judge misdirected himself in several instances on the facts, to the prejudice of the appellants, and further that there was a serious irregularity during the course of the trial. We will consider these matters. We will refer first to the evidence of the 9th prosecution witness, Efulansi Naisikwe, the wife of the second appellant, who was called

by the prosecution. This witness supported her husband's alibi, that he was sleeping beside her when the alarm of the attack was made, and if her evidence was true, then the second appellant could not have been guilty of the murder. Apparently, in so far as this portion of her evidence was concerned, she told the same story at the preliminary enquiry. This witness completed her examination-in-chief and was duly cross-examined and further examined by the judge, and then the day's hearing was adjourned. On the resumption the State Attorney at this late stage applied to treat this witness as a hostile witness under the provisions of s. 152 of the Evidence Act on the ground that she had given different evidence at the preliminary enquiry. An application of this nature should have been made by the State Attorney when her evidence became different from that in her deposition during the examination-in-chief, and not at this late stage when her evidence was practically completed. Anyway the trial judge acting in his discretion granted the application and in his ruling he said inter alia:

"It seems to me that this witness should never have been called. It was obvious from the deposition that she was going to say that she awakened her husband when she heard the alarm and presumably therefore he could not have killed Florence; and secondly that she was going to say that he went to Kamanya's house in answer to the alarm. Both these matters are favourable to the defence.

But if on the other hand in the lower court the witness had said something favourable to the prosecution and at the trial fails to mention this I fail to see why it should not be shown to the court that this witness is unworthy of credit."

And then the judge made the following statement which would seem to show an undue prejudice against the second appellant's defence. He said:

"I do not see any reason why the defence should benefit from the evidence of a witness who is unworthy of credit and I accordingly give leave to State Attorney to cross-examine this witness."

With respect it does appear that at this early stage the learned trial judge had already completely rejected the witness's evidence although she had consistently from the start of the investigation given this account of her husband's movements, an account which would have resulted in his acquittal.

We would then refer to the first misdirection on the facts which occurred in the judgment. The murder took place at night and a very material question was the light by which the assailants were identified and one of the matters in issue was whether Sana had a light. In his judgment on this point, in considering whether or not Sana had a light the learned trial judge said:

"I have referred earlier to Sana's statement to the police to the passage which seems to suggest that Sana did not have a light but the Chief Namuyonjo testified that Kamanya told him that he recognised the accused persons by the light of the lamp which Sana had.

Now the Chief Namuyonjo would appear to be an independent witness. He is related neither to Kamanya nor to any of the accused persons and no discrepancies have been shown to exist in his evidence. I am satisfied that Namuyonjo is an impartial and truthful witness.

"If therefore Kamanya told him that Sana had a lamp, Sana must have had a lamp. I am satisfied therefore that at least one of the attackers had a torch and Sana had a lamp."

From this passage it does appear that the judge's final conclusion on this important question is based on the hearsay evidence of Chief Namuyonjo repeating

what the second prosecution witness, Kamanya, had told him. It would appear that the judge had gone beyond what was intended under s. 155 of the Evidence Act, which allows a previous statement of this kind to be used as corroboration of Kamanya's evidence.

Another serious misdirection occurred when he considered the evidence as to whether the second appellant had an injured leg and the blood stains on his shorts. The passage contained in his judgment reads as follows:

"A blood stain of human origin Group O was found on the shorts worn by A.2. When A.2 was medically examined on 15.1.66 he had a wound below the left knee. A.2 claims that the blood came from this injury. But the doctor who examined him said that he could not have had this wound on 14.12.65 because if he did by the time he examined him on 15.1.66 it would have been a scar. Both Kamanya and Florence had blood of Group O and if the blood on A.2's shorts was not his own it must have come from either Kamanya or from Florence."

The learned trial judge here apparently dismisses the second appellant's explanation that he had a bad leg on the night of the murder and also comes to the conclusion that the blood stains on his shorts must have come from either Kamanya or from Florence, and this would have placed the second appellant as being one of the assailants on the murder scene. The facts show that the second appellant had been in the custody of the police since December 15, 1965, and that he had made a statement to the police on December 17, 1965, in which he had said that he then had a wound on the knee on his left leg. It is hardly likely that this witness would have lied about this fact in his statement to the police when he was then in police custody, and the matter could have been then so easily settled by a medical examination. Instead of this no action was taken until nearly a month after. And then the doctor does in fact find an injury but gives it as his opinion that the injury he then saw could not have been in existence on December 14. The prosecution called no evidence at all to show that he had in fact no wound on his knee on December 14 and the probability in view of his statement to the police must be that such an injury did exist. We are of the view that the passage quoted is a misdirection on the facts.

We would then consider the question arising from the assessors expressed opinion as to the onus of proof. In this case both assessors gave long and considered opinions, and it is a legitimate ground of complaint if in doing so they clearly show that their opinions are based on a wrong understanding of the law. We would refer here to the following passage from the opinion of the second assessor:

"A.1, A.2, A.3 and A.4 have failed to satisfy the court why Kamanya and Sana should accuse them. It is the responsibility of accused persons to show the court the misunderstanding that caused the allegation."

This is clearly a misdirection. It means that this assessor in arriving at a decision has done so on a complete misunderstanding of the law. He places on an accused person the onus of proving why a prosecution witness should be lying, and apparently accepts the prosecution case because this has not been done. It would appear probable that the first assessor might also have had such an understanding of the law as he commences his opinion with the words "I am not satisfied with the defence".

The judge made no attempt to correct the second assessor's mistaken view as to the onus of proof, nor does he mention this error in his judgment but rather he appears to accept the opinion based on such a mistaken view of the law, and to give due weight to this in arriving at his verdict.

Learned counsel for the appellants in submitting that the appellants had not had a fair trial placed much reliance on the manner in which the trial judge dealt with the fact that the first, third and fourth appellants had exercised their rights to make an unsworn statement expressly provided for under ss. 278 and 279 of the Criminal Procedure Code. He complained of the following passages in the judgment. First the learned trial judge said with regard to the first appellant “A.1 Biriku has not dared to give evidence but has contented himself with making an unsworn statement and calling witnesses”, and then as to the third and fourth appellants he stated:

“A.3 and A.4, although they have called witnesses, have not dared to give evidence and my conviction that they were both present at the scene of the crime has not been uninfluenced by the fact that they chose not to give evidence.”

There can be no doubt that a judge in assessing the evidence in order to arrive at his verdict can take into account the fact that an accused person has not given evidence on oath, but this right must be exercised with caution and must not be used to bolster up a weak prosecution case or be taken as an admission of guilt on the part of an accused person. We would refer here to a passage from the judgment of the Privy Council in the case of *Cyril Waugh v. R.* (1) ([1950] A.C., at p. 211). This was a case on an appeal from Jamaica but the position is similar in Uganda and the passage is applicable here:

“The law of Jamaica is the same as the law of England both as to the right of a judge to comment on a prisoner’s not giving evidence . . . It is true that it is a matter for the judge’s discretion whether he shall comment on the fact that a prisoner has not given evidence; but the very fact that the prosecution are not permitted to comment on that fact shows how careful a judge should be in making such comment.”

This court has also considered this question in an appeal from Tanganyika in the case of *Omari s/o Hassani v. R.* (2) (23 E.A.C.A. at p. 582), and the following passage is applicable:

“A judge is, of course, entitled to take into account an accused person’s refusal to give evidence on oath, but not to use such refusal to bolster up a weak case or to relieve the prosecution from proving its case beyond reasonable doubt. Nor can such a refusal amount of itself to corroboration of evidence which requires to be corroborated: *R. v. Jackson* (3) (37 Cr. App. Rep. at p. 48). It is very clear from the judgment that the learned trial judge gave great weight to what he described as the appellant’s refusal to face cross-examination. He says, for example:

‘Had he (the accused) given such evidence and given a reasonable explanation of his absence from home after Ali was attacked and also a reasonable account of his movements at the time of the attack and before, he might have succeeded in undermining or reducing the value of much of the prosecution evidence which I now feel bound to accept as reliable.’

As we have already pointed out, the appellant had already given his account of his movements and adduced evidence to support it: that was disbelieved and he was not likely to gain greater credibility by giving a different account in the witness-box.”

The learned judge in this case has twice used the words “not dared to give evidence” and he has made it quite clear that he has considered this as a factor influencing his decision of guilt. The word “dare” as used here would ordinarily connote a meaning that the accused was afraid to give evidence on oath because he was guilty and felt that his guilt would be apparent if he did so. This would

be contrary to the presumption of innocence which is the right of all accused persons, and also contrary to the right of election given by s. 278 of the Criminal Procedure Code. If it was intended that the fact that an accused person elects to make an unsworn statement should be used as a positive factor in determining his guilt then the provisions of s. 278 would not have referred to this as a “right” and would surely also have contained a warning that an adverse inference may be drawn from his election to make an unsworn statement. In this connection we would refer to the judgment of Law, J. in *Wiston s/o Mbaza v. R.* (4) ([1961] E.A. at p. 275). A judge has a right to consider and comment on the fact that an accused has not given evidence on oath in assessing the evidence, but we are of the view that the directions in this case go beyond what is permissible and show that the learned judge has considered the appellants’ undoubted exercise of their statutory right as further proof of their guilt, and this is in our view a serious misdirection.

After full consideration of this case we are unable to find that the trial court would have inevitably come to the same conclusion on a proper and correct direction on the facts and on the law, and we feel that it would be unsafe to allow this conviction to stand.

Appeal allowed and conviction and sentence quashed.

The appellants in person.

For the respondent:

Attorney-General, Uganda

A. G. Deobhakta (Senior State Counsel, Uganda)

Kigotho v Republic
[1967] 1 EA 445 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	3 April 1967
Case Number:	12/1967 (63)
Before:	Sir Charles Newbold P, Sir Clement de Lestang VP and Duffus JA
Sourced by:	LawAfrica
Appeal from:	The High Court of Kenya – Miller, J.

[1] *Criminal Law – Practice – Judgment – Whether the summing up to assessors may be a substitute for the judgment – Criminal Procedure Code, ss. 169, 322 (1) and 322 (2) (K.).*

[2] *Criminal Law – Judgment – Contents of – Observations on – Criminal Procedure Code, s. 169 (K.).*

Editor's Summary

In a trial of an accused who was convicted of rape the trial judge incorporated in his judgment his summing up to the assessors. On appeal the conviction was upheld, but it was observed:

- (i) every judgment must comply with s. 169 of the Criminal Procedure Code and in particular must contain “the point or points for determination, the decision thereon and the reasons for the decision”;
- (ii) before writing the judgment, the judge should sum up to the assessors in accordance with s. 322 (1) *ibid.*, including a direction in simple language on the law applicable;
- (iii) then should follow the judgment as required by s. 322 (2) *ibid.*, and references to the summing up to the assessors may be made both as to the evidence and to the law to avoid unnecessary repetition; but the judgment itself

must fully comply with requirements of s. 169, and the summing up may not be in substitution for the judgment.

No cases referred to in judgment.

Judgment

De Lestang VP, delivered the following judgment of the court: The appellant appeals against his conviction for rape. We can see no merit in his appeal and it is accordingly dismissed. We have, however, some observations to make on the practice adopted by the learned trial judge in the present case of incorporating his summing up to the assessors in the judgment. This practice, though of relatively recent origin, is unfortunately growing and if allowed to continue uncurbed is likely to defeat the proper function of judgments and cause embarrassment both to appellants and to this court when hearing their appeals.

The function of a summing up is, of course, quite different from that of a judgment. Section 322 (1) of the Criminal Procedure Code requires the judge to:

“... sum up the evidence for the prosecution and the defence, and shall then require each of the assessors to state his opinion orally, and shall record such opinion.”

Although the section makes no reference to the law there can be no doubt that the judge should direct the assessors as to the law applicable but he should do so in simple language and restrict his observations strictly to what is required by the case in hand. A long and detailed lecture on the niceties of legal problems is more likely to confuse than to assist the assessors in arriving at a correct opinion.

Having thus ascertained the opinions of the assessors the judge is required by s. 322 (2) to give judgment. While as a general rule there can be no objection to references in the judgment to the summing up so as to avoid unnecessary repetition of the law and the evidence in the case it must be remembered that the summing up is not and cannot be a substitute for a judgment and that the judgment itself must comply with s. 169 of the Criminal Procedure Code. In particular it must “contain the point or points for determination, the decision thereon and the reasons for the decision.” We hope that these observations will be of assistance to trial judges.

For the respondent:

Attorney-General, Kenya

H. G. D. Graham

Hassanali Issa & Co v Jeraj Produce Store
[1967] 1 EA 447 (HCT)

Division: High Court of Tanzania at Dar-Es-Salaam
Date of judgment: 27 February 1967
Case Number: 20/1966 (73)

Before: Hamlyn J
Sourced by: LawAfrica

[1] Practice – Issues – Not to be inconsistent with pleadings – Whether issue of lack of consideration inconsistent with plea of duress.

[2] Practice – Summary procedure – Claim on cheque – Affidavit alleging “duress” – Leave to defend – Civil Procedure Code, 1966, O. 35, r. 3 (T.).

Editor’s Summary

The respondent obtained leave to defend a claim on a cheque brought by the appellant under the summary provisions of O. 35, r. 2 of the Civil Procedure Code. The affidavit supporting the respondent’s application and also the defence subsequently filed alleged that the cheque was given “under duress”. The learned magistrate at the trial framed the issue in the case as “was there consideration?” The appellant’s main ground of appeal was that the issue was too widely framed by the magistrate, who should have restricted the issue to “Was there duress?”

Held –

- (i) where leave to defend is granted, the affidavit has the effect of destroying the plaintiff’s position of being entitled to a decree on the ground that the defendant is deemed to admit the allegation in the plaint;
- (ii) in such a case the onus then lies in the normal manner between the parties and the learned magistrate was clearly right in requiring proof of consideration, rather than limiting the issue to duress only;
- (iii) issues should not be inconsistent with the pleadings; but they should at least embrace questions which are inter-related, and an issue of lack of consideration is not inconsistent with a plea of duress.

Appeal dismissed.

No cases referred to in judgment.

[**Editorial Note:** This judgment has been reversed on appeal by a decision which will appear in these Reports.]

Judgment

Hamlyn J: This is an appeal against the judgment of the District Court of Dar-es-Salaam in respect of a claim by the plaintiff-appellant for Shs. 716/80 on a cheque drawn by the defendant in the plaintiff’s favour. The case was filed as a summary one under the provisions of O. 35, r. 2 and the defendant obtained leave to defend under r. 3 after the court had heard an application by him supported by the usual affidavit. The affidavit alleged that the cheque was given “under duress” and the learned magistrate, on the hearing of the application, gave the necessary leave to defend, as he was clearly bound to do. A written statement of defence was filed within the time ordered by the court and this also stated that the

cheque (the subject-matter of the suit) “was given under duress”. On the case coming on for trial, the court framed issues prior to hearing, and the first ground of appeal is that these issues were wrongly framed and that they prejudiced the plaintiff’s claim. Paragraph 1 of the memorandum of appeal claims (and this is the basis of the contention that the appellant’s case was prejudiced) that the learned trial magistrate framed an issue “Was there consideration?”, while the appellant says it ought to have read “Was the cheque given under duress?” If I understood the arguments of counsel for the appellant aright, he set out in his arguments to show that, once the defendant had obtained leave to defend on the grounds of duress, he was

narrowly tied down at the trial to giving evidence to support that contention and to none other; learned counsel subsequently relaxed such interpretation and agreed that where an allegation is made in the affidavit covering the application for leave to appeal, when the case comes on for hearing the defendant is bound to show that the claims in his affidavit are supported by some circumstances of “abnormality” in the giving by the defendant of the negotiable instrument – abnormality such as fraud, duress, illegality or the like, though the circumstances in which the negotiable instrument is given may not completely correspond to that in the affidavit.

Now I think that this broader view adopted subsequently by learned counsel for the appellant is the correct one. If I plead duress in my affidavit to obtain leave to defend, it matters not whether I can in evidence substantiate that actual duress (in the accepted legal meaning) was the motivation by reason of which I gave the negotiable instrument. But I must show in evidence that such cause or some such similar cause vitiated the contract. It may be mistake or fraud, but at least I must show that something operated to invalidate the transaction when the cheque was given.

If this principle is correct, then the issue framed in respect of it should be wider than one of mere duress only. The plaintiff claims that the court framed the first issue too broadly and asked “Was there consideration?” He says that it should have been framed as narrowly as possible, by tying it down to the words “Was the cheque given under duress?” I think that he is wrong in arguing so restrictively. If the defendant at the trial can show any circumstances from which the court can say, “This apparent contract was no contract at all”, then the particular issue should be framed to cover such circumstances. While issues should not be inconsistent with the pleadings, they should at least embrace questions which are inter-related and a plea that a document was obtained by fraud is not inconsistent with proof that it was obtained by undue influence. Where any such contention is raised by affidavit – whether it be fraud, mistake, undue influence or the like – the real matter underlying the claim is that consideration had gone, because the agreement was no agreement at all. If the defendant claims that his negotiable instrument was given under duress, what he really says is that his mind did not go with his act and that consequently consideration failed.

Order 35, r. 3 (1) reads:

“3.(1) The court shall, upon application by the defendant, give leave to appear and to defend the suit, upon affidavits which (a) disclose such facts as would make it incumbent on the holder to prove consideration, . . . (b) disclose such facts as the court may deem sufficient to support the application”

This rule is broadly drafted and makes it clear that proof of consideration is the yard-stick by which the matter is to be measured; it therefore appears that the learned magistrate, in framing the issue as he did, was strictly conforming to r. 3 of the Order. I cannot find that any injustice was worked upon the plaintiff in this respect.

The plaintiff states in his memorandum of appeal that the defendant was bound to prove duress by evidence and that the acceptance of the statement in the affidavit alone invited a miscarriage of justice. I think that here the plaintiff does not quite appreciate the evidential position. When he files his case under O. 35, he puts himself in a privileged position. Order 35 r. 2 (2) provides that, in default of the defendant obtaining leave to defend “the allegations in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree”. Rule 3 (1), however, restores the normal position and where leave to defend is obtained from the court, acceptance of the affidavit makes it “incumbent on the holder to prove consideration”. That is to say, the affidavit (if it

discloses the necessary facts) has a dual effect; first of obtaining leave to defend on the application and secondly of destroying the plaintiff's position of being entitled to a decree on the ground that the defendant is deemed to admit the allegations in the plaint. In other words, the case becomes a simple suit for recovery of money, with onus lying in the normal manner between the parties. For the plaintiff to claim that he need not prove consideration is not in accordance with the ordinary requirements of procedure and the learned resident magistrate was clearly right in requiring such proof: see Bills of Exchange Ordinance, s. 30 (2).

Appeal dismissed.

For the appellant:

R. C. Kesaria, Dar-es-Salaam

For the respondent:

Vellani and Co., Dar-es-Salaam

N. M. Kassam

Gitau and another v Republic [1967] 1 EA 449 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	14 March 1967
Case Number:	1141 and 1142/1966 (97)
Before:	Sir John Ainley CJ and Rudd J
Sourced by:	LawAfrica
Appeal from:	The Resident Magistrate, Kiambu.

[1] *Criminal Law – Common intention – Whether offence committed must be probable consequence of agreement – Two policemen firing into the air in self-protection – One wounds an innocent party – Whether joint conviction proper – Penal Code, s. 21 (K.).*

[2] *Criminal Law – Joint conviction – Common intention – Whether offence must be probable consequence of agreement – Penal Code, s. 21 (K.).*

[3] *Criminal Law – Unlawfully doing grievous harm – Whether intention to do harm essential or whether negligence sufficient – Penal Code, s. 234 (K.).*

[4] *Criminal Law – Unlawfully doing grievous harm – Administration police firing into the air in self-protection – Shot injures innocent party – Whether policeman guilty of unlawfully doing grievous harm – Penal Code, s. 234 (K.).*

[5] *Criminal Law – Shooting – Administration policeman firing into the air in selfprotection injures*

innocent party – Whether guilty of unlawfully doing grievous harm – Penal Code. s. 234 (K.).

[6] Firearms – Use of – Whether armed police officer entitled to fire into the air to stave off a dangerous attack which he reasonably believes to be imminent – Whether risk of injury unnecessary.

[7] Police – Firearms – Whether armed police officer entitled to fire into the air to stave off a dangerous attack which he reasonably believes to be imminent.

Editor's Summary

The two appellants, Administration Policemen, were on night patrol together in Kikuyu country and were both armed with loaded rifles. Their duty was to discourage trespassing Masai from stealing cattle. They saw a man who was in fact on his way to his home but whom they took for a Masai. They challenged him, and, when he ran (he in turn taking them for Masai) they both fired. One or other of them in doing so hit and grievously injured him. The intention

of the appellants when they fired was obscure but it appeared that they did so in self-protection, to discourage attack from possible companions of the man, which would possibly have been sanctioned by the somewhat confused instructions about the use of firearms which had been given to the appellants by their commanding officer, the local chief. It was accepted that neither appellant intended to kill or hurt the man. Both appellants were convicted of jointly and unlawfully doing grievous harm, and appealed. One ground of appeal was that there was no intent to cause grievous harm; the other was that there was no common intention.

Held –

- (i) the word “unlawfully” in s. 234 of the Penal Code covers reckless and grossly negligent acts (as well as acts punishable under s. 231) and intention to cause harm is unnecessary (*Mohanlal Nathoo Bakrania* (1) applied);
- (ii) in certain circumstances an armed police officer would be entitled to fire in the air to stave off a dangerous attack which he reasonably believes to be imminent; but
- (iii) in this case, although the appellants probably were acting within their instructions, they fired when there was no reasonable apprehension of serious danger to themselves and each of them took a risk which was unnecessary;
- (iv) in the circumstances it was possible to fire into the air in such a way that this risk was so slight as to remove the firing from the category of crimes;
- (v) while one of the appellants may have fired without gross negligence the other clearly fired in a manner which was extremely dangerous, but it was impossible to know which;
- (vi) before both appellants could be jointly convicted under s. 21 of the Penal Code it had to be shown that the wounding was a probable consequence of the prosecution of their purpose to fire in the air; but it was never shown that the appellants agreed on the manner of firing;
- (vii) the injury could not be said to be a probable result of what the two appellants agreed to do (if indeed they agreed at all); therefore s. 21 of the Penal Code could not apply (*R. v. Salmon* (2) distinguished).

Appeal allowed.

Cases referred to in judgment:

- (1) *Mohanlal Nathoo Bakrania* (1951), 18 E.A.C.A. 248.
- (2) *R. v. G. Salmon, J. Salmon and A. Hancock* (1880), 14 Cox C.C. 494.

Judgment

The following reasons for the judgment of the court were read by **Rudd J**: The two appellants, whose appeals we consolidated, were convicted of jointly and unlawfully doing grievous harm to a man named Peter Waweru contrary to s. 234 of the Penal Code. We allowed their appeals and now give our reasons for doing so.

In March last year Peter Waweru was returning to his home after dark from a neighbour’s house. At

that time the two appellants, who are officers of what is now called the Administration Police, were on night patrol together in the neighbourhood, which is in Kikuyu country. Each was armed with a loaded rifle. The local chief who had night patrols of this nature under his control and command said that one of the duties of these patrols was to discourage trespassing Masai from stealing cattle, and he detailed the instructions given to the patrols touching the use of firearms. We find the instructions a little difficult

to follow. There was of course an instruction that no officer should fire to hit man save in necessary defence. But instructions as to firing in the air were given, and it is not easy to say whether the patrols were instructed to fire in the air in order to scare off armed or thieving Masai or to do so as a means of effecting the arrest of such persons; in short whether the firing was to make the Masai run, or to make them stand still. That however is a question we will consider again later.

To continue with the narrative, the two appellants saw Peter as he was making for his home, and Peter saw the appellants. It is fairly clear that the appellants thought that Peter was a Masai, and that Peter thought that the appellants were Masai. The appellants challenged Peter and it is at any rate possible that he then ran away. Both appellants discharged their firearms not, it must we think be conceded, with any intention of killing or hurting Peter, but with the intention either of speeding him, and possible companions of his, on the way, or (just possibly) of arresting him. The curious confusion of ideas in the instructions to which we have referred occurs also in the evidence of the appellants. The first appellant said "I said in Kikuyu 'Who are you'. I did this three times; that person (Peter) did not answer and that man turned and started to run. No. 2 accused said 'Stop stop . . . we are askaris' . . . we fired in the air". Now one would have expected this appellant to have added "We fired, of course, to stop the man". But he never did say that and his final word was "If I saw a person carrying a weapon, first to ask who he is, second if no answer to fire in the air, if he turns and runs away we have to fire in the air, so that if there are others in a gang they can run away". This appellant's view appears to have been that the firing in the air was a protective measure.

The second appellant took the same view, we think. His final word was "I fired this bullet because the man was running away and I thought there might be other persons with him in a gang". The object in firing was then to make the fleeing man run faster, a frequent result of firing in the air, and to discourage attack from friends of the fugitive who might be at hand. It seems to us that it is at any rate possible that the instructions of the chief sanctioned firing in the air in such circumstances.

Be all that as it may, Peter was struck and grievously injured by a bullet. Which of the appellants fired that bullet is not known, but it is very obvious that one of them did so. The magistrate, as we have already indicated, convicted both men of causing the injury unlawfully.

One ground of appeal was that there was no evidence of an intent to cause grievous harm and that such an intent was a necessary ingredient of the offence created by s. 234 of the Penal Code. The magistrate apparently held that there was an intent to wound, by which he clearly meant an intent to cause the injuries which were in fact caused. He said "Every man must contemplate the necessary consequences of his own acts, and moreover every act, in itself unlawful, is wrongly intended or in other words 'malicious', and he held, we think, that the wounding of Peter was a necessary consequence of the act of each appellant. Here, with respect, he was clearly in error, and it is not necessary to labour the point. Moreover malice should not be confused with intent, and it is not in fact a word used in s. 234 of the Penal Code. That section reads:

"Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life, with or without corporal punishment."

Now it was never proved that either appellant intended to hit Peter, let alone grievously to hurt him. The problem raised by this particular ground of appeal is whether the words of the section cover cases where grievous harm has resulted

from criminal negligence or recklessness. It is scarcely necessary to say that acts of a character sufficient only to establish civil negligence are not covered by the section, but the Court of Appeal for East Africa decided in the case of *Mohanlal Nathoo Bakrania* (1), that this section (which was then numbered as s. 230) did cover acts of criminal negligence. The court considered the argument that where a man causes hurt by criminal recklessness or negligence he should be convicted and punished under one or other of the sections contained in Cap. 23 of the Penal Code, which is headed “Criminal Recklessness or Negligence”, but said “The title to chapter 23 and the marginal note to s. 239 (now 244) gives some colour to the argument, as does also the somewhat confused drafting and arrangement of the relevant sections. But making all due allowances for these considerations we are of opinion that there is no justification for the suggested limitation on s. 230”. The court went on to point out that the intentional causing of grievous harm was made an offence by s. 227 (now s. 231) and further pointed out that under that section the intentional causing of grievous harm was punishable with imprisonment for life. “It therefore seems reasonable” the court said “to conclude that s. 230 (presently s. 234) with its lesser maximum punishment of seven years is intended to be limited to cases where grievous harm is caused otherwise than in circumstances contemplated in s. 227 (presently s. 231)”.

Now it is somewhat unfortunate that the legislature, whom we must suppose to have been aware of the decision of the Court of Appeal for Eastern Africa, and of the reasoning which lay behind it, chose in 1952 to raise the penalty for an offence contrary to s. 230 (presently s. 234) to imprisonment for life. The legislature went further in 1960 and, for some reason which evades us, added to s. 227 (231) and to s. 230 (234) the words “with or without a flogging”. It must then be conceded that not all the factors which affected the decision of the Court of Appeal in 1951 exist in 1967. It would be difficult to think of a less appropriate penalty for negligence than flogging, while life imprisonment for recklessness however gross is to our way of thinking an entirely ludicrous punishment. Whatever the nature of the wrongdoing covered by this section that wrongdoing is regarded by the legislature as more serious than a killing of a man by an unlawful act, for a flogging cannot be imposed for the offence of manslaughter. We cannot charge the legislature with caprice, and the situation is indeed worthy of careful consideration. If one omits wording irrelevant in the present case s. 231 reads “Any person who . . . with intent . . . to do some grievous harm to any person . . . does any grievous harm to any person . . . is guilty of a felony and is liable to imprisonment for life with or without corporal punishment”. It may most reasonably be asked whether s. 234 with its identical penalty clause creates an offence of a different nature or one which is made up of different elements. The answer is we think that s. 234 does embrace acts of criminal negligence and recklessness as well, clearly enough, as acts which would be punishable under s. 231. It is of no great use to inquire why the legislature has chosen to enact two sections which overlap in this way. It is enough to say that they have, very obviously, done so. As the Court of Appeal in *Bakrania’s* case (1) pointed out the word “unlawfully” in a penal Act prima facie includes all unlawful acts, and when together in one part of the Penal Code we find one section dealing with the intentional causing of grievous harm and another dealing with the unlawful causing of grievous harm, we cannot suppose that the two sections were intended to have precisely the same meaning, and in the section which deals with the unlawful causing of grievous harm, it must be proper to give to the word “unlawfully” its ordinary meaning, and that meaning without any doubt covers reckless and grossly negligent acts.

It was our opinion then that the ground of appeal which we have just discussed failed. Learned counsel for the appellants was on much stronger ground when

he argued the question of common intention. It will be noted that we have earlier left a number of questions touching the legality of firing in the air to scare off possible attackers, undecided. In certain circumstances, though the matter is not covered either by the Police Act or the Administration (or Tribal) Police Act, it seems to us that an armed police officer would be entitled to fire in the air to stave off a dangerous attack which he reasonably believed to be imminent. In the present case although the two appellants probably were acting within their instructions they did to our minds fire when there was no reasonable apprehension of serious danger to themselves and since what goes up must eventually come down, and spent bullets can cause injury, each appellant must, we think, have taken a risk which was unnecessary. It is of course wrongful to take unnecessary risks, but in the circumstances of this case it was clearly possible to fire into the air in such a way that the risk either to Peter or to anyone else was so slight as to remove the act of firing from the category of crimes. One of the appellants may have fired this rifle without gross negligence. The other appellant clearly fired in a manner shown by the event to have been extremely dangerous, and if we knew which of the two it was who fired the bullet which struck Peter there would be little difficulty in supporting the conviction of that appellant. But our ignorance on that point is of course the crux of this case. The magistrate who wrote, if we may say so, a careful and sensible judgment, said:

“There is, of course, no evidence to show which of the two accused fired the shot which caused the wounding. However the evidence in the record on the actual firing and stated briefly now are:

- (i) Both challenged almost at the same time.
- (ii) Each one fired almost simultaneously.
- (iii) The reasons for firing given by each accused.
- (iv) The general circumstances of the use of firearms leaves the court in no reasonable doubt that the two accused acted with common design.

I would here quote the case of *R. v. Salmon* (2): ‘So also if three persons amuse themselves by shooting with a rifle at a target without taking proper precautions to prevent injury to others and one of them kills a man, all three are guilty of manslaughter, although there is no proof which of the three fired the fatal shot’. I have also directed my mind to s. 21 of the Penal Code.”

It might be helpful if, at this stage, we set out the section to which the magistrate referred. It reads:

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

Now the common design, the common intention of the two appellants was not to shoot Peter, and if the magistrate supposed that it was, he fell, we think, into error. Certainly the appellants formed the intention more or less simultaneously to fire in a manner which would scare Peter, but neither formed the intention to injure him. Whether the intention formed was “common” in the sense that it was formed by those two men in conjunction one with the other, appears to us doubtful. But let it be assumed that the intention was common in that sense, and that the intention of the appellants was to prosecute the purpose, in conjunction with one another, of firing in the air to scare Peter and imaginary Masai, and that such a purpose was unlawful, and that the wounding of Peter

resulted from the prosecution of that purpose, and that the wounding was an offence, which may we think be conceded, it had yet to be shown before both the appellants could properly be convicted of the offence of wounding Peter that the wounding was a probable consequence of the prosecution of their purpose to fire in the air. It is at this point, if not at a much earlier point, that the attempt to bring the facts of this case within the terms of s. 21 of the Penal Code, fails. If these two men had agreed together shall we say to shoot as close to Peter as they could without killing him, the attempt might have been successful. But it was never shown that the appellants agreed on the manner of firing. Sensibly carried out the plan of these two men, if plan there was between them, was not likely to result in harm either to Peter or to anyone else. One of these men carried out the plan safely, an achievement well within the powers of anyone save a fool, but the other handled his firearm foolishly and dangerously. The appellant who was guilty of that folly could have been convicted, but as we have repeatedly pointed out we do not know which of the appellants was so guilty, and the appellant who in fact discharged his firearm safely was not to our minds legally or indeed morally responsible for the other man's folly.

The magistrate, when he held otherwise, was clearly influenced by the decision in *R. v. Salmon* (2), very fully reported in volume 14 of Cox's Criminal Cases at p. 494 et seq. The decision was that of the Court for Crown Cases Reserved and was reached nearly ninety years ago. Little mention of degrees of negligence was made by any one of the five judges who deliberated, though the negligence revealed by the evidence was very great.

The three prisoners had one rifle and some ball cartridges between them. They decided one evening to practice shooting, and target practice was clearly their common purpose, their common enterprise. It was their duty, and the duty of each of them, to take all proper precautions to prevent danger to other persons. This they failed to do. It would appear that between them they so arranged matters and so placed their target that they were firing over three highways, and dangerously close to neighbouring gardens. A boy in an apple tree in a neighbouring garden was struck and killed by a bullet fired by one of the three men, but it was not clear which of the three men fired that bullet. At the trial of the three men at Wells Assizes all three were convicted of manslaughter and the Court for Crown Cases Reserved held that the conviction was right. Perhaps the most helpful judgment was delivered by Field, J. He said:

"At first I thought it was necessary to show some duty on the part of the prisoners as regards the boy, but I am now satisfied that there was a duty on the part of the prisoners towards the public generally not to use an instrument likely to cause death without taking due and proper precautions to prevent injury to the public. Looking at the character of the spot where the firing took place, there was sufficient evidence that all three prisoners were guilty of culpable negligence under the circumstances."

It is not difficult to see how readily s. 21 of our Penal Code could be applied to the facts in that case, but the difference between the facts of the two cases scarcely needs comment. The two *Salmons* and *Hancock*, acting in concert created a situation which seriously endangered everyone who might be near to a pre-determined line of fire, and it was very likely that there would be living souls near to that line of fire. In the case for our determination if there was a pre-concerted plan to any kind the essence of the plan was to fire so as to scare Peter, but so as to miss him. Unlike the plan in the *Salmons'* case (2) it was a plan which could safely be carried out and was safely carried out by one appellant. The injury to Peter could not in the circumstances be said to be a probable

result of what the two men agreed to do if indeed they agreed together at all. It was for the reasons set out above that we allowed this appeal.

Appeal allowed.

For the appellant:

Macdougall and Wollen, Nairobi

P. J. Ransley

For the respondent:

Attorney-General, Kenya

J. R. Hobbs (Senior State Counsel, Kenya)

In the Matter of a Petition by Habel Kasenha
[1967] 1 EA 455 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	7 June 1967
Case Number:	9/1967 (99)
Before:	Saidi J
Sourced by:	LawAfrica

[1]Constitutional Law – Elections – District Council – Whether decision of a District Executive Committee to reject a preliminary nomination by the Branch Annual Conference can be questioned in court – Whether election petition will lie – Local Government (Elections) Act, 1966, s. 78 (2) (T.).

[2]Local Government – Elections – District Council – Whether decision of District Executive Committee to reject a preliminary nomination by the Branch Annual Conference can be questioned in court – Whether election petition will lie – Local Government (Elections) Act, 1966, s. 78 (2) (T.).

[3]Elections – District Council – Whether decision of a District Executive Committee to reject a preliminary nomination by the Branch Annual Conference can be questioned in court – Whether election petition will lie – Local Government (Elections) Act, 1966, s. 78 (2) (T.).

[4]Elections – “Election” and “By-Election” – Nomination by Branch Annual Conference of TANU – Whether such nomination amounts to a by-election within the Local Government (Elections) Act, 1966, s. 2 (1) (T.)

Editor’s Summary

The petitioner was nominated for election to the District Council at Mpwapwa by a large majority at the

Branch Annual Conference of TANU, but (for reasons which were not revealed in court) his name was not thereafter declared by the District Executive Committee as a candidate in the election and another person was elected to the seat. The petitioner thereupon brought an election petition.

Held –

- (i) the decision of the District Executive Committee in rejecting the petitioner's name as a candidate could not be called in question because of s. 78 (2) of the Local Government (Elections) Act, 1966;
- (ii) the proceedings before the Branch Annual Conference did not amount to a by-election within s. 2 (1) of the Local Government (Elections) Act, 1966.

Petition dismissed.

No cases referred to in judgment.

Judgment

Saidi J: This is an election petition relating to the seat in Ward No. 29 of the Mpwapwa District Council. The petitioner, Habel Kasenha,

was not in fact one of the candidates finally nominated for the election of this seat. The candidates nominated were Ernest Jovan and Jackson Mshame. Ernest Jovan won the election.

The main complaint of Habel Kasenha is that his name was not forwarded to the District Executive Committee of Mpwapwa by the Returning Officer. It is admitted that at the preliminary nominations by the Branch Annual Conference, where 70 votes were cast, Habel got 58 votes, Jackson 16, Ernest 4, Isaka 1 and Ashiri 1. It does certainly appear that the highest preference was given to Habel by the Branch Annual Conference. He was then and still is TANU Chairman of his area, but when the final nominations were declared by the District Executive Committee of Mpwapwa, on October 23, 1966, he was surprised to find that he was not one of the candidates, and that Jackson and Ernest had been nominated. Thereafter Ernest was elected to the ward.

Before this court Mr. Kanabar, who appeared for the petitioner, contended that, had the petitioner been accordingly nominated, he would have been successful in the election, because he was the most popular candidate in his constituency. He further contended that the proceedings before the Branch Annual Conference, where 70 votes were cast and the petitioner had obtained more than half of all the votes cast, amounted to a by-election in terms of s. 2 (1) of the Local Government (Elections) Act, 1966, No. 47 of 1966. From the evidence of Mr. Nalumba, the Returning Officer of Mpwapwa District, it appears that the name of Habel was forwarded by him along with the other four names to the District Executive Committee. Mr. Nalumba told the court that for some reason, which appeared in a confidential letter he had in his possession, the name of Habel was not recommended by the District Executive Committee. He did not wish the letter to be read in court, because it was confidential. Mr. Nalumba referred to the provisions of s. 78 (2) of the Local Government (Elections) Act, 1966, which debarred a court of law from reviewing or questioning the decision of either the Branch Annual Conference, Branch Executive Committee or the District Executive Committee in any matter relating to nominations of candidates for elections within their jurisdiction. This subsection reads:

“The proceedings of a meeting of a Branch Annual Conference, Branch Executive Committee, a District Executive Committee or the Central Committee or any other organ of the Party which is held for the purposes of this Act shall not be subject to review in any court either by way of an election petition or otherwise.”

It follows therefore that the decision of the District Executive Committee of Mpwapwa in rejecting the name of Habel as a candidate for the elections to the seat in Ward No. 29 cannot be called in question, and Habel's petition on this ground must fail. It remains to consider the other ground of this petition put forward by the petitioner's counsel, that the proceedings before the Branch Annual Conference, where 70 votes were cast and Habel obtained more than half of the votes, amounted to a by-election. The Returning Officer in reply to Mr. Kanabar's submission had submitted that these proceedings were not a by-election, and that they were preliminaries for the primary nominations of candidates. Section 2 (1) of the Local Government (Elections) Act, 1966, provides that:

“‘election’ means an election in a ward of an elected member of an Authority and includes a by-election for that purpose.”

It does not appear to me therefore that a by-election would be a preliminary election. I think a by-election would have the same results as an election itself. It appears to me that a by-election is held to fill a vacancy of an appointed member who happens to vacate the seat for one reason or another. I think the

provisions of s. 7F of the Local Government (Elections) (Amendment) Act, 1966 (No. 48 of 1966), will make this matter clear. That section reads:

- “7F. (1) Where a vacancy is caused on any council by the death, retirement, resignation, or disqualification of any member or through any other cause:
- (a) if the vacancy is in the office of an elected member, a by-election shall be held to fill the vacancy within such period as the Minister may direct;
 - (b) if the vacancy is in the office of an appointed member, the President may, by notice published in the Gazette, appoint another person to fill the vacancy,

and the person so elected or appointed shall hold office for the remainder of the term of office of his predecessor.

Provided that where a vacancy occurs in the office of an elected member within nine months before the ordinary day of retirement from such office, the vacancy shall not be filled by a by-election but the President may, notwithstanding anything to the contrary contained in this Ordinance, appoint, by notice published in the *Gazette*, a member to fill the vacancy.

- (2) A by-election shall be held in accordance with the provisions of the Local Government (Elections) Act, 1966.”

In Hart’s Introduction to the Law of Local Government and Administration (6th Edn.), the learned author, at p. 101, says the following:

“Elections of councillors may occur either on the ordinary occasions when the term of office of existing councillors comes to an end, or when for any reason a casual vacancy occurs. This latter event, leading to a by-election, may happen in a variety of ways, e.g. when a councillor dies, ceases to be qualified, or becomes disqualified, or resigns, or forfeits the office by absence of a certain period, or he is elected for a certain office which he cannot hold while he is a member . . . Where a casual vacancy occurs, an election is, with two exceptions, held in exactly the same manner as an ordinary election, the member elected at a by-election holding office until the date upon which the person, whose vacancy he was elected to fill, would regularly have retired.”

It follows from the foregoing that the proceedings before the Branch Annual Conference, where the petitioner had the highest preference, were not a by-election as alleged by the petitioner and his counsel, but were mere preliminaries for primary nominations of candidates. The petitioner’s appeal on this ground fails.

In the result the petition is dismissed with costs.

Petition dismissed.

The respondent appeared in person.

For the petitioner:

T. C. Kanabar, Dar-es-Salaam

C C Patel & Co Ltd v N B Patel
[1967] 1 EA 458 (HCK)

Division: High Court of Kenya at Nairobi

Date of judgment: 12 May 1967
Case Number: 628/1964 (101)
Before: Rudd J
Sourced by: LawAfrica

[1] Bankruptcy – Property available for distribution – Attachment of debtor’s interest in land by prohibitory order before receiving order made – Interest in land consisting of registered third charge stated to have been released by the terms of an unregistered agreement for sale to the third chargee himself – Whether such interest capable of being attached by prohibitory order.

[2] Execution – Attachment of judgment-debtor’s interest in land by prohibitory order – Interest consisting of registered third charge stated to have been released by the terms of an unregistered agreement for sale to the third chargee himself – Whether such interest capable of being attached by prohibitory order.

[3] Land – Chargee’s interest in – Whether third chargee retains any right title or interest in land after execution and part performance of an unregistered agreement for sale to the third chargee himself containing release of charge – Whether third chargee’s interest capable of attachment.

Editor’s Summary

K. M. M. was the registered owner of certain land subject to three registered charges. In August, 1957, K. M. M. entered into a written agreement for the sale of the land to the third chargee. The agreement provided that the third chargee would pay off the first and second charges; but the first and second chargees were not parties to the agreement. The agreement stated that the amount due on the third charge was satisfied by the third chargee releasing K. M. M. from liability. The third chargee went into possession, but never paid off the first and second charges, and the agreement was never registered against the title. In April, 1959, the plaintiff company obtained a prohibitory order attaching “all the right title and interest” of the third chargee in the land. On June 3, 1959, a receiving order was made against the third chargee and he was adjudicated bankrupt on October 16, 1959. On October 22, 1959, the land was sold on the instructions of the first and second chargees, and realised a surplus over the amount required to satisfy those charges, but not over the amount due under the third charge at the date of the agreement for sale. The third chargee was registered as discharged in August, 1960. The Official Receiver claimed the surplus as trustee of the third chargee’s estate, and so also did the plaintiff company under its attachment. By agreement the parties sought the opinion of the court on questions of law. The Official Receiver argued firstly that the agreement for sale conferred no rights of title or property but that it did release the land from the third charge, so that the third chargee was left only with a right to compel a transfer of the property, which right was not one which could be attached under the prohibitory order; and secondly that the charge had been notionally paid off and had ceased to exist so that nothing was due under it.

Held –

- (i) the effect of the agreement for sale as regards the third chargee was merely to give K. M. M. a personal release which did not operate to clear the title or to release the title of the land from the encumbrance; therefore the third charge still subsisted;

- (ii) therefore the third chargee had right and title in and to the land as an encumbrancer; which right and title was immovable property capable of attachment and which was attached before the receiving order was made;

- (iii) therefore the plaintiff as attaching creditor had a valid claim to the surplus on sale but the Official Receiver did not.

Judgment for the plaintiff.

No cases referred to in judgment.

Judgment

Rudd J: Prior to August 29, 1957, one K. M. Mehta was the registered owner of certain land subject to three registered charges, and N. B. Patel was registered as the chargee of the third of these charges.

On August 29, 1957, K. M. Mehta and N. B. Patel entered into a written agreement for sale of the land to N. B. Patel for a total purchase price of Shs. 210,000/- made up as to Shs. 45,990/- by the release of Mehta from his obligation under the third charge of Shs. 42,000/- as principal and Shs. 22,365/- interest to August 31, 1957; and as to Shs. 125,000/- the principal amount due to the chargees of the first charge; and as to Shs. 22,365/- the principal amount with interest to August 31, 1957 due to the chargees of the second charge; and as to the balance various specified amounts which were declared to be satisfied.

As regards such of the amounts as were due on the first and second charges it was declared that the amount of the first charge was to be satisfied by N. B. Patel taking over the liability under the first charge, and as to the amount due under the second charge that was declared to be deemed to be satisfied by the purchaser taking over the liability for the said amount.

As the first and second chargees were not parties to the agreement for sale K. M. Mehta remained personally liable and the land remained charged to them. N. B. Patel had a personal liability to K. M. Mehta, but not to the chargees, to pay off their charges.

As regards the amount due on the third charge the agreement states as follows: "such amount being satisfied by the purchaser releasing the vendor from the liability in respect of such amount".

Pursuant to this agreement N. B. Patel was put in possession as from September 1, 1957. The liabilities under the first and second charges were never discharged by N. B. Patel. On April 27, 1959, C. C. Patel & Co. Ltd., whom I shall call the company, obtained in execution of a decree against N. B. Patel a prohibitory order attaching "all that right title and interest" of N. B. Patel in the land. On June 3, 1959, a receiving order was made against N. B. Patel who was adjudicated bankrupt on October 16, 1959. On October 22, 1959, the land was sold on the instructions of the chargees of the first and second charges. It realised Shs. 15,627/- more than the amounts required to satisfy the first and second charges. The agreement for sale of August 29, 1957, was not registered against the title of the land and the third charge was not registered as discharged until August, 1960.

In these circumstances the Official Receiver, as trustee of the bankrupt's estate, claims the surplus realised by the sale over the amount due on the first and second charges and the company also claims the said surplus under the attachment. The surplus did not exceed the amount that was due under the third charge as at August 31, 1957. (K. M. Mehta also claims the surplus and I think this claim has no substance and it has not been put forward at the trial.)

It was argued for the Official Receiver that the agreement of sale conferred no rights of title or

property but that it did in the circumstances release the land from the third charge in favour of N. B. Patel and that N. B. Patel thenceforth at least only had a right to compel a transfer of the property and that this right was not a right that could be attached under the prohibitory order. It was

further argued that the charge had been paid off and had ceased to exist and therefore that it could not be attached and sold since the charge had been notionally paid off and there was nothing due on it. I think the best way to approach this is to examine the position in law as it was immediately before and immediately after the agreement of August 29, 1957.

Immediately before that agreement the position was that K. M. Mehta was the owner of the property subject to the three charges. The property was subject to the three charges and I take it that K. M. Mehta was also personally liable for the amounts due on the three charges. As regards the land the chargees of the three charges were registered as chargees and were in every way entitled to the full benefits of their respective charges as against K. M. Mehta personally and also as affecting the land. After that agreement or on or about September 1, 1957, the position was as follows:

The chargees of the first two charges were entitled to the benefits of their charges as against the land, and also entitled to enforce the charges personally and contractually as against K. M. Mehta personally but not as against N. B. Patel personally, though they could still enforce the charges by way of recourse to the land and in fact they had recourse to the land later. K. M. Mehta was still the owner of the land subject to the first two charges and, if it still subsisted, subject to the third charge. He was also personally still bound to the chargees of the first two charges and personally bound to N. B. Patel in terms of the agreement. N. B. Patel was in no sense the owner of the land but he was personally liable to K. M. Mehta to discharge the first two charges or to obtain for K. M. Mehta a release as far as K. M. Mehta was concerned from the obligations of the first two charges. He was entitled to and in fact enjoyed possession of the lands subject to the obligations of the first two charges. He was still in law the registered proprietor of the third charge but he was barred from enforcing it against K. M. Mehta personally. Now if we suppose that at or soon after September 1, 1957, the chargees of the first two charges enforced their charges by sale, and that some surplus above the amounts due on these charges resulted, there is no doubt but that N. B. Patel would have been entitled to the said surplus but the important thing is to consider how he would have been so entitled. As against K. M. Mehta he was contractually so entitled by virtue of the agreement of sale of August 29, 1957 at least and possibly by virtue of his registered third charge which is part of the matter in dispute. As against the purchaser on such a sale by the chargees, however, who was a stranger to the agreement of August 29, 1957, I think he could claim on the basis of his registered third charge without recourse to the agreement of August 29, 1957. This charge it appears to me must still have existed lawfully as a matter of title until it was legally discharged.

Still considering the notional case of a sale in September, 1957, by the prior chargees, if that sale had produced enough to discharge all three charges and still leave a further balance, then N. B. Patel would only be entitled to that further balance and could only sue for it through K. M. Mehta but I have no doubt but that he could recover the amount due on his charge in his own name as the registered chargee. The purchaser would not get a valid release as regards the amount due on the third charge by payment of this amount to K. M. Mehta if K. M. Mehta had kept this money for himself, and I feel no doubt but that any professional conveyancer would advise the purchaser to see that he got a valid release from K. M. Mehta as regards the further balance and from N. B. Patel as regards the third charge.

It appears to me that the effect of the agreement of August 29, 1957, as regards the third charge, was merely to give K. M. Mehta a personal release in that regard but that such personal release could not, without further steps being taken, operate to clear the title or to release the title of the land from the encumbrance. It follows from this that the third charge still subsisted as against

the land and as an encumbrance affecting the land and the title thereto. In my opinion N. B. Patel had right and title in and to the land as an encumbrancer and indeed that was his only right and title in and to the land. In my opinion such right and title was immovable property capable of attachment and it was attached by way of prohibitory order before the receiving order was made.

The agreement of August 29, 1957 operated as regards the amount due on the third charge merely as a personal discharge, a discharge in personam, to Mehta. It did not operate to alter the legal title and the charge subsisted in law as against the land until it was legally discharged according to the prescribed registration procedure. I answer the question submitted as follows:

1. K. M. Mehta has no claim to the balance held on deposit from the sale of the plot.
2. K. M. Mehta has no claim to refund of all the rents collected by N. B. Patel.
3. The agreement for sale dated August 29, 1957 was a valid agreement for sale and the subsequent transactions in question in this matter were valid transactions.
4. C. C. Patel & Co. Ltd. have a valid claim to the balance held on deposit from the sale of the plot by virtue of their prohibitory order dated April 27, 1959.
5. The Official Receiver has no valid claim to the balance held on deposit from the sale of the plot for the benefit of the estate in bankruptcy of N. B. Patel.

In accordance with the terms of the agreement to seek the opinion of the court on questions of law there will be judgment for C. C. Patel & Co. Ltd., for Shs. 15,627/- with costs against the Official Receiver and K. M. Mehta. Messrs. Daly & Figgis should have their costs as stake holders as against the unsuccessful disputants.

Judgment accordingly.

For the plaintiff:

Patel and Patel, Nairobi

M. M. Patel

For the defendant:

Daly and Figgis, Nairobi

P. J. S. Hewett

Kelshiker v Republic
[1967] 1 EA 462 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	7 April 1967
Case Number:	85/1967 (112)
Before:	Saidi J
Sourced by:	LawAfrica

Appeal from: The District Court of Dar-es-Salaam

[1] Criminal Law – Dangerous drugs-Issuing prescriptions alleged to be defective because name and address of person for whose use drug prescribed not stated – “Prescription” in the form of an order to supply – Whether constitutes a “prescription” under Dangerous Drugs (Internal Control) Rules, r. 6 (1) and Dangerous Drugs Ordinance, s. 23 (1) (T.).

[2] Criminal Law – Dangerous drugs – Failing to keep register – Charge alleging failure to keep register relating to supply to one named person – Evidence showing general failure – Whether charge curable – Dangerous Drugs (Internal Control) Rules, r. 10 (1), Dangerous Drugs Ordinance, s. 23 (1) and Criminal Procedure Code, s. 346 (T.).

[3] Criminal Law – Defective charge – Charge of failing to keep register of dangerous drugs – Particulars relating to supply to one person – Evidence showing general failure – Whether charge curable – Criminal Procedure Code, s. 34 (9) (T.).

[4] Drugs – Dangerous drugs – Charge of issuing defective prescriptions for – “Prescriptions” worded as orders to supply – Whether case to answer shown – Dangerous Drugs (Internal Control) Rules, r. 6 (1), and Dangerous Drugs Ordinance, s. 23 (1) (T.).

[5] Medicine – Dangerous drugs – Charge against doctor of issuing defective prescriptions for – “Prescriptions” worded as orders to supply – Whether case to answer proved – Dangerous Drugs (Internal Control) Rules, r. 6 (1), and Dangerous Drugs Ordinance, s. 23 (1) (T.).

Editor’s Summary

The accused, a doctor, was charged on four counts with issuing prescriptions for dangerous drugs which were defective under r. 6 (1) of the Dangerous Drugs (Internal Control) Rules in that they did not state the name and address of the person for whose use they were given; he was charged also with alternative counts of failing to keep a register of dangerous drugs “showing his dealings in drugs effected by him by way of supply” to a single named patient. The documents alleged to be prescriptions were worded as orders “Please supply for cash . . .”. The drugs concerned were purchased by the patient with his own money at a time when the accused was away in India. The trial magistrate held that the documents were orders, not “prescriptions” within the meaning of the rule, and that there was no case to answer, and acquitted the accused. The prosecution stated a case to the High Court.

Held –

- (i) the drugs referred to in the documents having been purchased for cash while the accused was in India, and not supplied on the accused’s own account they could not be said to have been obtained on orders but on prescriptions;
- (ii) therefore a case had been made out against the accused;
- (iii) on the evidence it was clear that the accused was charged with failing to maintain a register of dangerous drugs handled by him generally and not with failing to keep a particular register of dangerous drugs supplied by him to the named person, and this defect was curable under s. 346 of the Criminal Procedure Code.

Decision of trial magistrate set aside. Case remitted for trial.

No cases referred to in judgment.

Judgment

Saidi J: This is an appeal from the district court of Dar-es-Salaam and comes before this court on a case stated.

The accused, a medical practitioner, was charged on four counts with issuing prescriptions contrary to r. 6 (1) of the Dangerous Drugs (Internal Control) Rules and s. 23 (1) of the Dangerous Drugs Ordinance, and/or alternatively with failing to keep a register of dangerous drugs contrary to r. 10 (1) of the Dangerous Drugs (Internal Control) Rules and s. 23 (1) of the Dangerous Drugs Ordinance, Cap. 95 of the Laws. The particulars of the offence in the first four counts are exactly similar in all respects except with regard to the quantity of medicine prescribed. Counts 1, 2, 3 and 4 related respectively to 4, 4, 6 and 2 tubes of Morphia purchased on the direction of the accused. It will thus suffice for purposes of illustration to reproduce the particulars of count 1, which read as follows:

“Dr. Yeshwant Bhaurao Kelshiker on or about September 17, 1964, in Dar-es-Salaam in the Coast Region did issue a certain prescription for 4 tubes Morphia Hel. 1/2 Gr. (4 × 20 × 1/2 Gr.) a dangerous drug in favour of one Shamshudin Gulamali Karim Jetha without stating therein the name and address of the said person for whose use the said prescription was given”.

The particulars of the alternative count read:

“Dr. Yeshwant Bhaurao Kelshiker on or about September 17, 1964, at Dar-es-Salaam in the Coast Region did fail to keep a Dangerous Drugs Register showing his dealings in drugs effected by him by way of supply to Shamshudin Gulamali Karim Jetha”.

At the close of the prosecution case after evidence of six witnesses had been heard a submission of “no case to answer” was made by the learned defence counsel. The learned Resident Magistrate upheld this submission in his two rulings dated August 11 and 18, 1966, and dismissed the charge and acquitted the accused. Thereafter the learned Director of Public Prosecutions applied to him to state a case for the opinion of this court on the following questions:

- (1) Whether at the close of the case for the prosecution a case was made out against the accused person sufficiently to require him to make a defence in regard to counts 1 to 4.
- (2) Whether the learned magistrate directed himself correctly in evaluating the standard of proof required to establish a prima facie case.
- (3) Whether the ruling of the learned magistrate dated August 18, 1966, whereby he acquitted the accused of the alternative count in the charge, be supported, regard being had to the evidence in this case.
- (4) Whether the learned magistrate’s direction as to the burden of proof to establish a charge in the alternative count is correct in law.

The accused was charged in the first four counts under r. 6 (1) of the Dangerous Drugs (Internal Control) Rules. This rule reads:

“A prescription for the supply of the drugs shall comply with the following conditions:

- (1) The prescription must be in writing, must be dated and signed in full by the person giving it with his address, with the name and address of the person for whose use it is given, and the total amount of the drug to be supplied on the prescription”.

In stating the case the learned Resident Magistrate expressed himself as follows:

“What I had to decide here is whether or not Exhibits ‘B’ – ‘B3’ were prescriptions within the meaning laid down by Rule 6 (1) above. As a general rule of medical practice, any prescription written by a doctor for a patient always commences with the sign ‘Rx’, meaning ‘Recipe’ followed by whatever drug the medical practitioner desires the pharmacist to dispense, but although this may be a general rule of medical practice, it does not as a rule follow that any prescription which does not strictly adhere to this rule of practice is not a prescription, and I am of the opinion that that is a prescription which conforms with the requirements of r. 6 (1) of Cap. 95. Now turning to the alleged prescriptions (Exhibits ‘B’ – ‘B3’) one finds that they are written thus:

‘M/s House & McGeorge Ltd.,

Dar-es-Salaam.

Please supply the following for cash:

1 Btl. Adrenalin 1.1000 1 fluid ounce

24 Tablets FRANOL

4 Tubes Morphia Hel. 1/2 Gr. (4 × 20 × 1/2 Gr.)

Yours faithfully,

(Sgd.)

and that Exhibit ‘B3’ reads:

‘To whom it may concern,

Dar-es-Salaam.

Dear Sir,

Please supply for cash the following for my use:

2 Tubes Morphia Hel. (2 × 20 × 1/2 Gr.).

I am not of the opinion that these are prescriptions within the meaning of r. 6 (1) of Cap. 95 in that there was the evidence of Jetha himself to the effect that these pieces of paper were never dated by the writer when they were handed to him and that he added the dates to them at any time that he wanted to purchase the drugs. Again, none of these bore the address of Kelshiker and finally it did not contain the name and the address of the person (i.e. Jetha) for whose use it was given. To my mind, these, not complying with r. 6 (1) of the Dangerous Drugs (Internal Control) Rules, Cap. 95, are not and cannot be properly classified as prescriptions but as orders. This is a criminal case, and the onus lay upon the prosecution to prove its case beyond reasonable doubt, the maxim being ‘Ei incumbit probatio qui dicit, non qui negat’ and in the absence of substantial proof that these constitute prescriptions within the meaning of r. 6 (1) of Cap. 95 I ruled that there was no case made out against the accused person to answer”.

With due respect I must say that I am unable to follow the reasoning of the learned Resident Magistrate here. It is not clear to me how he came to the conclusion that the Exhibits B1 – B3 were orders and not prescriptions at that stage of the hearing. The case for the prosecution, in simple terms, was that the accused had issued “defective” prescriptions, i.e. Exhibits B1 – B3, to his

patient, Mr. Jetha, for the purpose of obtaining drugs and that by reason of his doing so he had contravened r. 6 (1) of the Dangerous Drugs (Internal Control) Rules. The defects alleged were the absence of the name and address of the patient for whom the drugs were to be supplied. The defence makes use of the absence of these particulars in Exhibits B1 – B3 to put forward the case that these are orders and not prescriptions.

There is evidence showing that Shamshudin Jetha was a regular patient of the accused. Mr. Jetha had told the court that he had been treated for asthma by the accused for some 7-8 years; that he attended at accused's surgery 2-3 times a day for treatment which consisted of injections of combinations of morphia and adrenaline; and that when the accused went to India in September, 1964, for a few months' leave he advised him not to go to another doctor and gave him prescriptions with which to buy drugs from the chemist from time to time. Exhibits B1 – B3 were the prescriptions he is referring to. He said that he bought the drugs from the chemist on different dates. Mr. Jetha treated these exhibits as prescriptions and not orders.

The accused's own statement to Superintendent Liddle, Exhibit A, shows that he left for India on September 17, 1964. Exhibits B1 – B3 were not dated by him. Mr. Jetha said in his evidence that he inserted on these exhibits the actual dates on which he purchased the drugs. Exhibit B1 bears the date September 17, 1964, although the original date seems to have been September 23, 1964. Exhibit B2 bears the date September 25, 1964, and Exhibit B3 bears the date September 30, 1964. According to Mr. Jetha these must be the dates he bought the drugs shown on the exhibits. It seems clear that Mr. Jetha purchased the drugs prescribed in Exhibits B2 – B3 when the accused was in India. As the date on Exhibit B1 has been altered from September 23 to September 17, 1964, it is difficult to say that the drugs mentioned on it were not supplied to the accused in the first instance and then utilized by him in treating Mr. Jetha. The accused was leaving for India on the same date. It is not known by what means and at what time he left for India on that date.

If the drugs, four tubes and six tubes of Morphia Hel., supplied to Mr. Jetha on September 25 and 30, 1964, in respect of Exhibits B2 and B3, respectively, were purchased for cash from the chemist when the accused was in India then they could not be said to have been obtained on orders but on prescriptions. It would have been a different matter if they had been supplied by the chemist on accused's own account, but that is not the case here. These drugs were purchased by Mr. Jetha with his own money. Mr. Jetha says in his evidence that Exhibits B1 – B3 were given to him as prescriptions to enable him to obtain drugs from the chemist when the accused was away in India. It appears that when these drugs were exhausted he wrote to the accused in India asking for more prescriptions but was unsuccessful. Mr. Osman Mohamed Khambiye, another prosecution witness, also considered Exhibits B1 – B3 not to be proper prescriptions.

Learned defence counsel had submitted that it was the duty of the prosecution to establish that Exhibits B1 – B3 were prescriptions and not orders. From the evidence already reviewed the exhibits could not be held to be orders. I cannot see how the accused could have ordered drugs for his own use or for the use of his patients in Dar-es-Salaam when he was not there physically but was away in India. Again it is difficult to believe that Exhibits B1 – B3 were orders when the drugs supplied through them were not paid for by the accused but by his patient.

As to the alternative count, there is evidence showing that the accused had had in his possession dangerous drugs on various occasions, and at the time he was approached by Superintendent Liddle, he had in his possession some dangerous drugs, which he showed the witness, but yet he admitted that he

had

not kept a register of dangerous drugs. There seems to be an error in the particulars of this count. I think the accused is here charged with failing to maintain a register of dangerous drugs handled by him generally and not with failing to keep a particular register of dangerous drugs supplied by him to Mr. Jetha alone. This defect is not one that could mislead the accused in his defence or cause a miscarriage of justice and is, therefore, curable under s. 346 of the Criminal Procedure Code.

To sum up my conclusions I would answer the questions asked by the case as follows. I find on the evidence recorded that at the close of the case for the prosecution a case had been made out against the accused sufficiently to require him to enter upon his defence in respect of counts 1 to 4 of the charge; that the learned Resident Magistrate had not directed himself correctly in evaluating the standard of proof required to establish a prima facie case; that the ruling of the learned Resident Magistrate dated September 18, 1966 dismissing the charge and acquitting the accused on the alternative count cannot be supported; and that the learned Resident Magistrate's approach on the burden of proof to establish the charge in the alternative count was not correct.

In the result the decision of the learned Resident Magistrate dismissing the charge and acquitting the accused is set aside and the case is remitted to the district court with a direction that it be heard de novo before another Resident Magistrate.

Order accordingly.

For the accused:

Janmohamed, Dar-es-Salaam

For the prosecution:

Attorney-General, Tanzania

S. K. Laxman (Senior State Attorney, Tanzania)

Bakari v Republic
[1967] 1 EA 466 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	23 January 1967
Case Number:	12/1967 (114)
Before:	Biron Ag CJ
Sourced by:	LawAfrica

[1] *Criminal Law – Possession of property suspected to have been stolen – Whether property should be identified and established as having been stolen – Penal Code, s. 312 (T).*

Editor's Summary

The appellant was convicted of being in possession of property suspected to have been stolen, under s. 312 of the Penal Code. The property concerned was identified and established in evidence as having in fact actually been stolen. On revision:

Held – a conviction under s. 312 Penal Code will not lie where the property the subject-matter of the charge is identified and established in evidence as having been stolen. (*R. v. Msengi* (1) applied.)

Case referred to in judgment:

(1) *R. v. Msengi s/o Abdullah* (1952), 1 T.L.R. 107.

Judgment

Biron Ag CJ: The accused was originally charged with receiving property knowing it to have been stolen contrary to s. 311 of the

Penal Code. The first witness to give evidence was a police officer, who testified that after receiving information that a dhow from Zanzibar had been exporting copper wire from Pangani he searched the house of the accused. He first of all found the accused hiding under a bed, and subsequently outside the house, described as “the place where the accused takes his bath”, he found some copper wire. He accordingly arrested the accused and charged him with being in possession of the wire, which he produced as Exhibit ‘A’. The witness’s evidence is then cut short and the record continues as follows:

“Court: At this stage I will like to know whether there is any actual evidence that the accused received the wires. If not the proper charge should have been under s. 312 of the Penal Code.

Pros.: There is no evidence of receiving. I ask to substitute a fresh charge of being in possession of property suspected to have been stolen contrary to s. 312 of the Penal Code.

Order: Leave is granted to substitute a fresh charge against the accused. Accused is discharged of the original charge under s. 86 (a) C.P.C.”.

The charge sheet was then altered and the accused charged with an offence under s. 312 of the Penal Code. After further evidence was adduced, including that of a Post Office mechanic to the effect that copper wire produced (Exhibit A), had been stolen from telephone lines the accused was put on his defence. He made an unsworn statement to the effect that he obtained the wire from one Juma who had informed him that it was unusable. He also denied having hidden the wire. This Juma, incidentally, was called by the prosecution as a witness and he denied having handed over, or having been in possession of, the wire. The magistrate rejected the evidence of the accused and convicted him under s. 312 of the Penal Code. He then sentenced him to a fine of Shs. 120/- or imprisonment for two months in default.

The magistrate would appear to have overlooked the doctrine of recent possession, which is simply a presumption of fact that a person found in possession of property recently stolen, on failure to give an explanation of innocent possession which may reasonably be true, may be presumed to have either stolen such property, or have received it knowing it to have been stolen. There is no requirement as to evidence of actual receipt. That, however, is by the way.

Apart from the irregularities in procedure in respect of the amendment or withdrawal of the original charge and its substitution by another, the conviction cannot be sustained, because it is well established that a conviction under s. 312 will not lie where the property the subject-matter of the charge, is identified and established as having been stolen. There are numerous cases to the point. It is sufficient to quote but one, that of *R. v. Msengi s/o Abdullah* (1), a Court of a full Bench presided over by the then Chief Justice. In this case it was established that the wire, the subject-matter of the charge, was the property of the Post Office and stolen therefrom.

The conviction, which is not supported by the Director of Public Prosecutions, is accordingly quashed and the sentence imposed thereon is set aside. The fine, which it is noted has been paid, is to be refunded to the accused.

Order accordingly.

Kagwa v Uganda
[1967] 1 EA 468 (HCU)

Division: High Court of Uganda at Kampala

Date of judgment: 21 June 1967
Case Number: 311/1967 (117)
Before: Sir Udo Udoma CJ
Sourced by: LawAfrica
Appeal from: The Soroti Magistrate's Court.

[1] Criminal Law – False pretences – Obtaining money by false pretences – Money handed over during police trap – Whether complainant must believe the false pretence – Penal Code, s. 289 (U.).

Editor's Summary

The appellant offered to sell the complainant some “gold” which was in fact brass chippings. The complainant was suspicious and reported the matter to the police. A trap was arranged in the course of which the complainant handed the accused Shs. 10/- as part of the price of the “gold”. The complainant said in evidence that he paid this money to the appellant as part of the trick to have the appellant arrested and not because he believed that the brass was gold. The appellant was convicted of obtaining money by false pretences and appealed.

Held – The offence committed was only an attempt to obtain money by false pretences. (*R. v. Arthur Dennison Light* (4) applied.)

Appeal allowed. Conviction quashed. Conviction of attempt substituted and sentence confirmed.

Cases referred to in judgment:

- (1) *R. v. Hensler* (1870), 11 Cox, C.C. 570.
- (2) *R. v. Mills* (1857), 7 Cox, C.C. 263.
- (3) *R. v. Collins* (1864), 9 Cox, C.C. 497.
- (4) *R. v. Arthur Dennison Light* (1916), 11 Cr. App. Rep. 111.

Judgment

Sir Udo Udoma CJ: The appellant was convicted by the Magistrate Grade I in the Magistrates' Court, Soroti, of obtaining money by false pretences contrary to s. 289 of the Penal Code. He was sentenced to two years' imprisonment. This appeal is against conviction and sentence. In his petition of appeal the appellant has stated in effect that the decision of the magistrate convicting him was wrong in law; and that the said conviction was unreasonable, unwarranted and could not be supported having regard to the evidence. The particulars of the charge against the appellant were in the following words:

“Particulars of Offence

James Kagwa on 25th day of January 1967 at Soroti township in the Teso District with intent to defraud obtained Shs. 10/- from Peter Metha by falsely pretending that you had some gold to sell to the said Peter Metha.”

The case of the prosecution in support of the charge was that on January 25, 1967, at about lunch time the appellant was found in Peter Metha's house. On inquiry as to what he wanted, the appellant told Peter Metha that he was looking for one Mr. Latigo. He was told that Mr. Latigo was no longer in Soroti but had gone overseas. The appellant then told Peter Metha that he had some gold for sale. When asked where he had got the gold from the appellant replied that he had then just returned from the Congo with the gold. At the request

of Peter Metha the appellant produced for his inspection a bottle containing some metal. On examining the bottle and its contents Peter Metha became suspicious and thought that the appellant was either a thief or someone who had come to his house with a view to getting money from him. When questioned by Peter Metha as to the price, the appellant said that he was asking Shs. 4,000/- for the contents of the bottle. The appellant then offered to sell the gold to Peter Metha for the sum of Shs. 4,000/-. Thereupon Peter Metha became more suspicious and decided to contact the police. He told the appellant that he would have to look for money and that the appellant should meet him at 4 p.m. near the Post Office at Soroti. The appellant then asked Peter Metha to advance him some money as part of the price to enable him to have some lunch and thereafter meet him at the rendezvous. Peter Metha told him that he had no money on him then. He requested the appellant to give him some of the pieces of the metal in the bottle, which the latter did. Peter Metha reported the matter to the police at the Police Station. He was given police officers who were instructed to join him in waiting for the appellant near the Post Office. At 4 p.m. the appellant, according to their arrangement, came to the gate of the Ministry of Works near the Post Office. Peter Metha then asked the appellant for the bottle containing the gold. The appellant told Peter Metha that he had hidden the bottle with its contents in the bush somewhere and would deliver the same to him if he was paid Shs. 4,000/- the price of the contents of the bottle. On the advice of Peter Metha the appellant handed over to an askari at the gate of the Ministry of Works his own bicycle for safe custody and walked away for the purpose of fetching the bottle containing the gold. As he walked away, Peter Metha pointed out the appellant to the police officers with him, who were then in mufti, as the person who had offered to sell him gold. Peter Metha and the two police officers waited at the spot until 5.30 p.m. The appellant did not return to join them. Thereupon Peter Metha decided to go in search of the appellant. He took one of the police officers, Detective Constable Damiano Wangwe with him in his car while the other police officer, Detective Constable Yefusa Mwanje was waiting at the gate for them. The appellant was later seen sitting under a tree at Mile 1 New Mbale Road. Peter Metha stopped his car. He alighted therefrom leaving the constable alone in the car. He approached and spoke to the appellant. He invited him to join him in his car. He offered to pay the appellant Shs. 600/- by way of deposit as part of the price of Shs. 4,000/- and in addition to give him a cheque for the balance. The appellant refused to accept the offer. He however joined Peter Metha and Detective Constable Damiano Wangwe in the car. He told Peter Metha that he would rather wait for the full cash price of Shs. 4,000/- the next morning. When the car arrived back at the Ministry of Works gate, it stopped. The appellant there and then asked Peter Metha for Shs. 10/- as part of the price to be paid to him the following morning for the gold. Peter Metha thereupon gave him the sum of Shs. 10/-, knowing full well that he would get back the money, since the police were there and had seen him pay the money to the appellant as a trick, according to his evidence, to enable the police to have the appellant arrested.

Peter Metha, in his evidence, clearly swore that in paying the appellant the sum of Shs. 10/- he did so as a trick with a view to inducing the police to have the appellant arrested. This piece of evidence needs emphasis in view of the finding of the learned trial magistrate.

Under cross-examination by the appellant, Peter Metha emphatically stated again that the only reason why he had paid the sum of Shs. 10/- to the appellant was not because he wanted to buy the gold purported to have been carried by the appellant, but only for the purpose of enabling the police to have the appellant arrested. The appellant was arrested and charged by the police. He was also there and then searched and the sum of Shs. 10/- was recovered; a box of

matches and the bottle, alleged by the appellant to have contained gold, were taken out of a black bag, which was then being carried by the appellant. When questioned by the police the appellant denied that the contents of the bottle were gold. He stated that the bottle contained brass chippings, which were usually used by him for the purpose of repairing bicycles. The contents of the bottle were subsequently tested by Bathalal Jeram, a goldsmith of some 20 years' experience and found to be brass chippings.

In his defence the appellant, who described himself as a bicycle repairer and of 24 years of age, swore that the contents of the bottle were metal usually used by him for welding bicycle parts. He denied that he had at any time told Peter Metha that the contents of Exhibit 1 were gold. He also denied having offered the said contents to Peter Metha to buy. He admitted, however, having met Peter Metha at his house on the date in question; and also of having enquired after Mr. Latigo and being told by Peter Metha that Latigo had gone to the United Kingdom. He maintained that, on meeting Peter Metha, he had introduced himself to him as a bicycle repairer; and that in order to convince him of his assertion, he had produced the bottle, Exhibit 1, and told him that the contents thereof were materials for repairing bicycles. The appellant also said that he had asked Peter Metha to lend him Shs. 5/- to enable him to have his bicycle repaired at Soroti, and that instead of Shs. 5/- he was surprised that Peter Metha should have lent him Shs. 10/-. Under-cross examination, the appellant swore that he did not know what gold was as he had never seen gold before.

After a review of the evidence, the learned trial magistrate in his judgment disbelieved and rejected the evidence of the appellant. He accepted the evidence of the witnesses for the prosecution, and more particularly, the evidence given by Peter Metha whom he described as an honest witness. He found as a fact that the appellant had represented the contents of the bottle to Peter Metha as gold for sale.

The learned trial magistrate then proceeded to direct his mind, quite properly, to the evidence in order to ascertain whether the charge had been established in law. For that purpose the learned trial magistrate said:

"The question which now remains to be answered in law is whether the alleged false pretences operated on the mind of Metha to have defrauded him and to have induced him to have parted with his Shs. 10/-".

On the evidence the correct answer to the above question should have been in the negative. The very passage of the evidence of Peter Metha referred to by the learned trial magistrate did not support the conclusion arrived at by him to the effect that Peter Metha had parted with his Shs. 10/- because he had believed the contents of the bottle to be gold.

In considering the question as to whether the misrepresentation operated on the mind of Peter Metha when parting with the sum of Shs. 10/-, the learned trial magistrate said:

"At this juncture *I must refer to Metha's evidence in that he parted with Shs. 10/- as a part of the trick to have the accused arrested.* Further, it is abundantly clear from Metha's cross-examination by the accused on the former's recall by the court, that the Shs. 10/- was paid by him to the accused as a part-payment of the purchase price of Shs. 4,000/- of what the accused had held out the metal as gold. Metha had in my judgment all along believed the metal as being gold and in fact had received Exhibit 2 from the accused as gold."

The above passage of the learned trial magistrate's judgment is a clear case of misdirection in law. The passage read as a whole is even contradictory. The

inference drawn from the above passage by the trial magistrate and conclusion reached by him as a result are wrong in law.

It is quite clear from the evidence that Peter Metha did not pay the sum of Shs. 10/- to the appellant because he believed the contents of the bottle were gold. On the contrary, when he was recalled by the court this was what he said:

“I therefore gave him (meaning the appellant) Shs. 10/- knowing full well that I would not lose the money as the police officer was there and that it was part of the trick on my part to have the accused arrested. At the time I paid Shs. 10/- to the accused, I was not tricked into paying the money to the accused; in fact it was I who was playing a trick with a view to having him arrested.”

It is plain from the above passage of the evidence of Peter Metha that he did not genuinely believe the contents of the bottle to be gold. He did not even pretend that he had paid the sum of Shs. 10/- to the appellant because he had genuinely wanted at the time to buy the contents of the bottle whether it was gold or some other metal. The money was paid to the appellant as a trick in order that the appellant might be arrested by the police, which is quite different from the money being paid as part of the price of Shs. 4,000/-, for which the appellant had offered the contents of the bottle to Peter Metha to buy. Peter Metha had no genuine intention of buying the contents of the bottle. He did not mince his words on the point because all that he did was to trick the appellant to be arrested by the police.

I accept the submission of Mr. Deobhakta, Senior State Attorney, that the learned trial magistrate was wrong in law to have convicted the appellant of obtaining money by false pretences contrary to s. 289 of the Penal Code. I think counsel was right in not seeking to support the conviction of the appellant.

In *R. v. Hensler* (1), the prisoner was indicted for attempting to obtain money by false pretences in a begging letter. In reply to the letter the prosecutor sent the prisoner Shs. 5/-: but he stated in his evidence at the trial that he knew the statements contained in the letter were untrue. It was held that the prisoner was guilty of attempting to obtain money by false pretences. On appeal, it was contended that the conviction could not be sustained because the prosecutor at the time he parted with his money knew the pretences were false. It was submitted further that the case in that respect was like *R. v. Mills* (2), where it was held that a statement by the prisoner that he had done more work than was the fact and was obtaining more pay than he was entitled to, the prosecutor at the time being aware of the true amount of work done by the prisoner, and that the prisoner was making a knowingly false overcharge, was not obtaining money by false pretences within the statute. It was also contended that in *R. v. Collins* (3), it was held that a person could not be convicted of an attempt to pick a pocket if there was nothing in it and so a larceny could not be committed.

It was held by Kelly, C.B. in the judgment of the Court of Appeal in England, that the facts disclosed by the evidence in that case amounted to an attempt by the prisoner to obtain money by false pretences, which might have been so obtained. The money was not so obtained because the prosecutor remembered something which had been told him previously. “In my opinion” concluded the learned judge “as soon as ever the letter was put into the post the offence was committed”.

In *R. v. Arthur Dennison Light* (4), it was held that the offence of attempting to obtain by false pretences may be committed although the person to whom the pretences were made knew that they were false.

In that case the prisoner was convicted before the Recorder at the Central Criminal Court on January 20, 1915, of attempting to obtain money by false

pretences. He was sentenced to three months' imprisonment in the Second Division. The prisoner was charged, tried and convicted on the third and fifth counts of an indictment. On the third count the prisoner was charged with attempting to obtain £1 1s. 0d. from one Gibbin with intent to defraud by means of certain false pretences, while the fifth alleged a similar attempt to obtain £1 11s. 6d. from one Wagstaff.

In 1914 the prisoner, who had described himself as the Principal of the "British Health Institute", held himself out through the medium of advertisements as having "made arrangements to test the urine of those who so desire for a nominal fee of 1/6d." The advertisement came to the notice of Gibbin, who, suspecting the qualifications of the appellant to make such a test, obtained from a friend a bottle containing a solution of water coloured with potassium dichromate and bismark brown with a small quantity of soap. He forwarded this to the prisoner requesting him "to analyse his water". Subsequently he received a letter from the prisoner advising "a course of tonic treatment in your case. An eight weeks' course would only cost you one guinea"; and adding "I should like to have another sample of urine after you have been under treatment one month". Similar facts occurred in the case of Wagstaff, the fee for the treatment recommended in his case being £1 11s. 6d. As a result proceedings were instituted and terminated in the conviction of the prisoner as stated above.

On appeal, it was contended on behalf of the appellant that the conviction could not be sustained because the evidence did not establish in law the offence of attempting to obtain money by false pretences, it being an essential element of the offence that the mind of the person to whom the false pretences are made should be affected thereby; and that on the evidence the minds of both Gibbin and Wagstaff were not affected.

In dismissing the appeal Rowlatt, J., delivering the judgment of the court said:

"I will deal with the point of law first. It was said that on a charge of attempting to obtain money by false pretences the fact that the prosecutor does not believe the false pretences renders a conviction impossible. It is abundantly clear that a person cannot be convicted of the offence of obtaining goods or money by false pretences unless the mind of the prosecutor has been misled by the false pretences, and he has been induced to part with his property thereby. But in our judgment it is a complete fallacy to suppose that the same principle has any application in the case of an attempt only. The false pretences are made by the prisoner with the intention of obtaining money thereby. He employs the false pretences in an endeavour to get money. Possibly the prosecutor disbelieves the false statements and does not give the prisoner money; or possibly he sends the prisoner money with the intention of carrying the matter further. In either case the prisoner has made false pretences; intending thereby to get money, and he has failed because the prosecutor has not been misled as was admitted. It seems to us there is no difficulty in holding in these circumstances that a prisoner is guilty of an attempt to obtain money or property by false pretences."

Applying this principle to the case under consideration, it is clear that since false pretences were in fact made, but that the witness Peter Metha who gave the appellant the sum of Shs. 10/- did not do so because he genuinely believed that the contents of the bottle were gold, which he had wanted to buy, and to pay for, the offence committed by the appellant can only be appropriately described as an attempt to obtain money by false pretences.

In the circumstances therefore the learned trial magistrate was wrong in law to have convicted the appellant of the completed offence of obtaining money by

false pretences. The appeal is allowed. The conviction of the appellant is quashed. The appellant is however found guilty and convicted of attempting to obtain money by false pretences. The sentence of two years' imprisonment imposed upon him stands confirmed.

Order accordingly.

The appellant did not appear and was not represented.

For the respondent:

Attorney-General, Uganda

A. G. Deobhakta (Senior State Attorney, Uganda)

Mukibi v Bhavsar
[1967] 1 EA 473 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	12 April 1967
Case Number:	4/1967 (65)
Before:	Sir Clement de Lestang VP, Duffus and Spry JJA
Sourced by:	LawAfrica
Appeal from:	The High Court of Uganda – Sir Udo Udoma, C.J.

[1] Conversion – Reversioner claiming damages for wrongful removal of chattels – Whether plaintiff must allege damage to chattels or to reversionary interest.

[2] Practice – Amendment of pleading – Whether application to amend should be allowed to substitute entirely new cause of action on appeal.

[3] Practice – Pleading – Plaintiff not disclosing cause of action – Claim for damages for wrongful removal of chattels – Whether cause of action disclosed – Civil Procedure Rules, O. 7, r. 11 (U.).

[4] Practice – Pleading – Trespass or conversion of chattels – Reversioner claiming damages for wrongful removal of chattels – No allegation of damage to reversionary interest – Whether cause of action disclosed.

[5] Trespass to Goods – Reversioner claiming damages for wrongful removal of chattels – Whether plaintiff must allege damage to chattels or to reversionary interest.

Editor's Summary

The appellant filed a plaintiff claiming damages against the respondent for the wrongful removal from the possession of a third party of certain chattels, suing on his right as reversionary to sue for an injury to his

reversionary interest before it vested in possession. The plaintiff did not, however, aver that the alleged wrongful removal had resulted in damage to the goods, nor that the appellant had been deprived of his reversionary interest. On application by the respondent the plaintiff was ordered to be struck out as not disclosing any cause of action, and against this order the appellant appealed. During the hearing of the appeal the appellant applied to amend the plaintiff to substitute a suit in conversion or detinue.

Held –

- (i) a reversioner not being in possession or entitled to immediate possession cannot sue for conversion or trespass unless by reason thereof he has actually been deprived permanently or temporarily of his reversionary interest: *Donald v. Suckling* (1) applied;
- (ii) the action can only be founded on damage, so that a reversioner can sue only if the chattel has been destroyed or if it has been so disposed of that a valid title to it has become vested in a third party: *Tancred v. Allgood* (2) applied;

- (iii) a bare allegation that the reversionary interest has been injured without alleging any damage to the goods themselves is insufficient to disclose a cause of action by a reversioner;
- (iv) it would not be proper to allow an amendment.

Appeal dismissed. Application for leave to amend refused.

Cases referred to in judgment:

- (1) *Donald v. Suckling* (1866), L.R. 1 Q.B. 585.
- (2) *Tancred v. Allgood* (1859), 4 H. & N. 438; 157 E.R. 910.
- (3) *Gordon v. Harper* (1796), 7 T.R. 9; 101 E.R. 822.
- (4) *Mears v. London & South Western Railway Co.* (1862), 11 C.B. (N.S.) 850; 142 E.R. 1029.
- (5) *Gupta v. Bhamra*, [1965] E.A. 439.

C.A.V.

The following judgments were read:

Judgment

Sir Clement De Lestang VP: This is an appeal from a decision of the High Court of Uganda. The appellant commenced a suit by filing a plaint in the High Court in which he claimed damages against the respondent for the wrongful removal of certain chattels which he claimed belonged to him. The respondent took the preliminary point that the plaint did not disclose a cause of action against him and should be rejected under O. 7, r. 11 of the Civil Procedure Rules. The learned Chief Justice decided the preliminary point in favour of the respondent and ordered that the plaint be rejected.

The principal question for decision in this appeal is whether or not the plaint disclosed a cause of action. To answer that question it is, of course, necessary to examine the plaint. This is a short document which is dated February 17, 1964 and contains the following four material paragraphs:

- “3. The plaintiff is and was at all material times the owner of property comprised in the document annexed hereto marked ‘A.M.1’.
- 4. On or about December 12, 1961, the plaintiff let the said goods on hire with the plaintiff’s building situate at Nyendo, Mutuba III, Buddu, Masaka District to one Deziranta Nakanwagi and Peter Sebowwa for one year. At all material times the said Deziranta Nakanwagi and Peter Sebowwa were in possession of the said goods specified in ‘Annexe A.M.1’ and the reversionary interest therein was vested in the plaintiff.
- 5. On or about January 16, 1962 at Masaka the agent or servant of the defendant wrongfully removed the goods specified in ‘Annexe A.M.1’ whereby the plaintiff’s reversionary interest therein has been injured and the plaintiff has suffered loss and damage.

Shs. Cts.

- (a) Loss of rent at Shs. 300/- per month from January 12, 1962 to December 11, 1962 3,300-00
- (b) Value of articles specified in ‘Annexe A.M.1’ taken 5,000-00

Total 8,300-00

6. Demand for return of said goods specified in 'Annexe A.M.1' had been made to the defendant, but he has failed to return said goods or any part thereof. Notice of intention to sue has already been given.

WHEREFORE plaintiff prays for judgment against the defendant for:

- (a) Shs. 8,300/- specified in para. 5 of plaintiff;
- (b) Taxed costs;
- (c) Interest, and
- (d) Any other of further relief.”

It will be noticed that as the plaintiff was filed about fifteen months after the expiry of the contract of hiring and at a time when the appellant was entitled to the immediate possession of the chattels the appellant as owner had a perfectly good cause of action against anyone wrongfully depriving him of his property. Nevertheless it is plain from the tenor of the plaintiff that he is not suing on such a cause of action but on his right as a reversioner to sue for an injury to his reversionary interest before it vested in possession. If there could be any doubt about this, which in my view there could not, such doubt was completely removed by counsel for the appellant, when he expressly stated in the court below that the appellant's claim was founded not on trespass, conversion or detinue but on an injury to his reversionary interest in the chattels. He repeated that statement at the hearing of the appeal. The law applicable to a claim by a reversioner is well settled and indeed not seriously in dispute in the present case. It is that a reversioner, not being in possession or entitled to immediate possession, cannot sue for conversion or trespass unless by reason thereof he has actually been deprived permanently or temporarily of his reversionary interest: *Donald v. Suckling* (1). It was decided in *Tancred v. Allgood* (2) that damage was the foundation of an action by an owner of chattels who as a result of hiring them out had only a reversionary interest in them. Thus a reversioner could sue only if the chattel has been destroyed or if it has been so disposed of that a valid title to it has become vested in a third party.

Applying these principles to the present case the learned Chief Justice said in his judgment:

“I hold that the plaintiff does not disclose a cause of action. It is nowhere in the plaintiff averred that the alleged wrongful removal of the goods the subject matter of the suit, had resulted in the destruction of the same, or that by such alleged wrongful removal the plaintiff has been permanently or even temporarily deprived of his reversionary interest in the goods or that the goods themselves have suffered any injury likely to affect his reversionary interest.”

I am in respectful agreement with what the learned Chief Justice has said. In para. 5 of the plaintiff the appellant avers that because the chattels were wrongfully removed from the possession of the tenants an injury to the reversion has resulted. As the learned Chief Justice pointed out in another part of his judgment:

“It is, however, not clear how a mere removal of goods (to God knows where) which at the time were not in the possession of the plaintiff but in the possession of Deziranta Nakanwagi and Peter Sebowa, who may rightly be described as the tenants of the plaintiff, could cause injury to the plaintiff. It is not alleged in the plaintiff that such an alleged wrongful removal had resulted in permanent or temporary damage or destruction of such goods to the prejudice of the plaintiff's reversionary interest.”

Again I respectfully agree that the bare statement in the plaintiff that the reversionary interest has been injured without alleging any damage to the goods themselves is insufficient to disclose a cause of action by a reversioner.

The other question for decision is whether the High Court should have given the appellant an opportunity to amend his plaintiff instead of rejecting it. It is

not clear whether any application to amend was made to the High Court. Counsel for the appellant informed us that it was but admitted that the nature of the amendment was not specified nor was the amendment itself formulated. In these circumstances it is not surprising that there was no mention in the judgment of such an application having been made. But be that as it may counsel for the appellant applied to us for leave to amend and he was allowed to submit in writing the amendment he wished to make. The proposed amendment would have the effect of substituting a suit in conversion and/or detinue – causes of action which were expressly negatived in the High Court – for the original cause of action pleaded. It would not in my view be proper to allow such an amendment at this stage of the proceedings. I would accordingly dismiss the appeal and as my brothers agree it is dismissed with costs.

Spry JA: This is an appeal from a decree of the High Court of Uganda, whereby it was ordered that the plaintiff be rejected under O. 7, r. 11, of the Civil Procedure Rules as not disclosing a cause of action.

By his plaint, the appellant had averred that he was the owner of certain goods which he had let on hire for a term certain of one year from December 12, 1961, to two persons, to whom, for convenience, I shall refer as “the tenants”. On January 16, 1962, that is, during the term of the hiring, the goods were removed from the possession of the tenants by the agent or servant of the respondent. The appellant asserted that this removal was wrongful and that by it his reversionary interest in the goods had been injured, and he claimed as the measure of his loss Shs. 8,300/-, representing as to Shs. 3,300/-, loss of rent from the date of the seizure to the expiration of the term of the hiring and as to Shs. 5,000/- the capital value of the goods. The plaint was dated February 17, 1964, and was filed on the following day.

The learned Chief Justice held that no action could lie in trespass, because at the date of when the goods were seized the appellant did not have possession or the right to possession of the goods, but that he was entitled to bring a special action on the case if his reversionary interest in the goods had been affected by any permanent injury to the goods or if he had been permanently deprived of that reversionary interest. Applying those principles, the learned Chief Justice held that nowhere in the plaint was it averred the alleged wrongful removal of the goods had resulted in their destruction or that by that removal the appellant had been permanently or even temporarily deprived of his reversionary interest or that the goods had suffered any injury likely to affect the reversionary interest. He therefore held that the plaint disclosed no cause of action.

I think it is clear that, apart from certain exceptions not now relevant, no action in trespass or conversion lies unless, at the time of the act complained of, the plaintiff was in possession of the goods or was entitled to the immediate possession (*Gordon v. Harper* (3)). It is clear from the plaint that the tenants were in actual possession of the goods at the time of their seizure and there is no suggestion in the plaint that under the contract of hiring, the appellant had any immediate right to resume possession. I therefore respectfully agree with the learned Chief Justice that the only form of action available to the appellant during the term of the hiring was the special action on the case.

In arriving at his decision, the learned Chief Justice has relied particularly on the case of *Tancred v. Allgood* (2). The facts which gave rise to that case were generally very similar to those in the present case and the basis of the decision was that the action had to be founded on damage sustained by the plaintiff and that it did not appear that she had suffered damage. That decision appears to have stood unchallenged for over one hundred years. Mr. Pandit sought to distinguish that case from the present on the ground that in *Tancred's*

case (2) there had been no allegation of injury, whereas there had been such an allegation in the present case. With respect, I cannot agree. In *Tancred's* case (2), it was alleged that the goods had been sold and dispersed "so as to prevent their being followed or found"; it seems to me that that is a far more substantial allegation of injury than the bare statement in the present plaint that the reversionary interest had been injured without any indication of the nature of that alleged injury.

Tancred's case (2) was followed by *Mears v. London and South Western Railway Co.* (4). It is unnecessary to set out the details of that case but there is a convenient summary of the law in the judgment of Williams, J.:

"It is fully established, that in the case of a bailment not for reward, either the bailor or the bailee may bring an action for an injury to the thing bailed; but in the case of a hiring, the owner cannot bring trover, because he has temporarily parted with the possession. It seems to me, however, to be clear that, though the owner cannot bring an action where there has been no permanent injury to the chattel, it has never been doubted that, where there is a permanent injury, the owner may maintain an action against the person whose wrongful act has caused that injury."

In the present case, as the learned Chief Justice pointed out, there was no allegation in the plaint that the goods had been injured in any way. Furthermore, there is nothing in the plaint even to suggest that the appellant had been deprived of his reversionary interest. There is no allegation that the goods had been sold, so that it is unnecessary to consider in what circumstances a sale may be prejudicial to the reversion. The only allegation is that the goods had been removed and I would respectfully agree with the learned Chief Justice that a mere removal cannot in itself have caused any injury to the reversion, and, consequently, that no suit lay in tort in respect of the reversionary interest.

Counsel for the appellant further argued that even if he was not entitled to the particular relief claimed in the plaint, it was open to the court to grant any other relief, including a declaration, and he would ask for a declaration that the removal of the goods was a wrongful act "particularly after the end of hiring". The argument, if I have understood it correctly, was that if such alternative relief might be granted, it followed that there must be a cause of action.

It seems to me, with respect, that this argument is misconceived. What concerns us is whether a cause of action has been shown; it is only if a cause of action has been shown that the question of alternative remedies may arise. To found his action, the appellant has to show a wrongful act against himself and, as a person not in possession of the goods and not entitled to possession at the time of their removal, that means an act by which he suffered damage. The removal of the goods may or may not have been a trespass as against the tenants but even if it were, it would not be a wrongful act against the appellant unless it injured his reversionary interest in the goods.

I have quoted the words "particularly after the end of the hiring" because counsel for the appellant repeatedly suggested that his cause of action had in some way been strengthened by the expiration of the term of the hiring and it appears to have been counsel for the appellant's view that even after that date the appellant could only sue for injury to the reversionary interest, because at the time when the goods were removed, they had not been in his possession. If I have understood this argument correctly, I cannot agree with it. During the term of the hiring, the only cause of action could have been injury to the reversion and the appellant could, of course, have sued on that cause of action at any time within the period of limitation, whether before or after the expiration

of the term. After the expiration of the term, when his interest had become possessory, the appellant might have sued in detinue, if a demand for delivery of the goods had met an unequivocal refusal. In the former case, the cause of action would not have been the removal of the goods but the act which caused the injury to the reversion. In the latter case, the cause of action would have been founded on the refusal to deliver up the goods. Reading the plaint as a whole, there can, in my opinion, be no possible doubt that the appellant was seeking to recover loss to his reversionary interest, that is to say, loss incurred by a wrongful act done during the term of the hiring. This appears particularly from a statement in para. 4 of the plaint that “at all material times” the tenants were in possession of the goods and “the reversionary interest therein was vested in the plaintiff”. Again, in para. 5, it was alleged that the goods were wrongfully removed “whereby the plaintiff’s reversionary interest therein has been injured”. It is true that para. 6 of the plaint contains a statement that a demand was made for the return of the goods and that the respondent had failed to return them, but it does not specify when the demand was made nor does it aver an unequivocal refusal. I think it is clear that this does not, and was not intended to, establish a cause of action. Counsel for the appellant also argued that an owner must have some means of protecting his property when it is out of his possession. The answer to that is, I think, that in an appropriate case, where substantial damage appears to be imminent, application may be made for an injunction quia timet before a cause of action has accrued.

Counsel for the appellant submitted, as an alternative to his main grounds of appeal, that he should have been given an opportunity to amend his plaint and he asked this court, if it rejected his main submissions, to give him the opportunity to amend at this stage. Counsel informed us that he had raised the matter of amendment before the learned Chief Justice but he conceded that he had not asked leave to make any particular amendment, nor had he formulated any amendment when he addressed us, although we allowed him to submit a draft amendment after the adjournment. Counsel for the appellant submitted, relying on *Gupta v. Bhamra* (5), that in Uganda the court has power to allow amendment to remedy a defect in a plaint going to the cause of action. I am reluctant to express any view on that question, which was not fully argued before us, and I do not think it necessary to do so, as in my view the amendment which counsel for the appellant seeks to introduce would substitute an entirely new cause of action. As I understand it, the proposed amendment would substitute an action in detinue based on a refusal to return the goods for the original claim based on injury to the reversionary interest. In my view, such an amendment should not be allowed.

For the reasons I have given, I would dismiss the appeal with costs.

Duffus JA: I have read and agree with the judgments of the learned Vice-President and Spry, J.A.

Appeal dismissed.

For the appellant:

S. V. Pandit, Kampala

For the respondent:

Patel and Dave, Kampala

R. S. Dave

[1967] 1 EA 479 (HCK)

Division: High Court of Kenya at Nairobi
Date of judgment: 14 April 1967
Case Number: 42/1967 (66)
Before: Rudd and Trevelyan JJ
Sourced by: LawAfrica

[1] *Criminal Law – Sentence – Probation – Whether sentence of corporal punishment may be combined with order for probation – Penal Code, s. 27 (3) (K.).*

[2] *Criminal Law – Probation – Order for probation is not “any other punishment” permitting the award of strokes with an order for probation – Penal Code, s. 27 (3) (K.).*

Editor’s Summary

A magistrate at Embu convicted an accused aged seventeen years of arson, and ordered “Accused placed on probation for two years and to receive seven strokes”.

Held – An order for probation is not “any other punishment” under s. 27 (3) of the Penal Code, and accordingly an award of strokes may not be combined with an order for probation.

Order for strokes set aside.

Cases referred to in judgment:

- (1) *Longomot s/o Ladama v. R.* (1960) (H.C.C.A. 1196/1960 – unreported).
- (2) *R. v. Mohamed A. H. Butt* (1954), 27 L.R.K. 187.

Judgment

Trevelyan J, delivered the following order of the court: The accused who is seventeen years of age was convicted of arson by the learned resident magistrate at Embu. A probation report having been obtained, the magistrate made an order which he expressed in the following terms: “Accused placed on probation for two years and to receive seven strokes”.

By s. 27 (3) of the Penal Code:

“Whenever a male person under the age of eighteen years is convicted of any offence for which he is liable to imprisonment, the court may, in its discretion, sentence him to corporal punishment in addition to or in substitution for any other punishment to which he is liable.”

As arson is punishable with imprisonment, corporal punishment may clearly be awarded under the sub-section in substitution therefor. But we are of the opinion that it is not competent to make the composite award which the magistrate made in the instant case, for probation is not a sentence of punishment. *Longomot s/o Ladama v. R.* (1) indicated that it is not by saying “A person convicted of an offence cannot be sentenced to punishment for the offence and also made the subject of a probation

order”, and *R. v. Mohamed A. H. Butt* (2) decided it was not when it said:

“It is certainly true that an order releasing a convicted person on probation is not a sentence of punishment, whether the court makes the order under the provisions of s. 340 of the Criminal Procedure Code or s. 3 (1) of the Probation of Offenders Ordinance . . .”

Probation is not, therefore, “any other punishment” within s. 27 (3) aforesaid, so that an order releasing an offender on probation cannot in law be accompanied by an award of corporal punishment. In any event it would be undesirable. Section 4 of the Probation of Offenders Act gives power to

subordinate courts to release an offender on probation in the circumstances therein referred to and the object of probation (as the word indicates) is to give an offender the opportunity of proving himself. We cannot believe that it is satisfactory that a person who is released so that he may prove himself shall, first, or at any time while the order is in force, receive corporal punishment. At least he may suffer a grievance.

We set aside the order in so far as it refers to the award of strokes.

Order for strokes set aside.

For the prosecution:

Attorney-General, Kenya

A. A. Kneller (Senior State Counsel, Kenya)

Gustav Adolf Schmitt'Sches Weingut v Leslie
[1967] 1 EA 480 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	17 March 1967
Case Number:	336/1965 (67)
Before:	Chanan Singh J
Sourced by:	LawAfrica

[1] *Bank – Information coming to bank as agent for a customer – Whether bank entitled to use such information to verify what it is told by another customer.*

[2] *Sale of Goods – Debenture over assets of buyer including goods covered by contract reserving right of disposal by seller – Whether a receiver and manager appointed under debenture entitled to such goods – Sale of Goods Act, s. 26 (2) (K.).*

[3] *Sale of Goods – Reservation of right of disposal by seller – Rights of debenture-holder to goods in possession of buyer – Sale of Goods Act, s. 26 (2) (K.).*

[4] *Company Law – Debenture – Receiver and manager – Whether receiver and manager entitled to stock held by buyer but under contract containing reservation of right of disposal.*

Editor's Summary

The plaintiffs were German wine merchants who supplied wines to a Nairobi buyer under an agreement which contained a clause reserving the right of disposal of the goods to the seller until such time as the purchase price was paid. The agreement also contained a prohibition against the buyer raising any charge on the security of the goods without the consent of the plaintiffs. On the other hand, the buyer was

entitled to sell the wines in the course of its business and pass a good title to a sub-buyer. The buyer, during the operation of the agreement, gave a debenture over all its assets to a bank; and the bank subsequently appointed the defendant as receiver and manager under the debenture. The defendant took possession of all the buyer's stock-in-trade, including wines supplied by the plaintiffs under the agreement which had not yet been paid for. The bank was, coincidentally, the agent of the plaintiffs' bank for handling shipping documents relating to the wine. The plaintiffs claimed recovery of the wines not paid for from the defendant on the grounds that ownership had never been transferred to the buyer and that the buyer was prohibited under the agreement from granting any charge over them.

Held –

- (i) the buyer was in possession of the goods with the consent of the seller and had authority to sell them in the ordinary course of its business;

- (ii) the debenture amounted to a disposition within s. 26 (2) of the Sale of Goods Act and the defendant was entitled to possession of the wines claimed by the plaintiff;
- (iii) the principle of ostensible ownership was too broad to be acceptable in this case;
- (iv) the bank had no notice of the defect in the buyer's title to the goods and was entitled to look at information obtained by it as the plaintiffs' agent to see that the wines appeared to be purchased and paid for in the normal way.

Suit dismissed with costs.

Cases referred to in judgment:

- (1) *Re Morrison, Jones and Taylor Ltd.*, [1914] 1 Ch. 50.
- (2) *Bishopsgate Motor Finance Corporation Ltd. v. Transport Brakes Ltd.*, [1949] 1 K.B. 322.
- (3) *Nicholson v. Harper*, [1895] 2 Ch. 415.
- (4) *Kitto v. Bilbie, Hobson & Co.* (1895), 72 L.T. 266.
- (5) *Olds Discount Co. Ltd. v. Krett*, [1940] 2 K.B. 117.
- (6) *Cahn and Mayer v. Pockett's Bristol Channel Steam Packet Co. Ltd.*, [1899] 1 Q.B. 643.
- (7) *Re B. Johnson & Co. (Builders) Ltd.*, [1955] 2 All E.R. 775.

Judgment

Chanan Singh J: The plaintiffs are wine merchants in the Federal Republic of Germany. They were for some years supplying wines to A. H. Becker & Co. Ltd. under a written contract. cl. 9 of which (in English translation, not elegant but sufficiently clear) reads as follows:

"The goods remain our property until they are completely paid for. The property will be transferred to the buyer only when all current and accruing liabilities, including those arising out of future deliveries, will have been met. If the purchase-price is entered in the current account, the goods remain our property as long as there results a balance to our credit. The pawning and the conveyance of the goods by way of security before complete settling of all liabilities existing with regard to us is therefore inadmissible. Attachments taken out by third parties must be announced to us without delay.

Regardless of the reservation of property, the buyer is authorised to dispose of the goods as a part of his regular business dealings, however not less than the purchase-price. In case extraordinary situations should spring up concerning the commercial enterprise of the buyer (such as transfer by way of security, pawnings, attachments, protest of bills on the part of the buyer as well as of third parties, clearance sales, suspension of payment), our entire claims fall due the moment this happens, regardless of the time of payment agreed upon or of the maturity of bills of exchange. At the same time, the right to sell is cancelled and the buyer is obliged to advise the seller of the situation and to return the goods. In this case we are justified to take back the goods without this meaning a withdrawal from the contract. In case our goods should be sold to a third party, our customer surrenders to us already from now on the entire claims accruing to him against his buyer in order to cover our current credit. If the goods are paid cash, the proceeds realised with a third party are due to us and must be held in trust until called in."

This comprehensive clause can be summed up in three broad propositions:

1. The plaintiffs retained the property in the wines that they supplied to A. H. Becker & Co. Ltd. until such wines had been paid for;
2. Notwithstanding this stipulation, A. H. Becker & Co. Ltd. were authorised to sell such wines in the course of their business and, thus, to pass property to their own customers;
3. A. H. Becker & Co. Ltd. were specifically prohibited, inter alia, from transferring by way of security any wines supplied by the plaintiffs for which the plaintiffs had not been paid or so long as any balance remained due to the plaintiffs.

On September 12, 1963, while the said cl. 9 was in force, A. H. Becker & Co. Ltd. granted to National and Grindlays Bank Ltd. a debenture charging with the repayment of an amount not exceeding Shs. 100,000/- “all its undertaking goodwill assets and property whatsoever and wheresoever both present and future including its uncalled capital for the time being”. The debenture was duly registered with the Registrar of Companies. In the beginning of May, 1964, the bank, acting under powers given to it by the debenture, appointed the defendant as the receiver and manager of A. H. Becker & Co. Ltd. and the defendant took possession of all the assets of that company. Among the assets so taken over were certain stocks of wines supplied by the plaintiffs to A. H. Becker & Co. Ltd. under the terms which I have already described.

The plaintiffs claim the value of the wines which had not been paid for and the property in which had not, according to them, passed to A. H. Becker & Co. Ltd. They contend that since they were the owners of the wines A. H. Becker & Co. Ltd. could not grant a debenture in respect of them and that the defendant could not take them over. The defendant says that the wines in question were subject to the debenture and were properly taken over by him. The parties’ advocates have agreed that I determine at this stage only the question of liability. They will, if necessary, fix another hearing date for the determination of quantum and any other outstanding issues.

It is common ground that cl. 9 of the agreement between the plaintiffs and A. H. Becker & Co. Ltd. is valid in German as well as in Kenya law; that the bank knew nothing about the existence of cl. 9; and that the plaintiffs knew nothing about the bank’s debenture. I agree with counsel for the plaintiffs that the passing of property to A. H. Becker & Co. Ltd. was suspended until all wines in their possession were paid for. The plaintiffs continued owners. This is the effect of cl. 9. Counsel for the defendant accepts this as a general proposition as between the plaintiffs and A. H. Becker & Co. Ltd., but he says that third parties who give value and do not know of the terms of the agreement between the plaintiffs and Becker nevertheless get a good title to the wines. Counsel for the plaintiffs refers me to Palmer’s Company Law (20th Edn.), p. 403, para. (8), which says that

“When chattels are in the company’s possession under hire-purchase agreement, under which the goods are to remain the property of the supplier, the rights of the owner prevail over a floating charge created by the company, even if the chattels become fixtures.”

This proposition was established by *Re Morrison, Jones and Taylor Ltd.* (1). I do not think one can quarrel with this statement of law and I shall deal with it later. Here I only wish to say that in my opinion the law of chattels is in a very unsatisfactory state as regards registration of rights. A bill of sale must be registered but a hire-purchase agreement need not be. The result is that a person can enter into a hire-purchase agreement and carry the document in his pocket until the time comes to throw it in the face of an innocent person who has been cheated by the hirer who was allowed to remain in possession

of goods. My own view is that if a person claims rights to or in goods which are in the possession of another – especially in the possession of a trader – then it should be possible, perhaps obligatory, for such rights to be registered somewhere. Registration will help in reducing the chances of innocent parties being deceived.

In short, this case is an example of the classical conflict between two principles of law. Denning, L.J. (as he then was), describes the conflict in *Bishopsgate Motor Finance Corporation Ltd. v. Transport Brakes Ltd.* (2) ([1949] 1 K.B. at p. 336) in these words:

“In the development of our law, two principles have striven for mastery. The first is the protection of property: no one can give a better title than he himself possesses. The second is the protection of commercial transactions: the person who takes in good faith and for value without notice should get a good title. The first principle has held sway for a long time but it has been modified by the common law itself and by statute so as to meet the needs of our times.”

The first “principle” mentioned by Lord Denning is universally acknowledged. The so-called second principle is likely on scrutiny to turn out a group of exceptions. I wish it were possible to say that in every case where a person takes in good faith and for value without notice he gets a good title. In some cases he certainly does. It is worth noting that all exceptions or “modifications” (as Lord Denning would prefer to call them) are specifically recognised either by statute or by common law.

The Sale of Goods Act admits the following exceptions to the first of the two principles stated by Lord Denning (*nemo dat quod non habet*):

1. where the owner is estopped from denying the seller’s authority: s. 23 (1);
2. where the sale is by a mercantile agent: s. 26 (3);
3. where the goods are sold under a power of sale or an order of the court: s. 23 (2) (b);
4. where the seller’s title is voidable and at the time of the sale has not been avoided: s. 24;
5. where goods are seized under a writ of execution and are sold to a bona fide purchaser: s. 27;
6. where goods are disposed of under the conditions described in s. 26.

The only provision that can possibly apply in the present case is sub-s. (2) of s. 26 of the Sale of Goods Act. That sub-section reads as follows:

“Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person ... of the goods or documents of title, under any sale, pledge or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.”

For a transaction to come under this section, it is necessary that there be either “delivery or transfer”. “Delivery” apparently refers to goods and means physical delivery – see the definition in s. 2. In *Nicholson v. Harper* (3) the owner sold wine but remained in possession. The goods were in a warehouse and no notice of sale was given to the warehouseman. Later, the seller purported to pledge the wine to the warehouseman and then went bankrupt. It was held

that the purported pledge was not covered by s. 25 (1) of the Sale of Goods Act because there was no delivery to the warehouseman *after* the pledge.

The word “transfer” seems to apply to documents of title but it can also apply to goods when conveyed by deed or an instrument in writing. See *Kitto v. Bilbie, Hobson & Co.* (4) per Vaughan Williams, J.

The *Nicholson* case (3) comes within the scope of sub-s. (1) of s. 25, whereas we are here concerned with sub-s. (2) (our sub-s. (2) of s. 26). But the essential terms of both sub-sections are the same, and authorities under the one apply to the other.

In the present case, there was on the execution of the debenture neither a physical delivery nor a transfer by a written document. The debenture created merely a “charge” not a “mortgage” and there was no transfer of property in the goods. But 34 Halsbury’s Laws (3rd Edn.), p. 84, note (i), says: “It should also be noticed that it is not the contract that is made valid under this section, but the delivery or transfer under the contract”. Thus, the mere execution of a debenture would not give the disponent the protection of s. 26 (2). I am of the opinion, however, that physical delivery under the terms of the debenture would. Again, in order to come within the scope of s. 26, a delivery or transfer must be “under any sale, pledge or other disposition”. There was no “sale” here as defined in s. 2. Nor was there a “pledge”. Was there “other disposition” of the goods in question? “Other disposition” must be of the same kind as a “sale” (which means disposition outright) or a “pledge” (which means disposition by way of security for the payment of a debt). I think a mortgage or a charge amounts to “other disposition” within s. 26 (2).

It can be argued that a delivery or transfer, in order to come within s. 26 (2), must be voluntary and for a consideration which is referable to that delivery or transfer, not for the satisfaction of, say, an antecedent debt. In the present case there was consideration which supported the charge but, as I have already stated, the charge itself is not within the section. Can the consideration for the charge be said to support the delivery at a later date? I think it can. The consideration supported not any particular term but all the terms of the contract in the debenture. One such term was that the goods could and would be taken over in a certain eventuality. When that eventuality happened the taking over was under the terms of, and for the consideration mentioned in, the contract.

Such taking over was under a contract freely entered into. It was not like a forcible taking over under a court decree.

I hold, therefore, that the giving of possession of goods under the terms of a debenture constitutes “delivery” under “other disposition” within the meaning of s. 26 (2) of the Sale of Goods Act.

Other requirements of s. 26 (2) are these:

- (i) There must be a person who has bought or has agreed to buy goods and he must have obtained possession of the goods or of documents of title to the goods “with the consent of the seller”;
- (ii) There must be a “delivery or transfer” under a sale, pledge or other disposition by that person of goods or of documents of title to the goods;
- (iii) The person to whom the goods or the documents have been disposed of must have received them in good faith and without notice of any lien or other right of the original seller.

I need hardly say that s. 26 applies only where there is a separation of “possession” and “property” under a sale and a disposition by the person in possession unauthorised by the real owner. In such a case, the person in whose favour disposition takes place acquires a good title if the three conditions I have

described are complied with.

In the present case, there is no dispute about conditions (ii) and (iii). A. H. Becker & Co. Ltd. did grant a debenture to the National & Grindlays Bank and the bank did accept the wines as security and later took possession of them under the terms of the instrument of security (the debenture) in good faith and without notice of the terms on which the grantor held such wines.

The only question is whether the facts here comply with the first condition. A. H. Becker & Co. Ltd. did buy or agree to buy wines from the plaintiffs. The purchase, undoubtedly, was subject to the terms of the aforesaid cl. 9. A. H. Becker & Co. Ltd. were “buyers”. Their position cannot be likened to that of a “hirer” under a hire-purchase agreement. A person who receives goods under a hire-purchase agreement is a bailee for the owner until, after the payment of the last instalment, he exercises the option to purchase the goods. Until then he does not have possession of the goods under a contract of sale and the purchaser from him cannot rely on his (the purchaser’s) good faith or want of notice by virtue of s. 26 (2) of the Sale of Goods Act. See *Olds Discount Co. Ltd. v. Krett* (5).

But did A. H. Becker & Co. Ltd. obtain possession of the wines “with the consent of the seller”? It needs to be emphasised that for the purpose of s. 26 the obtaining of “property” is not necessary: the obtaining of “possession” is all that is required.

The case of *Cahn and Mayer v. Pockett’s Bristol Channel Steam Packet Co. Ltd.* (6) may here be quoted. There, A. agreed to sell to B. a quantity of copper and forwarded to him a bill of lading indorsed in blank together with a draft for the price. Under s. 19 (3) of the Sale of Goods Act, 1893, of England, property would not pass to B. if he did not honour the draft and he was bound to return the bill of lading. B., who was insolvent, had, prior to obtaining possession of the bill of lading, contracted to sell the copper to C. B. did not accept the draft and delivered the bill of lading to C. who took it in good faith and without notice of A.’s rights as an unpaid seller. C. paid to B. the agreed price. A. stopped the copper in transitu. C. sued the shipping company for non-delivery. Held that, B. having obtained possession of the bill of lading with the consent of A., the transfer of it by him to C. gave C. a good title to the copper under s. 25 (2) of the Sale of Goods Act, 1893, and that A. had no right to stop it in transitu.

Section 25 (2) of the English Act corresponds to our s. 26 (2). Collins, L.J., stated ([1899] 1 Q.B. at pp. 658, 659):

“It is to be noted that the words of s. 25 (2) are ‘obtains possession’ with the consent of the seller. It is therefore immaterial whether the consent was afterwards withdrawn. When he has once got possession by consent, his subsequent disposition of the bill of lading, whether such consent still subsists or not, is made as effectual as if he were in making the transfer a mercantile agent in possession with the consent of the owner ... the Sale of Goods Act is the last of a series of statutes whereby the legislature has gradually enlarged the powers of persons in the actual possession of goods or documents of title, but without property therein, to pass the property in the goods to bona fide purchasers. Possession of, not property in, the thing disposed of is the cardinal fact. From the point of view of the bona fide purchaser the ostensible authority based on the fact of possession is the same whether there is property in the thing, or authority to deal with it in the person in possession at the time of the disposition or not. But the legislature has not carried the rights of a purchaser under these Acts so far as to make the sale equivalent to a sale in market overt. The purchaser must accept the risk of his vendor having found or stolen the goods, or documents, or otherwise got possession of them without the consent of the

owner. But, if a mercantile agent, or one of the persons whose disposition is made as effectual as that of a mercantile agent, has obtained possession by the consent of the owner, even though it were under a contract voidable as fraudulent . . . he is able to pass a good title to a bona fide purchaser. However fraudulent the person in actual custody may have been in obtaining the possession, provided it did not amount to larceny by a trick, and however grossly he may abuse confidence reposed in him, or violate the mandate under which he got possession, he can by his disposition give a good title to the purchaser.”

A. H. Becker & Co. Ltd. had the plaintiff’s authority to sell in the ordinary course of business. A sale by them could not, therefore, be impeached as it was in the *Cahn* case (6). The principles enunciated in that case, however, apply not only to unauthorised sales but also to other dispositions by persons who buy goods and are in possession of such goods with the consent of the seller but to whom property in such goods has not yet passed.

Counsel for the defendant has argued that the question is one of priorities and that the liability of A. H. Becker & Co. Ltd. to the bank has priority over their liability to the plaintiffs and that it is relevant, from that point of view, to consider the duties of the defendant as receiver and manager. He has referred me to a passage in the judgment of the Master of the Rolls in *Re B. Johnson & Co. (Builders) Ltd.* (7) ([1955] 2 All E.R. at p. 780) which reads:

“a ‘receiver and manager’, is in fact one who is appointed a receiver, not with any duties to carry on the business of the company, in the best interests of the company, but in order to realise, for the debenture-holders or mortgagees, the security which they have got; and only for that limited purpose is he given powers of management.”

This is a sound proposition of law but the issue in the present case is not whether the defendant can realise the security but, as counsel for the plaintiffs rightly argues, whether the security covers the wines in question. It is here that s. 26 (2) of the Sale of Goods Act is relevant.

Counsel for the defendant also draws attention to art. 84 of Bowstead on Agency (12th Edn.) which says that:

“Where a principal, by words or conduct represents, or permits it to be represented, that his agent is the owner of any property, any sale, pledge, mortgage or other disposition for value of the property by the agent is as valid against the principal as if the agent were the owner thereof, with respect to any person dealing with him on the faith of such representation.”

A. H. Becker & Co. Ltd. had possession of the wines and were selling them as any owner would do. Indeed, they had the plaintiffs’ authority to sell in the ordinary course of business. In these circumstances, did the plaintiffs not represent by their conduct that A. H. Becker & Co. Ltd. were the owners of the wines and could sell, pledge, mortgage, or otherwise dispose of them? Counsel for the plaintiffs does not accept this view because the relationship between his clients and A. H. Becker & Co. Ltd. was not that of principal and agent but that of seller and buyer; property remained in the seller who had expressly authorised A. H. Becker to sell wines in the ordinary course of business but had not permitted disposal of the wines in any other way.

Counsel for the defendant’s general argument can be summarised thus. A. H. Becker & Co. were authorised by the plaintiffs to take wines, to display them and to sell them as their own. They were given ostensible ownership and were thus enabled to cause loss to the bank. The plaintiffs must, therefore, bear the loss. In my opinion this is much too broad a proposition to be acceptable.

In the law of personal chattels there does not appear to be a general proposition like the one met with in equity that a purchaser for value in good faith always gets a title free from all equitable interests or estates of which he had no notice. The law of personal chattels, as I understand it, is that generally it is only the owner who can pass a good title. In a number of specified cases, however, a non-owner can also pass a good title.

Nor is there a question of priorities here. Hanbury and Waddock in their Law of Mortgages (1938 Edn.) at p. 398 express the following opinion:

“What is the position, if A. gives a bill of sale over certain goods to B., and then pledges the same goods to C.? . . . the question is not, as in the case of land, which of the two is entitled to rank first, but which of the two is entitled to possession? The one who is decided not to be entitled has no rights in the goods, but is thrown back on his action on the debt.”

One other point remains to be dealt with. Counsel for the defendant says that the bank was, as the agent of the Deutsch Bank, receiving shipping documents and bills of exchange for wines sent by the plaintiffs to A. H. Becker & Co. Ltd. and that it knew from these documents that the wines were purchased and paid for in the usual way, no special rights in the plaintiffs being shown by these documents. For this reason, in addition to the reason of ostensible ownership, the bank was entitled to conclude that the property in the wines had passed to the buyers.

Counsel for the plaintiffs says that the bank was not entitled to use for its own purposes the information it received as agent of the plaintiffs' bank for handling shipping documents. I cannot agree with counsel for the plaintiffs on this point. The bank would not be entitled to disclose this information to third parties. But to say that the bank cannot look at its own records to judge the financial capacity of a company which has applied for overdraft facilities would, I think, be going too far. It is common knowledge that business concerns, including banks, do make enquiries about customers who require extended credit or loans. Such enquiries are frequently made from business houses and from banks. I see no reason why a bank should not look at the information it itself possesses to verify what it is told by a customer, especially a customer who already has this information in his possession.

In the result, I hold that the wines were covered by the debenture and were properly taken over by the defendant as receiver and manager for the bank. I will now hear argument about any other matters the parties may wish to raise.

Suit dismissed with costs.

For the plaintiffs:

B. Sirley and Co., Nairobi

J. A. Mackie-Robertson, Q.C., and Esmail

For the defendant:

Hamilton Harrison and Mathews, Nairobi

B. O'Donovan, Q.C., and J. D. M. Silvester

Division: High Court of Uganda at Kampala
Date of judgment: 8 May 1967
Case Number: 8/1967 (82)
Before: Sir Udo Udoma CJ
Sourced by: LawAfrica

[1] *Constitutional Law – Government – Proceedings against – Form of – Whether respondent should be “Uganda” or should be the Attorney – General – Government Proceedings Act (U.).*

[2] *Constitutional Law – Interpretation – Procedure for, when point raised in criminal case – Whether judge who concludes that a question of interpretation involving evidence should take evidence and then frame issues for the Constitutional Court – Constitution, art. 95 (1) (U.).*

[3] *Constitutional Law – Procedure – Application under art. 32 for interpretation of the provisions of the Constitution of Uganda should be by Notice of Motion – Constitution of Uganda, arts. 25 (1) and (5) and 32; Civil Procedure (Fundamental Rights and Freedoms) Rules, 1963, rr. 3 and 4 – Constitutional Cases Procedure Act, s. 3 (U.).*

[4] *Practice – Constitutional cases – Procedure to be followed in applications under arts. 32 (1) and 95 (1) of the Constitution of Uganda – Constitutional Cases Procedure Act, s. 3; Civil Procedure (Fundamental Rights and Freedoms) Rules, 1963, rr. 3 and 4 (U.).*

[5] *Practice – Motion – Originating Motion – Observations on proper form for and signature of – Whether Registrar can sign a motion – Whether affidavit in support must be sworn by applicant himself – Civil Procedure (Fundamental Rights and Freedoms) Rules, 1963; Civil Procedure Rules, O. 5, r. 1 (3), and O. 46, r. 1; Civil Procedure Act, s. 2 (U.).*

Editor’s Summary

Before an acting judge of the High Court, an accused was charged with being a member of an unlawful society called “Dini Ya Musambwa” contrary to s. 56 of the Penal Code. Under s. 54 of the Penal Code the Governor had proscribed this society in 1948. As a preliminary point the defence contended that the proscribing of this society was contrary to the fundamental right of freedom of conscience safeguarded by art. 25 of the Uganda Constitution and asked for an adjournment to enable an application to be made to the Constitutional Court under art. 32 (1) of the Constitution to have the order of the Governor declared invalid. The adjournment was granted, and an application was made, although later than the time prescribed by the acting judge. The application was made by a document headed “Notice of Motion” in the form “Let all Parties concerned attend the judge . . .” showing the respondent as “Uganda” and signed by the Acting Chief Deputy Registrar, and was accompanied by an affidavit sworn not by the applicant, but by a stranger.

Held –

- (i) the application was not properly before the court, being out of time;
- (ii) where a judge concludes that an issue raised under art. 95 (1) of the Constitution is one of substance, he should proceed to hear evidence (if necessary) and then to have the issues framed by

the parties before referring the question to the Constitutional Court;

- (iii) where an accused raises a constitutional point of this nature in the course of criminal proceedings it is undesirable for those proceedings to be adjourned and an application made under art. 32 of the Constitution;

- (iv) proceedings under art. 32 of the Constitution must normally be initiated (where no proceedings are pending) by the party complaining and by proceedings which, being civil proceedings, must comply with the Civil Procedure (Fundamental Rights and Freedoms) Rules, 1963;
- (v) the motion prescribed by r. 3 of those rules must be an originating motion, which the motion in this case was not; therefore the application was not properly before the court;
- (vi) the document initiating the proceedings was incurably defective because:
 - (a) it was not in the correct form;
 - (b) it incorrectly showed the respondent as the sovereign state of Uganda instead of the Attorney-General;
 - (c) instead of being signed by the applicant or his advocate it was signed by the Deputy Chief Registrar, who had no authority to sign it;
 - (d) the affidavit accompanying it was sworn not by the applicant but by a stranger.

Application dismissed.

Cases referred to in judgment:

- (1) *Re Squire's Settlement* (1946), 115 L.J. 90.
- (2) *Re Limehouse Works Co.* (1874), 9 Ch.App. 266.
- (3) *Dixon v. Alcock*, [1945] W.N. 126.

Judgment

Sir Udo Udoma CJ: In this matter the accused, Natolo Masaba, was indicted by the Director of Public Prosecutions on a charge of "being a member of an unlawful society known as 'Dini Ya Musambwa'" contrary to s. 56 (a) of the Penal Code.

On October 7, 1966, the case came up for trial before Saldanha, Ag. J. Before plea was taken counsel for the accused raised a preliminary objection. He submitted that the society known as "Dini Ya Musambwa" was a religious society; that the charge was laid under s. 56 (a) of the Penal Code; that the offence was created by the Governor in 1948 in the exercise of his powers under s. 54 of the Penal Code; that the offence did not come within the ambit of the provisions of art. 25 (5) of the Constitution and consequently the order of the Governor creating the offence was unconstitutional as it contravenes the fundamental right of freedom of conscience enshrined in art. 25 (1) of the Constitution of Uganda. Counsel then applied to the court for an adjournment to enable him to make an application to this court under art. 32 (1) of the Constitution to have the order of the Governor declared invalid and unconstitutional.

The application was resisted by the State Attorney, who appeared for the Director of Public Prosecutions. He contended that even at the present day the society was still unlawful as its activities are still considered by the Government as against public safety.

After having given consideration to the arguments of counsel on both sides on the objection, the learned acting judge held that there was substance in the submissions made by counsel for the accused because it would be necessary to "show by evidence that the order made by the Governor" creating the offence was justified under the provisions of art. 25 (5) of the Constitution, particularly having regard to

the last three lines of art. 25 (5) which reads:

“and except so far as that provision or, as the case may be, a thing done under the authority thereby is shown not to be reasonably justifiable in a democratic society.”

The learned acting judge thereupon granted the adjournment sought and ordered that an application under art. 32 of the Constitution be made to the High Court for redress on or before November 15, 1966. That order by the learned acting judge has resulted in this matter coming before this court.

It may be observed in passing that although, according to the terms of the order made by the learned acting judge, the application was to be made on or before November 15, 1966, the purported application under consideration by this court was received and filed in the Registry on November 24, 1966. It is dated February 20, 1967, while the affidavit accompanying it is dated November 11, 1966. There has been no application for extension of time within which to bring this application before the court. So that strictly in law this so-called application is out of time and cannot be said to be properly before this court. On that ground alone this application could be struck out.

However that may be, when on April 26, 1967, this matter came up for hearing, a preliminary objection in point of law was raised again; but this time by the learned Solicitor-General. He referred the court to the Civil Procedure (Fundamental Rights and Freedoms) Rules, 1963, Legal Notice No. 13 of 1963 (hereinafter to be referred to as the Civil Procedure Rules, 1963) made pursuant to s. 3 of the Constitutional Cases Procedure Act. He also drew the court's attention to the provisions of rr. 3 and 4 of the said rules.

The learned Solicitor-General then submitted that as the application was brought under art. 32 of the Constitution, it was incumbent upon the applicant to have complied with rr. 3 and 4 of the said Rules, and that since the applicant had failed to do so this court should hold that the application was defective; and, in any case, not properly before the court. He then applied that on those grounds the application be struck out.

Counsel further contended that under r. 3 of the Civil Procedure Rules, 1963, the application ought to have been brought by an originating motion setting out in the notice of the said motion the grounds upon which this court is being called upon to declare invalid and unconstitutional the order of the Governor, which had declared the society known as Dini Ya Musambwa an unlawful society. No grounds, contended counsel, have been disclosed on the application itself as it stood, which would entitle the court to grant it. And further that the Attorney-General had not been served with a copy of the application as required by r. 4 of the rules.

Counsel for the applicant contended that the paper filed by him was a motion and not a summons; and that it was accompanied by an affidavit of evidence as required under r. 6 of the Civil Procedure Rules, 1963; and that the form used by him is the usual form generally used in this court. Counsel maintained that, although the paper was headed "Notice of Motion" underneath which were to be found the words "Chamber Summons", the latter had been struck off leaving the top heading undisturbed; and that what was before the court was a motion. He therefore submitted that the objection was ill-conceived and should be overruled.

This application, as well as the circumstances which had led to its being brought before this court, is in many respects unsatisfactory. It is not clear why the learned acting judge did not himself deal with the matter, having regard to the view expressed by him that in order to determine the issue raised evidence was necessary.

This is the more surprising as the learned acting judge had heard arguments on the matter and had even come to the conclusion that the issue raised by counsel for the accused was one of substance. One would normally have thought that the learned acting judge, having come to that conclusion, should have

proceeded to hear evidence which he thought was necessary in order to determine the issue

raised; and, if in the course of the proceedings or on the conclusion thereof, he should form an opinion that a substantial question involving the interpretation of the Constitution had arisen, to have had the issues, as affecting the Constitution, framed or settled by the parties, which is the usual practice followed in this court; and thereafter to have dealt with the matter in accordance with the provisions of art. 95 (1) of the Constitution.

The provisions of art. 95 (1) of the Constitution are in the following terms:

“95(1) Where any question as to the interpretation of this Constitution arises in any proceedings in any court of law, other than a court martial, and the court is of opinion that the question involves a substantial question of law the court *may*, and *shall if any party to the proceedings so requests*, refer the question to the High Court consisting of a bench of not less than three judges of the High Court.”

As I understand it, the provision of art. 95 (1) does not necessarily preclude a single judge from dealing with questions involving the interpretation of the Constitution, although for the sake and in the interests of uniformity in the construction of the Constitution, it is desirable that such questions, because of the importance attached to them, should be referred to, and dealt with by the Constitutional Court. It is only obligatory on the judge concerned to refer such questions to the Constitutional Court if requested so to do by any party to the proceedings.

There is no doubt that, even on the face of the proceedings, having regard to the arguments of counsel, a substantial question of law as to the validity and the constitutionality of the order made by the Governor, which had declared the Dini Ya Musambwa an unlawful society had arisen. It was quite properly raised by counsel for the accused in the course of the proceedings before the learned acting judge.

In such a situation the duty of the judge who was seised of the matter seems to me quite clear. Two courses as a matter of practice were open to him, one of which was for him to proceed to deal with the matter if neither party objected. The other was for him to have the issues involved, after having taken evidence as already indicated, formulated and thereafter refer the matter to the Constitutional Court.

With respect I do not think that the method or the practice resorted to by the learned acting judge in the instant case would normally commend itself to a court at the stage at which the proceedings in the case had reached. The accused person involved in the case had already been committed by the magistrate to the High Court for trial. He was there to face his trial, the indictment against him having been filed by the Director of Public Prosecutions. There was therefore before the court the record of the evidence taken before the committing magistrate and on which the indictment was based. If the learned acting judge had proceeded with the trial of the case, he would then have made it possible for counsel for the accused to call evidence probably to establish that this particular society was a lawful society, it being a religious body. That, in my view, would have supplied the learned acting judge the evidence which he said was required in order to be able to determine the issues raised. It is doubtful whether the procedure laid down in the Civil Procedure Rules, 1963, was intended to apply to a case of the kind under consideration, where proceedings, albeit criminal, have already been initiated. In my opinion the instant case falls squarely within the ambit of art. 95 (1) of the Constitution. It seems to me that the application contemplated under art. 32 of the Constitution must be “original proceedings” initiated by “a person who alleges that any of the provisions of arts. 17 to 19 inclusive or cl. 1 of art. 31 of the Constitution has been, is being or is likely to be contravened”.

Where such an allegation is made, and there is pending in court no proceeding concerning such allegation, proceedings should normally be initiated by the person who alleges that he is affected by the act done. Such proceedings must comply with the Civil Procedure Rules, 1963. With respect, the method adopted by the learned acting judge in adjourning the proceedings before him, and in ordering the accused to resort to the expedient of the provisions of art. 32 of the Constitution in my view unduly duplicates the proceedings and is likely to result in undue delay in the trial of the criminal charge against the accused person. Indeed that is what has happened in the instant case. There is still pending in the criminal court the criminal case against the accused. At the same time this application is now before this court as a civil proceeding apparently to determine whether the order of the Governor creating the offences with which the accused was charged is constitutional and valid. It may be noted that the rules governing proceedings under art. 32 of the Constitution as they stand at the present time are rules applicable to civil cases or matters; and the proceedings to be originated under art. 32 of the Constitution must of necessity be civil in nature and form in contra-distinction to the criminal proceedings which were brought and are still pending against the accused in the criminal court. The objection of substance alluded to by the learned acting judge was raised in the course of criminal proceedings. It seems to me quite conceivable and, indeed, competent for counsel for the accused, in anticipation of the trial of the criminal charge against the accused, to have applied to the court under art. 32 for determination of the constitutional issues raised in the case. But that was not the position in the instant case. Be that as it may, since the instant application was brought in obedience to the order of the court I now propose to consider it on the footing that it was properly brought. I must therefore turn to examine the objection in point of law which was argued by both counsel before me. Now the objection by the Solicitor-General, as already stated, is that since the application was brought under art. 32 of the Constitution the Civil Procedure (Fundamental Rights and Freedoms) Rules, 1963, ought to have been followed, and that the application was not properly before the court as it failed to comply with rr. 3 and 4 of those rules.

The provisions of rr. 3 and 4 of the Civil Procedure (Fundamental Rights and Freedoms) Rules, 1963, are as follows:

- “3. Every application *shall be made by motion*, and shall be heard in open court by a single judge: Provided that if the judge to whom an application is made is of the opinion that the application raises or is likely to raise a question as to the interpretation of the Constitution, he shall adjourn the application to be heard and determined in the manner provided by sub-s. 1 of s. 2 of the Act.
4. No motion shall be made without notice to the Attorney-General and to any other party affected thereby.”

And sub-s. 1 of s. 2 of the Constitutional Cases (Procedure) Act (Cap. 66) provides:

- “2.(1) Where any question as to the interpretation of the Uganda (Independence) Order in Council, 1962, or of the Constitution of Uganda is to be determined by the High Court of Uganda:
 - (a) an uneven number of judges, which shall not be less than three, shall sit for the purpose of determining that question; and
 - (b) the decision shall be according to the opinion of the majority of the judges sitting for such purpose.”

I accept the submission of the learned Solicitor-General that the motion prescribed under r. 3 of the Civil Procedure (Fundamental Rights and Freedoms) Rules, 1963, ought to be an originating motion; and that the paper before the court to which an affidavit is attached is not an originating motion. I consider this submission sound.

I hold therefore that, on a true construction of the provisions of r. 3 of the Civil Procedure (Fundamental Rights and Freedoms) Rules, 1963, since the application is prescribed to be made by motion and to be heard in open court, the motion contemplated by the rule should be an originating motion. In other words, the proceedings must be initiated by motion as distinct from a summons or action or a petition; and such a motion must also be distinguishable from one made in a pending action or an interlocutory application in an existing suit.

Originating motions frequently arise under the provisions of a statute, and even where a statute does not lay down the form in which an application is to be made, which is not the case in the matter under consideration, the court can always be approached by an originating motion.

In *Re Squire's Settlement* (1) the Public Trustee Act, 1906, provided by s. 4 (2) (i):

“The court may, on the application of either the Custodian Trustee, or any of the Managing Trustees, or of any beneficiary, and on proof to their satisfaction that it is the general wish of the beneficiaries, or that on other grounds it is expedient, to terminate the Custodian Trusteeship, make an order for that purpose, and the court may thereupon make such vesting orders and give such directions as under the circumstances may seem to the court to be necessary or expedient.”

In 1918 the Public Trustee was appointed Custodian Trustee of a settlement. In 1943, the surviving Managing Trustee having died, the persons having power to appoint new trustees were desirous of appointing the Public Trustee to be the sole Managing Trustee. They first applied by summons to have the custodian trusteeship terminated. The judge having indicated that no order would be made on summons, the application was renewed by originating motion. It was held that there being nothing in the Public Trustee Act, 1906, or in the rules made thereunder as to how an order should be obtained under s. 4 (2) (i) of the Act, the court had no power to make an order on summons: the proper procedure was by originating motion. The case being one in which the court should make an order, the court would make an order terminating the custodian trusteeship, upon the applicants' undertaking that they would appoint the Public Trustee to be an ordinary trustee.

As a general rule every originating motion must be in writing. It must be properly signed by the party moving if in person or by his counsel. The notice of motion must be addressed to the correct parties and it must be properly framed.

In *Re Limehouse Works Co.* (2) a notice of appeal motion was served without any signature, though the name of the solicitors serving it appeared on the back of the notice. After seven days the solicitor of the appellant, having discovered the omission, asked the solicitor of the respondent to allow the errors to be corrected. The respondent's solicitor refused this, and stated that every technical advantage would be taken. The appeal motion was set down, and the respondent's solicitor informed of it, but no notice of its being set down was regularly served. The respondent's solicitor, at the earliest possible moment, inrolled the order.

On appeal, it was held that as distinct notice that no technicality would be waived had been given, the respondent was entitled to avail himself of the

irregularity in the notice of motion and maintain the enrolment, though there had been correspondence which, standing alone, might have allowed the court to vacate it.

Every motion must be intituled with the reference to the record and headed in the cause or matter in which the application is to be made; and must also express by whom such application is being made.

In the light of the principles above stated, as a matter of interest I hereunder reproduce the paper which has been filed by the applicant. It is a printed form with blank spaces to be filled in. It reads:

“Notice of Motion

In the High Court of Uganda

Criminal Misc. (Reference) Cause 8 No of 1966

(Arising out of Crim. Session Case No. 938/1966)

Natolo Masaba Applicant

versus/and

Uganda Respondent

Let all parties concerned attend the Judge in Court at the Law Courts, Mbale on Wednesday the 15th of March. 1967 at 10.00 o'clock in the forenoon/afternoon when the court will be moved/on the hearing of an application on the part of the Applicant.

That on the grounds stated in the affidavit of Danieri Kamoto annexed hereto this court may be pleased to declare the order declaring Dini Ya Musambwa to be unlawful society to be invalid and contrary to art. 25 (1) of the Constitution of Uganda and costs of this application provided for.

Dated this 20th day of February 1967 at Mbale.

This summons was taken out by Girish K. Patel Esq.

Counsel for the Applicant.

(sgd) E. A. Oteng

Ag. Deputy Chief Registrar.”

It is obvious and I agree with the Solicitor-General that the paper the particulars of which are set out above may be anything but a notice of motion, and least of all a notice of originating motion. This printed form does neither appear to be related to nor prescribed by any of the rules of this court. It is not included in the list of forms shown in the appendix to the Civil Procedure Act and the rules made thereunder.

It appears more like an originating summons but it does not conform to the specimen of an originating summons prescribed under O. 34, r. 7, which is to be found in Appendix B and therein bears the number 13, at p. 790 of the Civil Procedure Act and the rules made thereunder. The origin of the form is obscure. When counsel for the applicant was asked to satisfy the court that this printed form was the correct form to be used for the purpose of motions or that he should refer the court to the specimen of the form which he had used in the appendix to the rules he confessed that his search had proved fruitless. No such form has been prescribed by the rules of this court.

The document itself as it stands is defective, for although the words “Chambers Summons” on the top lefthand corner of the paper appear to have been struck off yet before the signature of the Acting Deputy Chief Registrar, who had signed this document, appear these words:

“This summons was taken out by Girish K. Patel. Esq., counsel for the applicant.”

The paper is more like a summons, as I have already stated, than a motion because the opening sentence is a command. It states:

“Let all parties concerned attend the judge etc. etc. etc.”

whereas a motion usually begins with the words:

“Take notice that this Honourable Court will be moved etc. etc. etc.”

Furthermore in O. 5, r. 1 (3) there is a provision that a summons for appearance “shall be signed by a judge or such officer as he appoints”. So that if even this paper were a summons, there is no evidence that the Acting Deputy Chief Registrar or any registrar for that matter has ever been appointed by a judge to sign summonses of any kind.

The respondent to this so-called application is the sovereign state of Uganda; and this, in my view, is in contravention of s. 11 of the Government Proceedings Act (Cap. 69), the provisions of which are to the effect that proceedings by or against the Government shall be instituted by or against the Attorney-General. These, it must be remembered, are proceedings brought under art. 32 of the Constitution and the Rules of Procedure, 1963, and therefore must be civil in nature, the application not being an application in a criminal cause or matter, or an interlocutory application in a pending suit. Indeed any application made under the rules must be civil. The rules themselves are intitled “The Civil Procedure (Fundamental Rights and Freedoms) Rules, 1963”.

I think I am right in stating that the fact that this paper (for it is difficult to classify it) was signed by the Deputy Chief Registrar upon whom no authority has been conferred to sign such documents, is sufficient to render the paper incurably defective and therefore null and void and of no legal virtue or effect.

Indeed, it would be straining language to describe this document as a notice of motion whether originating or interlocutory under a pending action. The generally accepted rule of law and practice in England or in some parts of the Commonwealth, for example in Nigeria, is that a motion must be signed by the applicant himself, if he is appearing in person: or by his solicitor or advocate, if he has one.

It seems to me plain therefore that the signature of the Deputy Chief Registrar on the document were it to be treated as a motion would vitiate the whole application. It is of some significance to note that in all the court forms shown in the appendix to the Civil Procedure Act and the rules made thereunder there are indications that the signatory to such documents or forms should be a judge.

When this question of signature was raised by me with reference to O. 5, r. 1 (3) of the rules made under the Civil Procedure Act (Cap. 65), which states as follows:

“Every such summons shall be signed by the judge or such officer as he appoints, and shall be sealed with the seal of the court”,

my attention was drawn to O. 46, r. 1 of the said rules, the provisions of which are as follows:

“Wherever in the ordinance or in the rules thereunder it is provided that any act or thing may be done by such officer as the court may appoint that act or thing may be done by the Registrar”,

and it was submitted that in view of that provision it was competent for the Deputy Chief Registrar to have signed this paper. With this submission I respectfully disagree, because looking at s. 2 of the Civil Procedure Act (Cap. 65), it is therein provided that the word “court” means “any court exercising civil

jurisdiction”; and “judge” is defined as “including a magistrate exercising civil jurisdiction in a subordinate court”. Nowhere in that definition is a “judge” defined as a “court”. This court is bound to give effect to the definition contained in s. 2 of the Civil Procedure Act (Cap. 65). On that basis therefore O. 46. r. 1 will have no application to the provisions of O. 5, r. 1 (3) since the appointment therein prescribed must be made by a judge and not by a court.

An originating notice of motion must always be in a prescribed form. There is in fact no such prescribed form in the rules of this court. The only form prescribed in the rules for an application approximating an originating motion is an “originating summons”. It is to be found in Appendix B and the form is therein set out and numbered 13 at p. 790 of the Civil Procedure Act and the rules made thereunder. At the top of this particular form for a summons, it is indicated that it only applies to cases falling within O. 34, r. 7, which concerns administration of the estates of deceased persons, or the determination of any question of construction arising under instruments, or a declaration of the rights of the person interested. That being the position, it is necessary to look elsewhere for a specimen of the form which an originating motion ought to take.

The usual form for an “originating notice of motion” is to be found in 28 Atkin’s Court Forms (2nd Edn.), p. 180; or in Appendix A, Part 1, form 13 of the Annual Practice, 1967, Vol. 2, p. 15. The form is prescribed for use under O. 8, r. 3 of the Rules of the Supreme Court of England.

The form is as follows:

“Notice of (Originating) Motion

In the High Court of Justice etc 19

Queen’s Bench Division

In the Matter of.....Act.....

And

In the Matter of.....

Take notice that the High Court of Justice, Queen’s Bench Division, etc. etc. will be moved at the expiration of.....days from the service upon you of this notice, or so soon thereafter as counsel can be heard. by counsel on behalf of AB above named (applicant) for an order that (or for the following relief).....

And that the costs of and incidental to this application may be paid by (respondent).

And Further take notice that the grounds of this application are:

(1).....

(2).....

(3).....

Dated the day of 19

Signed

Solicitor for appellant (or Counsel)

Whose address for service is:

To CD (respondent) above named of (address for service).”

The important thing to note in this form is that in the notice of motion itself the grounds upon which the applicant seeks to rely in support of his application for an order of the court are clearly set out; and those

grounds must be grounds of law. The notice of motion must be accompanied by affidavit sworn to by the

applicant himself. In the present application the affidavit is sworn to by someone called Danieri Kamoti. He is not a party to the application, and if his affidavit should be accepted at all it must be in corroboration of the affidavit sworn to by the applicant as the one directly affected.

I may observe that the form for an originating motion in use in Nigeria is similar to the form, the particulars of which are set out above, except that the opening paragraph usually begins as follows:

“Take notice that this Honourable Court will be moved on
day of 1967 at the hour of 9.30 o’clock in the forenoon or
so soon thereafter as the applicant or counsel on his behalf can be heard for an order of
this Honourable Court that (relief sought).”

As a rule all notices of motion must be signed by the party or his solicitor or advocate and one of the distinguishing features between a summons and a notice of motion is that while the former must be signed and is usually signed by a judge or some other officer of the court duly authorised to do so a notice of motion must be signed by the applicant himself or his advocate. The obvious reason for this is that a summons is issued by the authority of the court and is regarded as a command directed by the court to the party concerned. But a motion is usually brought by a party seeking some form of relief or remedy from the court and must therefore be signed by him in the same way as grounds of appeal or a plaint is usually signed either by the party concerned or by his advocate if he has one.

When considering an application by motion the courts are usually very strict to see that such an application is in proper form. For it is the duty of the court to see that correct and proper forms are used, and that the relief or remedy sought and the grounds of law upon which such application is based are clearly set out in the notice of motion itself.

In *Dixon v. Alcock* (3), an application for judgment in default of defence in an action for specific performance, the plaintiff asked for an order in the terms of the minutes annexed to the notice of motion, but did not add the words “or such judgment or other order as upon the plaintiff’s statement of claim in this action, the court may consider the plaintiff entitled to”.

Vasey, J., in his ruling said that where such words were omitted although the court might well alter the minutes in minor matters, or so as to make the order more favourable to the defendant, it ought not to sanction alterations in matters of substance in favour of the plaintiff, because the defendant might subsequently allege that he had been led to suppose the judgment was being asked against him in particular terms and that nothing further would be inserted therein to his disadvantage.

I think I have said enough to show that this application is not properly before this court. It is incurably defective. It is bad in law in that it has failed to comply with r. 3 of the Civil Procedure (Fundamental Rights and Freedoms) Rules, 1963. It was signed by an officer of this court without authority to do so, and that in itself is a serious irregularity. On a careful consideration of all the circumstances of this case I have come to the conclusion that this application is so defective that it could not be granted: and for the several reasons appearing in this ruling the application must fail. It is accordingly refused with costs to the respondent.

Application refused with costs.

For the applicant:

G. K. Patel, Kampala

For the respondent:

Attorney-General, Uganda

J. P. Nkambo-Mugerwa (Solicitor-General, Uganda)

The Pioneer Investment Trust Ltd v Amarchand and others
[1967] 1 EA 498 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	22 February 1966
Case Number:	26/1966 (64)
Before:	Sir Charles Newbold P, Sir Clement de Lestang VP and Duffus JA
Sourced by:	LawAfrica
Appeal from:	The High Court of Kenya – Farrell, J.

[1] Costs – Redemption action – Whether mortgagee always entitled to costs or whether conduct of mortgagee in denying right to redeem and his general tactics in litigation place costs in discretion of judge – Whether mortgagee should be ordered to pay costs.

[2] Mortgage – Delay in redemption – Mortgagor suffering loss as a result – Whether mortgagor entitled to damages for such loss – Whether mortgagor must tender amount due – Whether purchaser/chargee in same position as mortgagor with regard to prior mortgage.

[3] Mortgage – Interest – Delay in redemption – When mortgagor or subsequent chargee entitled to redeem may cease to be liable for interest – Whether tender necessary – What constitutes tender – Whether amount due should be set aside or deposited in court after refusal of tender – Transfer of Property Act, ss. 83 and 84 (K.).

[4] Tender – Mortgage – Amount due under – Whether mortgagor must tender amount to be excused from liability to pay interest – Observations on what constitutes tender.

Editor's Summary

Vendors owned premises which they mortgaged and which they also subsequently agreed to sell to a purchaser. Under this agreement for sale possession was to be given by September 30, 1960, by which date a block of flats in the course of construction by the vendors was to be completed. Construction was not completed on time, but the purchaser paid part of the price. The vendors later asked the mortgagees to take over the premises and complete construction. The mortgagees filed an originating summons claiming possession of the premises from the vendors and the vendors were ordered to deliver up possession to the mortgagees. The purchaser unsuccessfully applied to be joined in this originating summons, claiming that it had an interest in the premises. On the same day that these orders were made

on the originating summons the advocates for the purchaser wrote to the advocates for the mortgagees threatening legal proceedings unless by 4 p.m. that same day the mortgagees agreed to redemption by the purchaser on payment by it of all amounts due; and four days later without waiting for a final reply to this letter the purchaser filed suit against the vendors and the mortgagees, claiming as against the vendors, specific performance; and as against the mortgagees, a declaration that the purchaser was entitled to redeem and an enquiry into the damages suffered by the purchaser as a result of the mortgagees refusing to allow it to redeem. The plaint contained an offer to repay the amount due under the mortgages. The mortgagees in their defence denied the right of the purchaser to redeem and claimed also that if redemption were granted the purchaser must pay their costs of the originating summons if the vendors did not pay them. At the trial the purchaser got an order for specific performance against the vendors (which was not appealed against); and an order that it was entitled to redeem but not entitled to an enquiry into damages. The trial judge also held that the purchaser was liable to the mortgagees for the interest payable under the mortgages up to the redemption date and also for the

costs of the originating summons. The mortgagees were ordered to pay the costs of the redemption proceedings. Against this decision the purchaser appealed, arguing firstly that it was entitled to an enquiry as against the mortgagees into the loss suffered by it as a result of the delay in redemption; and secondly that it was not liable to pay the interest on the mortgages after a specified date. The mortgagees cross-appealed against the order against them for costs.

Held –

- (i) the purchaser as a chargee under s. 55 (6) (b) of the Transfer of Property Act could only be entitled to damages for delay in redemption (if at all) if he had made a proper tender or had properly been excused from making a tender of the mortgage debt;
- (ii) he purchaser was not excused from making a tender in the present case and therefore, not having made an actual tender, could not possibly be entitled to damages;
- (iii) a mortgagor who has failed to tender the amount due is only excused from a continuing liability to pay the interest in accordance with the terms of his contract where there has been an unequivocal refusal of a genuine proposed tender, or circumstances from which such an unequivocal refusal is a necessary inference followed by the mortgagor depositing the amount in court or else (per De Lestang, V.-P. and Duffus, J.A., Newbold, P. dissenting) setting the amount aside and depriving himself of any benefit from it;
- (iv) although prima facie a mortgagee is entitled to the costs of the redemption action, the mortgagees by their conduct in persistently denying the right of the purchaser to redeem and by their general tactics had forfeited this prima facie right and had placed the costs in the discretion of the judge, whose decision should not in the circumstances be interfered with;
- (v) (per Newbold, P., obiter) in principle there is no reason why a mortgagor should not receive compensation for damage suffered by him by reason of delay in redemption where the loss caused by such damage is not covered by an order for the cessation of the interest payable to the mortgagee and for the mortgagee to pay the costs; but a chargee has no rights to compensation for any wrongful delay in redemption of a prior mortgagee.

Appeal and cross-appeal dismissed.

[**Editorial Note:** This case is reported on appeal on an earlier procedural point at [1964] E.A. 703.]

Cases referred to in judgment:

- (1) *Rice v. Noakes and Co.*, [1900] 2 Ch. 445.
- (2) *Gillingham v. National Bank* (1901), 2 Ir. R. 514.
- (3) *Hornby v. Matcham* (1848), 16 Sim. 325; 60 E.R. 899.
- (4) *Brown v. Sewell* (1853), 11 Hare 49; 68 E.R. 1182.
- (5) *James v. Rumsey* (1879), 11 Ch.D. 398.
- (6) *Bank of New South Wales v. O'Connor* (1889), 14 A.C. 273.
- (7) *Kinnaird v. Trollope* (1889), 42 Ch.D. 610.

(8) *Chalikani Venkatarayanim v. Zamindar of Tuni* (1922), L.R. 50 Ind. App. 41.

(9) *Velayuda v. Hyder* (1909), I.L.R. 33 Mad. 100.

(10) *Satyabadi Behara v. Harabati* (1907), I.L.R. 34 Cal. 223.

C.A.V.

The following judgments were read:

Judgment

Sir Charles Newbold P: This is an appeal by a plaintiff against the decision of Farrell, J. in the High Court of Kenya ordering as against the first defendants, who are the first respondents, specific performance of an agreement to sell certain premises, and as against the second defendants, who are the second respondents, redemption of the premises.

The facts, in so far as they are relevant to the issues raised on the appeal, are essentially simple. The first respondents (hereinafter referred to as “the vendors”) are the owners of certain premises. They mortgaged those premises to the second respondents (hereinafter referred to as “the mortgagees”). Subsequent to the mortgages the vendors, in July 1960, entered into an agreement to sell the premises to the appellant (hereinafter referred to as “the purchaser”) and possession was to be given by September 30, 1960, by which date a block of flats, which was in the course of construction by the vendors, was to be completed. The agreement to sell was a complicated document, but it is unnecessary to go into its terms. The construction of the flats was not completed by September 30, 1960, and possession of the premises was demanded by the purchaser in December, 1960, by which date the purchaser had paid an appreciable portion of the purchase price. Early in January, 1961, the vendors asked the mortgagees to take possession of the premises, complete the buildings and then, if they desired, sell the premises. The vendors, however, did not send to the mortgagees the keys of the premises until May 15, 1961.

At the end of February, 1961, the mortgagees filed an originating summons claiming possession of the premises from the vendors. The purchaser unsuccessfully applied to be joined as a party to the originating summons, claiming that it had an interest in the premises. Both the vendors and the mortgagees, by affidavits filed in that application, disputed any right on the part of the purchaser to redeem the premises. On May 25, 1961, an order was made in the originating summons by the High Court directing the vendors to deliver the premises to the mortgagees. On the same day the application of the purchaser to be joined in the originating summons was dismissed.

On the same day, that is May 25, 1961, the advocates for the purchaser wrote a letter to the advocates for the mortgagees referring to a discussion earlier that day between them and stating:

“Unless we hear from you by 4.0 p.m. this afternoon to the effect that your clients are now prepared to agree to redemption upon payment of all the moneys due under the legal (and) equitable mortgages, including interest and costs, our clients propose to institute legal proceedings to protect their right immediately. If your clients are prepared to recognise the right of redemption please let us know the amount due to your clients under the above legal and equitable mortgages, when our clients will arrange payment of the same.”

This letter was received by the advocates for the mortgagees on the afternoon of the same day and their letter in reply, dated May 26, 1961, included the following paragraph:

“Your letter . . . was only received by us at 3.45 p.m. on the 25/5/61 and it is surprising that you ask for the impossible, that is a reply by 4.0 p.m. A reply will be addressed to you in due course after we have taken instructions.”

On May 29, 1961, the purchaser filed a plaint against the vendors and the mortgagees claiming, as against the vendors, specific performance of the agreement to sell together with other claims which it is

unnecessary to consider, and

as against the mortgagees, a declaration that the purchaser was entitled to redeem the premises upon payment of the money secured under the mortgages up to the date of redemption, and, inter alia, an inquiry into the damages suffered by the purchaser as a result of the mortgagees refusing to allow it to redeem the premises. Paragraph 14 of the plaint set out the desire of the purchaser to redeem the premises and an offer to repay to the mortgagees “the whole of the principal sums and interest and other moneys and costs now due” under the mortgages. The mortgagees in their defence, as amended from time to time, denied, in one form or another, the right of the purchaser to redeem the premises and claimed also that if redemption were granted the purchaser was liable to pay the costs incurred by the mortgagees in the originating summons if the vendors did not pay them. In its reply, as amended from time to time, the purchaser disputed its liability to pay these costs.

For a variety of reasons, which included two appeals to this court on procedural matters, the case was not heard and determined until the latter part of 1965. It then came on before Farrell, J. and he, in what I regard as a very clear and able judgment, ordered the vendors to give specific performance of the agreement to sell, subject to certain variations which are immaterial for the purposes of this appeal. No appeal has been brought against his order in so far as the vendors are concerned. As regards the claims against the mortgagees in so far as they are relevant to this appeal, he ordered that the purchaser was entitled to redeem the premises but that it was not entitled to an enquiry into the damage suffered by it as a result of the mortgagee refusing to allow it to redeem the premises. In so far as relates to the amounts payable on redemption Farrell, J. decided that the purchaser was liable to the mortgagees for the interest payable under the mortgages up to the redemption date and that the mortgagees were entitled to recover from the purchaser the costs of the originating summons. As regards the costs of the suit, Farrell, J. ordered that these costs should be paid jointly and severally by the vendors and the mortgagees to the purchaser, with the qualification that the costs attributable solely to the claim for specific performance should be borne by the vendors and the costs attributable solely to the redemption proceedings should be borne by the mortgagees.

From this decision the purchaser appealed. Counsel for the purchaser argued two points. First, that the purchaser was entitled to an enquiry as against the mortgagees into the loss suffered by it as a result of the delay in redemption and an order for the payment by the mortgagees of compensation equal to the amount of such loss: secondly, that the purchaser was not liable to pay the interest on the mortgages after a specified date. The mortgagees cross-appealed on the question of costs. Counsel for the mortgagees argued that the mortgagees should have been given their costs and that in any event the order for costs against them was wrong. The vendors, who had left Kenya, were served with the appeal but not with the cross-appeal. Counsel for them simply adopted the arguments of counsel for the purchaser on both the appeal and the cross-appeal.

Turning now to the first point argued by counsel for the purchaser which in effect is that the purchaser is entitled to compensation for the loss caused to it by the mortgagees improperly delaying the time in which the purchaser could have obtained the premises, the statutory links in the chain of the argument are as follows: under s. 55 (6) (b) of the Transfer of Property Act (hereinafter referred to as “the Act”) the purchaser has, by reason of payment of a part of the purchase price, obtained a charge on the premises: under s. 91 (a) a chargee has a right to institute a suit for redemption of the premises; and under s. 60 a mortgagor, on payment or tender of the amount due, is entitled to redeem the premises and to obtain delivery of them, which right is enforced by a redemption suit. It is submitted that, by virtue of these statutory provisions, the chargee is in the same position as a mortgagor in so far as the redemption suit is concerned, though this

may appear to conflict with s. 100 which assimilates the position of a chargee with that of a mortgagee. The argument, rightly in my view, did not seek to place the purchaser, who is a special type of chargee and who subsequently became entitled to specific performance of the contract and thus to ownership of the premises, in any different position from any other chargee. Counsel for the purchaser accepted that as the chargee's rights are the same as those of the mortgagor in so far as they are relevant to the redemption suit, the purchaser, before he could succeed in any claim for compensation, must satisfy the requirement that he had made a proper tender of the amount due to the mortgagee or had properly been excused therefrom: and it was submitted such was the position in this case. As this aspect of the matter arises for consideration in relation to the second point on the appeal, that is, whether there should be any cessation of the interest to which the mortgagee would otherwise be entitled, I shall consider this aspect later, and I shall assume for the purposes of this point that the purchaser has satisfied this pre-requisite to his right to obtain redemption of the premises.

It is urged that a mortgagor is entitled on payment of the mortgage debt to receive back the mortgaged property undiminished in value (see *Rice v. Noakes & Co.* (1) and *Gillingham v. National Bank* (2)) and that compensation or an indemnity has been granted where the title deeds have been damaged or destroyed (see *Hornby v. Marcham* (3) and *Brown v. Sewell* (4)), such compensation being based upon the fact that the title deeds are treated as part of the realty. It is urged also that a mortgagee may do as much or more harm to a mortgagor by wrongfully delaying redemption as by causing damage to the mortgaged property and if equity recognises a right to compensation where the property is damaged it must equally recognise a right to compensation where the property is wrongfully withheld with the result that damage is occasioned. It is further urged that the absence of any precedent for such an award (though such compensation was claimed in *James v. Rumsey* (5) but was not considered for procedural reasons) should not be regarded as a precedent against the right to compensation.

I consider that as far as a mortgagor is concerned there is great force in the argument. Equity has always been astute to ensure that once a mortgagee is properly paid what is due, then the mortgagor shall not suffer damage by reason of the premises having been used as a security for the loan, hence the doctrine relating to clogging. It seems to me that a mortgagor may suffer as much or more damage by reason of the wrongful withholding of his property as he may by its return in a damaged state and in principle I can see no reason why he should not receive compensation for such damage where the loss caused by such damage is not covered by an order for the cessation of the interest payable to the mortgagee and for the mortgagee to pay the costs. I do not regard anything said by Lord Macnaghten when delivering the judgment of the Privy Council in *Bank of New South Wales v. O'Connor* (6), which was an action in detinue, as precluding the existence of such a claim in equity. But this tenderness of equity for a mortgagor is related to the ownership by the mortgagor of the mortgaged premises and to his right to receive them the moment he has discharged the debt for which they are a security. I cannot see any reason why a chargee, who has no interest in the mortgaged premises save in so far as they are security for the repayment of his charge, should have the same tenderness shown to him. To a chargee, as to a mortgagee, the premises are merely a security for the repayment of money, and equity will not seek to ensure that he will obtain anything more than he bargained for, that is the return of his money together with the interest thereon. He has no interest in the property itself and so long as he continues to receive his interest on the money advanced and ultimately to receive repayment of the principal, I see no reason why a chargee should receive any compensation because his right to redeem a prior mortgage has been wrongfully delayed. If in fact the purchaser had been able to redeem the prior mortgage at an earlier date, this

would not have given him any right to the true ownership of the premises. He would merely have stepped into the shoes of the mortgagee and held the premises as security for the repayment of the mortgages.

Accordingly, whatever may be the rights of a mortgagor to compensation where redemption has been wrongfully delayed, in my view a chargee has no rights to compensation for any wrongful delay in the redemption of a prior mortgagee. Thus, even if there had been a proper tender of the amount due, or circumstances which excused such a tender, and the purchaser had been wrongfully delayed in his redemption suit he is not entitled to compensation and the decision of the trial judge to that effect was correct.

I turn now to consider the second point raised by counsel for the purchaser which was that Farrell, J. was wrong in holding that the mortgagees were entitled to continue to receive interest on the mortgage debt. Farrell, J. came to this conclusion on three grounds, though not in the order I set out. First, that there had been no unequivocal refusal by the mortgagees to accept a proper tender; secondly; that the purchaser had disintitiled itself by the hasty filing of the suit from saying that it was unable to tender because it was unaware of the amount which should have been tendered; and thirdly, that the purchaser had not been willing to pay all the sums to which the mortgagees were entitled. As regards the first of those grounds, it was urged that the whole attitude of the mortgagees in denying any right on the part of the purchaser to redeem, both before the action was filed and in the pleadings and in the evidence given, was such as to make it clear that any tender would have been an empty matter of form and that this attitude amounted to an unequivocal refusal of any proposed tender. In any event it was also urged that the plaint contained a continuing offer to redeem on payment of all the sums due. As regards the second of the grounds, it was urged that by reason of the continuing offer to pay in the pleadings there was nothing to prevent the mortgagees from informing the purchaser of the amount due even after the action had been filed, but this they never did because they maintained the attitude that the purchaser was not entitled to redeem. As regards the third ground, it was urged that it was not until the defence was amended on September 27, 1965, that it was clear that the mortgagees were demanding the costs of the originating summons from the purchaser because the mortgagor, on whom the primary liability fell, had failed to pay these costs.

Before considering the facts of this case it is, I think, necessary to set out what the law is. Under s. 83 of the Act it is provided that a mortgagor, or any person entitled to institute a redemption suit, may at any time after the principal money has become payable and before the redemption of the property is barred, deposit in any court in which he may have instituted such suit to the account of the mortgagee the amount remaining due on the mortgage. Thus it is clear that any such deposit may take place after the suit has been filed. Under s. 84 where a mortgagor, or such other person, "has tendered or deposited in court under s. 83 the amount remaining due on the mortgage, interest on the principal money shall cease from the date of the tender or as soon as the mortgagor or such other person as aforesaid has done all that has to be done to enable the mortgagee to take such amount out of the court". I do not think it can be questioned that tender means the actual production of the money due with an offer to pay it over, though having regard to commercial usage there are many circumstances in which the production of a cheque for the money due would take the place of the actual production of the money. It is not disputed that in this case there was neither tender nor deposit. It is, however, urged that these two sections do not cover all the cases in which interest will cease and that equitable principles, which have long been recognised in the United Kingdom and which, subject to the constitutional provisions, have been applied in Kenya, cover other cases where it is right and proper that the mortgagee should cease to be entitled to recover

his interest. In England it is probable that where there has been an unequivocal refusal of a proposed tender then it is unnecessary to go through the empty farce of making a tender (see *Kinnaird v. Trollope* (7) and this is probably also the position in India under the Transfer of Property Act (see *Chalikani v. Tuni* (8)). Counsel for the purchaser accepts that in England before a mortgagee ceases to be entitled to his interest there must be, in addition to tender or circumstances which result in tender being excused, a deposit or setting aside of the amount owed; but he submits that in Kenya, by reason of the provisions of s. 84 of the Act, where tender had been made and refused or the circumstances excuse the necessity for actual tender, there is no necessity either to deposit the amount due or to set it aside before the mortgagee loses his entitlement to interest. He submits that such is the position in India (see *Velayuda v. Hyder* (9), and that as the same legislation applies in Kenya such is also the position in Kenya.

This matter should, I think, be approached from first principles. By contract between the parties the mortgagee is entitled to his interest until he is repaid all the amount due under the mortgage deed. Just as equity is astute to ensure that the mortgagor should, on compliance with his bargain, obtain back the mortgaged property undiminished in value, so it is astute to ensure that the mortgagor shall comply with his bargain unless the attitude of the mortgagee disentitles him from relying on the terms of the bargain. The Act has set out circumstances in which the mortgagee loses his entitlement to interest. It is not disputed that neither of these circumstances applies in this case but the purchaser says that the attitude of the mortgagees disentitled them to their rights under the mortgage deed and entitled the purchaser to be absolved from a contractual liability. For that to be the position I am satisfied that the purchaser would have to show first, that it had done everything which it ought to have done and had taken every step to ensure that the rights of the mortgagees have been fully protected and, secondly, that it did not obtain any improper benefit by reason of being absolved from paying what it would have had to pay but for the attitude of the mortgagees. I am satisfied that in Kenya a mortgagor who has failed to tender the amount due is only excused from a continuing liability to pay the interest in accordance with the terms of his contract where there has been an unequivocal refusal of a genuine proposed tender, or circumstances from which such an unequivocal refusal is a necessary inference, followed by the deposit in court of the amount due under the mortgage or, if that amount is unknown to the mortgagor by reason of the act of the mortgagee, such amount as would be reasonable in the circumstances of the case. It is unnecessary to consider whether this requirement for a deposit exists where tender is made and refused, though I think it probably does; certainly it exists where tender is excused and any dicta to the contrary in *Velayuda v. Hyder* (9) does not, in my view, set out the law of Kenya and accordingly should not be followed. It must not be forgotten that what the mortgagee is entitled to, before the property can be redeemed, is payment of the amount due to him, and neither tender nor circumstances which excuse actual tender is in fact the payment of the amount due. No matter how wealthy the mortgagor may be there is always the possibility that when the time comes for him to discharge his obligation he may not be in a position to do so. As neither tender nor the circumstances which excuse actual tender discharges his obligation it is essential, if he seeks to avoid his contractual liability to pay interest, that he should have taken all steps to ensure that the mortgagee is in a position at any moment and beyond question to be repaid the amount which the mortgagee would earlier have received but for his own default. To this extent therefore I am not in agreement with Farrell, J. when he stated that there was no necessity either to set aside the amount due or to deposit it in court.

With these principles in mind I turn to consideration of the evidence in this case. The purchaser, on Thursday, May 25, 1961, by letter asked for a reply by

4.0 p.m. that afternoon as to whether the mortgagees were prepared to agree to redemption and, if so, the amount due, so that payment could be arranged, failing which it would file a suit. As this letter was received only a quarter-of-an-hour before the deadline the purchaser was, I consider, taking up an indefensible position. The reply was quite properly that instructions would be taken from the mortgagees on this matter. Without waiting for a reasonable time the purchaser filed a suit on Monday, May 29, 1961. It is quite clear that there has been on neither of these dates any unequivocal refusal of any proposed tender, even if there was a genuine proposed tender. This is recognised by counsel for the purchaser who submits that the date from which the interest should cease should be, at the latest, July 28, 1961, when the mortgagees filed their defence denying the right to redeem. This very uncertainty as to the date from which it is claimed that interest should cease is itself indicative of the fact, as was pointed out by counsel for the mortgagees, that there has been no unequivocal refusal of any genuine proposed tender, even if what the purchaser stated in the letter and in its plaint could be construed as an offer to pay all the amounts to which the mortgagees were entitled. For this reason alone the purchaser cannot succeed. Further, as the purchaser had at no time deposited in court the amount due to the mortgagees it had not taken all the steps necessary to ensure that the rights of the mortgagees were fully protected and that the purchaser had not retained to itself any improper benefit, such as the use of the money free from the payment of the interest due under the mortgage deed. It is no excuse to say that it did not know the amount of the interest and that there was a continuing offer to pay the amount due and that the mortgagees at no time let the purchaser know what that amount was. If a purchaser seeks to absolve itself from a liability to pay interest then the onus is on it to take all necessary action to achieve a position where it can properly be said that the mortgagees have lost their contractual right to interest. There is no reason why the purchaser could not, either before or after the action, have asked the mortgagees what amount was due so that it could deposit that amount and state in the letter that if the mortgagees did not set out the amount the purchaser would deposit such amount as, according to the information in its possession, was adequate to cover the amount due to the mortgagees. As the purchaser had failed in these respects to do what it should have done I find it unnecessary to consider the position in relation to the costs of the originating summons.

For these reasons I am satisfied that the decision of FARRELL, J. on this point also was correct and accordingly the appeal fails and should be dismissed.

Turning now to the cross-appeal, counsel for the mortgagees submitted that the trial judge had erred in depriving the mortgagees of the costs and that even if the circumstances were such that the mortgagees should not get the costs they were not such that they should be ordered to pay costs. It was urged that the judge had found that the purchaser had brought the action prematurely; that however much the mortgagees may have been to blame the purchaser was also blameworthy and thus it could not be said that the action was solely occasioned by the fault of the mortgagees; that the mortgagees had succeeded before the trial judge on a number of issues which had not been the subject of the appeal and on other issues which, though under appeal, if the appeal was dismissed and the decision of the trial judge confirmed it would result in the mortgagees paying costs on issues raised by the purchaser, some of which issues were of considerable importance, and on which the purchaser had failed. It was further urged that, in so far as costs were in the discretion of the judge, the judge had misdirected himself in law in stating that the onus rested heavily on the mortgagees to show that they were entitled to their costs once they had denied the right of the purchaser to redeem.

These submissions were, of course, contested by counsel for the purchaser, but I do not understand that there is any real dispute as to the law on the matter. I think the basic position is most concisely and aptly set out by Lord Macnaghten when delivering the judgment of the Privy Council in *Bank of New South Wales v. O'Connor* (6) ((1889), 14 A.C. at p. 278) he said in relation to a mortgagee:

“He is also entitled as of right to the costs properly incident to an action for foreclosure or redemption, though he may forfeit those costs by misconduct, and may even have to pay the costs of such an action in a case where he has acted vexatiously or unreasonably.”

The position is, therefore, that a mortgagee is *prima facie* entitled to the costs of the redemption action and there is no discretion in a judge to make a contrary order unless the conduct of the mortgagee is such as to deprive him of his right. If there is such conduct, then the costs lie within the discretion of the judge; and I do not consider that such a discretion should be interfered with by a Court of Appeal unless the judge has misdirected himself on a question of law or his decision is so clearly erroneous that he could only have come to it by applying some wrong principle of law. Applying these principles to the facts of this case, I have no doubt whatsoever that the conduct of the mortgagees in persistently denying the right of the purchaser to redeem and in adopting general tactics which have resulted in this case coming before this court on two previous occasions have forfeited their *prima facie* right to costs and have thus placed the costs in the discretion of the judge. As the costs are in his discretion, unless he has misdirected himself or he is clearly erroneous in his decision, this court should not interfere. It is urged that he has misdirected himself by placing too heavy an onus on the mortgagees where they have denied the right to redeem. Taken by themselves, the words of the judge do, I think, place too heavy an onus on the mortgagees. But I consider that these words must be construed in the context of his findings of fact as a whole, and that where he used the words “denied the right to redeem” he meant denied the right to redeem in the circumstances which he found as a fact had occurred. I do not, therefore, consider that there has been any such misdirection as would entitle this court to substitute its discretion for that of the trial judge. Nor am I satisfied that the decision of the trial judge was so wholly erroneous in making the order which he did as would justify this court in interfering with the exercise of his discretion. I have no doubt, looking at the case as a whole, that though none of the parties was blameless the real cause of this litigation was the attitude adopted by the mortgagees in denying the right of the purchaser to redeem, an attitude which not only turned out to be wrong but also the reason for which has never been set out. Had I been the trial judge I doubt whether I would have made quite so sweeping an order for costs. I might well have borne in mind material issues, such as that relating to the interest, on which the mortgagees succeeded. But it is the trial judge who is best able to judge generally the attitude of the parties and the true weight to be given to any particular issue in relation to costs. Certainly I would not be prepared to substitute my own discretion on this matter for that of such an experienced judge as Farrell, J. For these reasons I consider that the cross-appeal fails and should be dismissed.

Counsel for the mortgagees asked that in any event para. 5 (c) of the decree be amended so as to provide that if the purchaser does not redeem the property then it would have to pay the costs of the mortgagees; and he asked also for a similar provision in relation to the appeal costs. I am not at all clear that this matter falls within the terms of the cross-appeal and counsel for the purchaser did not deal with this somewhat casual request. I do not think any order should be made other than an order giving liberty to apply to the High Court for reconsideration of the order for costs if the purchaser does not redeem. Counsel for

both the mortgagees and the purchaser are agreed that the decree of the High Court should, with a view to an early determination of these proceedings, be amended so as to provide that the mortgagees do file within one month of the date of the delivery of this judgment an account of what is due to them and that the date for payment should be one month after the date of the Registrar's certificate.

As regards the costs of the appeal, as it has failed, I consider that the mortgagees are entitled to these costs with a certificate for two counsel. As regards the costs of the cross-appeal, as it has failed I consider that the purchaser is entitled to these costs with a certificate for two counsel. I do not consider it is necessary to make any special order in relation to these costs if the purchaser does not ultimately redeem. This leaves only the question of costs to the vendors for whom, as I have said, counsel appeared but took no part other than to adopt the argument by counsel for the purchaser, an attitude which was a complete change from that adopted before the High Court. Under the Act the vendors would have been a necessary party in the court below. They were served with a copy of the appeal record but not with a copy of the cross-appeal. While they were a necessary party in the court below, it does not seem to me that there was any necessity, in their circumstances, for them to appear on either the appeal or cross-appeal; they certainly did not contribute anything. Accordingly I would make no order for costs either on the appeal or the cross-appeal in relation to the vendors.

For these reasons I would dismiss the appeal with costs in favour of the mortgagees, with a certificate for two counsel, dismiss the cross-appeal with costs in favour of the purchaser, with a certificate for two counsel, and make no order for costs in relation to the vendors. By consent I would amend para. 5 (a) of the decree of the High Court so as to provide that the mortgagees shall file their accounts within one month of this date and to provide that the account to be taken shall be of what is due to the mortgagees on a day 30 days after the date of the Registrar's certificate. I would also amend the decree so as to provide that there will be liberty to apply to the court on the subject of the order for costs if the purchaser does not redeem. As the other members of the court agree it is so ordered.

Sir Clement De Lestang VP: The facts giving rise to this appeal and the legal issues arising therefrom are fully set out in the judgment of Sir Charles Newbold, P. which I have had the advantage of reading in advance. Since it is common ground in this case that the chargee would only be entitled to compensation and to be excused from the payment of interest if he had made a proper tender or had properly been excused from making a tender of the mortgage debt, and since it is not in dispute that no tender was in fact made, the substantial question for decision in this appeal is whether the chargee was excused from tendering. If that question is decided in the negative it becomes unnecessary to decide also whether a mortgagor is entitled to compensation for the loss incurred by him by reason of a mortgagee improperly delaying the time in which the mortgagor should have obtained the premises, as well as whether a chargee who institutes a redemption suit under the powers conferred upon him by s. 91 (1) of the Transfer of Property Act must be treated differently from a mortgagor. While I am inclined to agree with my Lord on the second of these two matters I prefer to reserve my views on both matters until such time as they arise for decision.

I respectfully agree with my Lord that tender was not excused in the present case but regret being unable to subscribe to his view that when tender is excused the mortgagor or chargee will continue to be liable to pay interest until the mortgage debt is deposited in court. In my view it is sufficient if the amount is set aside and the mortgagor or chargee deprived of any benefit under it. As my Lord

has clearly shown, the Transfer of Property Act provides for interest to cease to run from the time the mortgage debt is deposited in court or properly tendered and improperly refused. It does not provide for interest to cease on tender being excused. The latter rule clearly derives from English principles of equity which, it is accepted in the present case, require the money to be set aside if interest is to cease to be payable. Moreover if a deposit in court, which is to all intents and purposes a tender, were necessary the rule of “tender being excused” would be unnecessary. There is some support for my view in the following passage in the judgment of the court in *Satyabadi Behara v. Harabati* (10) ((1907), I.L.R. 34 Cal. at p. 229):

“It appears to us, however, that the rule laid down by the Judicial Committee, which is substantially identical with the rule deducible from the provision of the Transfer of Property Act, may also be supported on the ground, that a tender, by itself, is not sufficient, unless the mortgagor shows, that from the time of the tender, the money was kept ready by him, and that no profit was afterwards made from it . . .”

Subject to what I have said I agree with the order proposed.

Duffus JA: I have had the advantage of reading the judgment of my Lord the President in draft form and this fully sets out the facts.

The substantive appeal is only against that part of the judgment which decided (i) that the plaintiff/appellant company was not entitled to an enquiry as to damages against the second respondents, the mortgagees, by reason of their refusal to allow the appellant company to redeem the mortgaged property and (ii) that part of the judgment which awarded the mortgagees interest on their mortgage as from May 25, 1961.

Both these decisions depend on whether the appellant company established as a fact that the mortgagees had refused to allow the company to redeem the mortgage, thus the right to damages, if it lies, depends on the wrongful refusal of the appellant’s right of redemption and the cessation of interest also depends on the appellant establishing such a refusal as would excuse its tendering of the full amount due under the mortgage, and thus come within the provisions of s. 84 of the Transfer of the Property Act.

As the learned President points out, the trial judge, in finding that the appellant company had failed to establish such facts as would excuse its omission to tender the amount due under the mortgage, based his findings on three grounds. First that the appellant had been too hasty in filing its suit on May 29, 1961 without waiting on the promised reply from the mortgagees to its advocate’s letter of May 25, 1961; secondly, that the appellant company had not shown its willingness to pay the full amount due as it had consistently denied its liability to do so; and thirdly that there had been no unequivocal refusal by the mortgagees to accept a proper tender.

I would here refer to the facts which have been admittedly established by the evidence and which relate to the mortgagees’ purported refusal to allow the appellant company to redeem.

The first stage occurred when the mortgagees brought their originating summons against the owners of the mortgaged property, the first respondents, seeking to obtain possession of the mortgage premises and the appellant company applied to be joined as a party and then the various affidavits exhibited were filed. The appellant company especially relies on that filed by Mr. S. M. Bhatt, one of the mortgagees, where he avers in para. 9, that he had been informed and verily believed that the appellant company never had any equity of redemption vested in it and further that any such equity would have been destroyed and extinguished because the mortgage loan became due and payable and a statutory

right of sale then became vested in the mortgagees. It is to be noted that at this stage there had been no offer to redeem and certainly no refusal by the mortgagee to accept payment of the amounts due under the mortgage.

The second stage followed when, apparently immediately after the court's decision ordering possession of the mortgage premises to be given to the mortgagees and refusing the appellant company's application to be joined as a party to that suit, the advocates of the appellant company, by the letter dated May 25, 1961, made a definite statement of their willingness to redeem the mortgages, and asked to be told the amount then due under the mortgages. This letter was, on the facts before the court, the first and only offer to redeem made before the action was filed. This letter required an answer by 4 p.m. that same day, some 15 minutes after it was received by the mortgagees' advocates. By his letter of May 26, 1961, the mortgagees' advocates replied and quite reasonably stated that they would further reply after taking instructions from their clients. Following on this the appellant company then filed this action on May 29, 1961 and there can be no doubt that it acted hastily and without giving the mortgagees a reasonable opportunity to reply, and it is also clear that at this stage that there had been no unequivocal refusal on the mortgagees' part to allow redemption.

The third stage concerns the trial, and as this trial has up to the present extended over a period of nearly six years and still continues and includes numerous interlocutory applications, and also includes two previous appeals to this court, these proceedings have been most prolific and voluminous. I would first refer to the plaint, and here the appellant company pleads in para. 14 that it has offered and still offers to repay the whole of the amount due under the mortgages, but the appellant company does not make or offer to make any payment in court and from the relief sought against the mortgagees, it is apparent that the company does not only seek to redeem the mortgages but it also seeks to establish a claim for damages caused by the mortgagees refusing to allow the company to redeem the mortgaged property, and also an enquiry as to the deterioration of the property and an account of all rents and profits received while the mortgagees were in possession. The plaint also seeks interest to be awarded at court rates on any amount that may be awarded under any of these heads. In the first of the mortgagees' statements of defence, dated July 28, 1961, the mortgagees repeated the allegations that the appellant company has no right to redeem the mortgaged property and they base their claim on legal grounds, even though quite untenable. In the appellant company's reply dated August 4, 1961, it then put forward the contention, which it persisted in right to the end of the trial, that the mortgagees were not entitled to add the cost of the first proceedings against the first respondent/owners to the amount payable under the mortgage. I would then refer to the second statement of defence filed by the mortgagees on March 19, 1964, in which they withdrew the contention that the appellant company were not entitled to redeem, but relied on the fact that no offer had been made to pay the full amount due under the mortgage and that there had been no tender or deposit in court. They also now pleaded that they would only allow the appellant company to redeem if the owners consented, or on an indemnity, or by an order of the court. In this statement the mortgagees also set out the various amounts that they had included since they had been in possession of the mortgage premises by order of the court and they claimed *inter alia* these amounts as also the costs of the former suit if redemption was to be ordered.

In the appellant company's reply dated March 24, 1964, the company contended that the mortgagees were not entitled to recover any of these amounts. There was yet a further amended statement of defence filed before the trial started and this statement of defence now contains a counterclaim. A further reply was also filed but shortly both maintain the same stand as previously taken and the appellant company still denied the mortgagees' right to recover any of the various

amounts that they claim as being due under the mortgage. Then evidence was also given by Mr. Kassam of the appellant company and Mr. Bhatt of the mortgagees, but this would not appear to take the matter much further except to show that there had in fact been no other offer to redeem the mortgages except those already referred to, and that the mortgagees' attitude at first was that the appellant company had no legal right to redeem but they later withdrew this but still desired a court order before allowing redemption to be made.

I am of the view that the learned judge was correct in his finding that there had been no unequivocal refusal to accept the proper tender. The mortgagees' first contention as contended in Mr. Bhatt's affidavit of May 23, 1961 and also in the first statement of the defence filed was to the effect that the appellant company had no legal right to redeem. I would in this respect refer here to the following extract from the judgment of the judicial committee delivered by Lord Buckmaster in the case of *Chalikani Venkatarayanim v. Zamindar of Tuni* (8):

"... Accepting this as the true reading, the meaning of the letter in their Lordships' mind is this, that the rights which the mortgagee had conferred upon him have vested in him the whole of the estate, and that consequently the mortgage is at an end. It was an erroneous view based upon invalid provisions in the deed, but it by no means followed from that that if in fact the tender had been made of the whole of the principal money and interest which was due up to that date, the mortgagee would not have accepted it, ... The fact is that this letter contains a reason why the tender is unnecessary, but the reason was wrong because the right to buy according to the terms which the mortgage deed contained was a right which was not enforceable in law. But it is on that hypothesis that they say there is no need for payment to be made. If this were not accepted as correct, there is nothing to relieve the appellants from making the tender. Their Lordships are unable to construe the letter as equivalent to any such clear release to the mortgagor of his obligation to tender the money as is required in order to justify him in not having presented it for receipt. ..."

I am of the view that these passages that I have quoted would apply to the facts in this case. The denial of the appellant company's right to redeem was based on legal, although admittedly entirely misconceived, grounds. When the appellant company through its advocates made the first offer to redeem contained in the letter of May 25, 1961, the mortgagees' advocates quite reasonably asked for time to obtain their clients' instructions. There was at this stage no refusal to allow redemption. The next step following just three days later was the filing of the action and this action not only seeks an order for redemption but also seeks damages for deterioration of the mortgaged premises although at that stage the mortgagees had apparently only been in possession under the order of court for some four days, but it also seeks damages for the mortgagees' refusal to allow the appellant company to redeem. In these circumstances it does appear that the appellant company's offer to pay what was due to the mortgagees would depend also on their claim for an enquiry as to any deterioration of the premises and as to any damage that was suffered due to the mortgagees' alleged refusal to allow redemption. In my view the mortgagees' defence at this stage in so far as it denied the appellant company's right to redeem was based purely on legal grounds and cannot be said to have been an unequivocal refusal to accept an offer for redemption. Even in the first statement of defence the mortgagees pleaded in the alternative asking for accounts to be taken if redemption was ordered by the court.

In all their defences the mortgagees claimed the costs of the former suit and in the last two statements of defence they also claimed in detail various expenses

incurred on the mortgaged property since they had taken possession under the order of the court. On this point I would mention here that the trial judge decided that the costs of that suit and the other expenses which the mortgagees claimed as arising since they had taken possession amounting to some Shs. 6,079/- was properly due and payable by the appellant company on redemption, and there has been no appeal against this part of the judgment. The appellant company consistently contested its liability to pay the costs, and also its liability to pay the other expenses.

On these facts I am of the view that the learned judge was justified in finding that the appellant company had failed to show that it was at any time willing to pay the full amount due and payable under the mortgage and further that there had never been an unequivocal refusal by the mortgagees to accept a proper tender. I agree also that the appellant company acted with undue haste in filing this action and without allowing the mortgagees a reasonable time for replying to its letter of May 25, 1961.

There is also the fact that the appellant company failed to either deposit the amount due in court or to "set this aside". I agree with the judgment of the learned President on this point except that I cannot agree that it is necessary to deposit this amount in court. As Farrell, J., said in his judgment, a tender necessarily implies not only the actual tender but a continued ability and willingness to pay. The learned Vice-President has dealt with this aspect in his judgment, and I agree that the rule of equity as derived from the English cases must apply here, and that the mortgagor must either deposit the amount in court, as he can do under s. 83 of the Transfer of Property Act, or else he must satisfy the court that he has set this amount aside, and not benefited from its use. A prudent mortgagor would deposit the amount in court as otherwise he would have to satisfy the court that he has actually set aside the amount, as for example by a specific deposit in a bank, so that as the learned President has stated the mortgagee is in a position where he can "at any moment and beyond question" be repaid the amount due. In this case the appellant company has not proved such a setting aside. This is another reason why appellant company cannot succeed on its claim for a cessation of interest.

It appears to me therefore that the appellant company has not established as a fact that the mortgagees ever improperly refused to allow it to redeem the mortgaged property, and further that it has not established such facts as would release it from its duty to tender the amounts due under the mortgage as required by s. 84 of the Transfer of Property Act.

It follows therefore that the appeal cannot succeed on either of these two grounds of appeal and I do not consider it necessary to deal with the question as to whether a mortgagor or chargee can recover any loss by way of damages or compensation arising out of a mortgagees' wrongful refusal to allow redemption. I agree that the appeal be dismissed.

I entirely agree with the judgment of the learned President dismissing the cross-appeal but giving liberty for an application to be made to the High Court for a reconsideration of the order for costs if the appellant company does not redeem and also his order giving effect to the amendment of the decree which both counsels agreed on. I also agree with his order as to the costs of this appeal.

Appeal and cross-appeal dismissed with costs.

For the appellants:

J. K. Winayak and Co., Nairobi

R. E. Megarry, Q.C. (of the English Bar), with J. K. Winayak and Z. Nimji

For the first respondents:

E. P. Nowrojee, Nairobi

E. P. Nowrojee

For the second respondents:

Khanna and Co., Nairobi

E. F. N. Gratiaen, Q.C. (of the English Bar) and *D. N. Khanna*

Harilal & Co and another v The Standard Bank Ltd [1967] 1 EA 512 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	5 April 1967
Case Number:	41/1966 (88)
Before:	Sir Charles Newbold P, Sir Clement de Lestang VP and Duffus JA
Sourced by:	LawAfrica
Appeal from:	The High Court of Kenya – Sherrin, J.

[1] *Bank – Interest – Compound interest – Whether bank may, by trade usage, charge compound interest on overdrawn mercantile account – When account ceases to be mercantile.*

[2] *Bank – Interest – Rate of – Whether bank by trade usage or acquiescence can change rate of interest charged to customer without customer’s consent – What rate should be implied after account closed by bank on filing suit.*

[3] *Contract – Trade usage – Proof of and requirements for enforceable trade usage – Effect when only one party aware of usage – Usage must be pleaded – Bank charging customer compound interest and varying rate of interest without customer’s consent – Whether judicial notice can be taken out of trade usage – Evidence Act, s. 60 (K.)*

[4] *Guarantee – Discharge of guarantor by variation made in arrangement between creditor and principal debtor without guarantor’s consent – Bank opening No. 2 account for principal debtor.*

[5] *Practice – Pleading – Trade usage – Must be pleaded to be relied upon.*

Editor’s Summary

A Nairobi merchant in 1955 was granted overdraft facilities by the respondent bank and the repayment of the overdraft was guaranteed by the second appellant, his wife, who also gave a mortgage as security. No formal agreement was drawn up and there was no specific agreement as to the rate of interest to be charged although the monthly statements rendered to the first appellant showed the amount, but not the rate, of interest debited to him each month. The interest in fact charged was compound interest calculated

on daily balances with monthly rests and the rate was varied by the bank from time to time without any notification to the merchant but was originally 7 per cent. per annum. In 1962 the bank was dissatisfied with the way in which the account was operated and required the merchant to open a No. 2 account which was always to be in credit, and to transfer £90 monthly from the No. 2 account to the original account. Except for those monthly credits, the original account was not to be operated. No notice of this arrangement was given to the guarantor. In 1964, the bank called upon the merchant to repay the sum due on the overdraft and informed him that until repayment the overdraft carried interest at the rate of 9 1/2 per cent. The merchant on querying the rate of interest discovered that the rate had been varied on a number of occasions without his being notified. In 1965, the bank called upon the guarantor to pay the amount by then due on the overdraft and informed the guarantor that until repayment the overdraft now carried interest at the rate of 10 per cent. The money was not repaid, and the bank sued both the merchant and the guarantor for repayment of the sum due, and claimed enforcement of the security given in respect of the overdraft. The bank alleged that there was an express or implied agreement on behalf of the merchant to pay interest at the current bank rate on the overdraft and further, to pay compound interest. The merchant denied this allegation; and claimed that the rate of interest agreed was 7 per cent. and only simple interest was to be charged. The guarantor claimed that she was discharged from liability by the variation of the terms of the original agreement without

her consent. The lower court found that although no trade usage had been proved by the bank, the merchant had agreed that the bank should make the charges normally made to a person of his financial status and he was estopped from denying the correctness of those charges. The court gave judgment for the bank against the merchant and the guarantor jointly and severally. Both appealed against the finding that the bank had the right to vary the interest as it did and against the finding that compound interest was payable. The guarantor also appealed against the finding that the variation of the agreement did not discharge the guarantee. The bank cross-appealed against the finding that no commercial usage was implied as a term of the contract.

Held –

- (i) (per Curiam) the bank had proved a trade usage to charge on overdrawn mercantile accounts compound interest calculated on daily balances with monthly rests;
- (ii) (per De Lestang, V.-P.) in the circumstances the merchant had also clearly acquiesced in the practice of the bank in charging compound interest and must be taken to have impliedly agreed to it;
- (iii) (per Curiam) the original account continued to be a current mercantile account (notwithstanding the opening of the No. 2 account) until the bank closed it to bring suit, when the bank's right to charge compound interest ceased; and was replaced by an implied agreement to pay simple interest at 7 per cent. per annum;
- (iv) (per Newbold, P., and De Lestang, V.-P.) the bank had failed to plead or to prove a trade usage giving it the right to vary the rate of interest charged without the merchant's consent; and the practice of the bank as put in evidence could not have amounted to a trade usage in any event, being uncertain, unreasonable and contrary to a fundamental principle of contract law;
- (v) (per Newbold, P. and De Lestang, V.-P., Duffus, J.A., dissenting) the bank had not shown that the merchant agreed, expressly or impliedly, to any variation in the rate of interest, which therefore remained at 7 per cent. per annum;
- (vi) (per Curiam) the opening of the No. 2 account without the consent of the guarantor discharged the guarantor from all liability under the guarantee (the effect of this variation on antecedent transactions not having been raised);
- (vii) (per Duffus, J.A., obiter) it is possible that a usage, if properly pleaded and proved, could be established to show that there would be a variation of interest paid by or to a bank in accordance with a change of a recognised and established bank rate.

Observations by Newbold, P., as to when and how a course of dealing can be proved to have become an enforceable trade usage.

Appeal allowed, cross-appeal dismissed.

Cases referred to in judgment:

- (1) *Crosskill v. Bower* (1863), 32 Beav. 86; 55 E.R. 34.
- (2) *National Bank of Nigeria Ltd. v. Awolesi*, [1964] 1 W.L.R. 1311.
- (3) *Holme v. Brunskill* (1878), 3 Q.B.D. 495.

C.A.V.

The following judgments were read:

Judgment

Sir Charles Newbold P: This appeal raises an important question for banks and the commercial community generally. Broadly, the question is whether a bank in East Africa is entitled by an alleged trade usage to vary the

charges it imposes on its customers without the prior consent of, or, indeed, prior notification to, the customers of the variation. Broadly, the answer to that question is quite clearly in the negative; for if any such usage were in fact proved then it would have no effect in law because such a usage would be contrary to the law of contract, unreasonable, oppressive and unjust.

In 1955 the first appellant (hereinafter referred to as the merchant) had a current account with the Standard Bank Ltd. (hereinafter referred to as the bank). The merchant desired to obtain overdraft facilities with a limit of £2,000. Arrangements to that effect were duly made and the merchant's wife (who is the second appellant and is hereinafter referred to as the guarantor) deposited the title deeds of certain premises as security for the overdraft facilities. The bank, for one reason or another, was unable to bring direct evidence of these arrangements and the merchant's evidence that there was a specific agreement that the rate of interest should be 7 per cent. and that he was not told it would be compound interest was not accepted by the trial judge. As a result of these arrangements the merchant enjoyed overdraft facilities and received thereafter monthly statements which showed interest on the overdraft debited to him every month. It was accepted by counsel for the respondent that it would have been impracticable for the merchant, merely from the interest figures shown on the monthly statements, to have ascertained the rate of interest. In 1958 the limit of the overdraft was increased and additional security was given and in 1959 the guarantor gave a guarantee of her husband's account. The material parts of the guarantee were as follows:

"In consideration of (the bank) allowing (the merchant) . . . certain banking facilities, i.e. opening an account with, making advances, or otherwise giving credit, subject to the conditions hereinafter mentioned I (the guarantor) do hereby guarantee and bind myself jointly and severally, for the repayment on demand of all sum or sums of money which the said debtor . . . may now or from time to time hereafter owe or be indebted to the said bank . . . It is agreed and declared that it shall always be in the discretion of the said bank as to the extent, nature and duration of the facilities to be allowed the said debtor . . . that all demands or acknowledgments of indebtedness to the said debtor . . . shall be binding on me, that the said bank shall be at liberty without affecting its rights hereunder, to release securities and to give time to, or compound or make any other arrangements with the said debtor . . ."

In 1962 the bank was dissatisfied with the way in which the account was operated and required the merchant to open a No. 2 account, which should always be in credit, and to transfer monthly from the No. 2 account to the original account £90. Except for these monthly credits the original account was not to be operated. No notice of this arrangement was given to the guarantor. In 1964 the bank called upon the merchant to pay the sum of Shs. 95,724/45, which was the amount due on the overdraft on the original account and the letter of demand contained the statement that that sum carried interest at 9 1/2 per cent. per annum until payment. The merchant challenged the rate of interest and on investigation it was discovered that the bank had on a number of occasions varied the rate of interest charged to the merchant without notifying him. In January, 1965, the bank called upon the guarantor to pay the sum of Shs. 97,503/61, which was the amount due on the overdraft on the original account, and the letter of demand contained the statement that that sum carried interest at 10 per cent. per annum until payment. The merchant refused to pay the sum claimed by the bank as it included interest inconsistent with what the merchant alleged had been agreed. The bank sued the merchant claiming repayment of the sum of Shs. 100,819/11, being the amount due on May 26, 1965,

on the original account “in respect of the aforesaid advances accrued interest thereon and certain other charges”, and also 10 per cent. on that sum. The bank did not give the merchant credit for the relatively small sum to his credit on the No. 2 account. The bank also sued the guarantor in respect of the same amount. There was also a claim against both the merchant and the guarantor for the enforcement of the securities given in respect of the overdraft. The claim in para. 10 of the plaint in relation to the interest was stated to be a claim in respect of “agreed interest”, but the later paragraphs refer to “accrued interest”. The defence of the merchant, which admitted liability except in so far as the amount claimed included interest in excess of what was alleged to be the agreed interest, was that in breach of the agreement between the parties the bank had, without the knowledge, consent or agreement of the merchant charged varying rates of compound interest, which rates had, as from October, 1960, reached 9 1/2 per cent. and from July, 1964, 10 per cent., and the merchant sought, in default of agreement, an account of the amount due. The defence of the guarantor was that, without her knowledge or consent, the bank altered the terms of the overdraft facilities which she had guaranteed by requiring the merchant to open a No. 2 account and cease to operate the original account. The bank in its reply to the defence of the merchant claimed that there had been either an express or implied agreement “to pay interest at the current bank rates on so much of the overdraft as should be outstanding from time to time; and further, to pay compound interest”, and it also claimed that it was “the practice, usage and custom by the bankers in East Africa to charge compound interest on overdraft amounts and furthermore that the rates of interest charged by the plaintiff bank at all material times are fair and reasonable.” In its reply to the defence of the guarantor the bank claimed that the changed arrangement had not prejudiced her. Questions of estoppel arising from the receipt by the merchant of the monthly statements and his signature of a certificate setting out the amount due on a certain date in 1960 were also raised originally but abandoned on appeal, as it was quite clear that the bank, in charging the interest in the way in which it had, did not do so by reason of any declaration or conduct of the merchant, but was asserting a general right.

Witnesses from what were described as the three main banks, that is, the defendant bank, Barclays Bank and National and Grindlay’s Bank, gave evidence on behalf of the bank but no witness who could be said to represent the commercial community was called. The claims made by the bank witnesses were broad in the extreme and were of a nature which were not only astounding but such as I never anticipated would be put forward by a reputable institution. For instance, an employee of the bank said:

“Rates go by judgment without consultation with customer . . . rates of interest are at discretion of bank concerned. Customer has no say . . . There are no maximum rates. The customer is at mercy of the bank. He is not notified but will receive his statements . . . Interest is always at unfettered discretion of bank.”

In effect this was a claim that the bank by a trade usage was unilaterally entitled to set aside the law of contract in that it claimed the right without the prior agreement of the other party to a contract, or, indeed, without even prior notification to that other party, to vary the terms of the contract.

The judge held that the bank had not proved any custom which had become a term of the contract but he held that the overdraft was arranged on the basis that the bank would make the charges usually made to the customer of the financial status of the merchant and that the merchant was stopped from denying the correctness of the charges. He also held that the guarantee had not been vitiated by the fact that the bank had caused the merchant to open a

No. 2 account. The judge gave judgment in favour of the bank against the merchant and the guarantor jointly and severally. From this judgment the merchant and the guarantor appealed and the bank cross-appealed against the finding that no usage had become a term of the contract. The main issues on the merchant's appeal and the cross-appeal were first, whether the bank could charge compound interest on the overdraft with monthly rests; and, secondly, whether the bank could vary the rate of interest charged without the prior agreement of the merchant. The main issue on the appeal of the guarantor was whether the alterations made without the knowledge of the guarantor to the terms of the overdraft resultant from the opening of the No. 2 account had discharged the guarantor from liability under the guarantee.

The general practice adopted by the banks in East Africa in relation to overdrafts as it appeared from the evidence of the witnesses for the bank is as follows. The banks from time to time agree what is known as a minimum rate of interest. This minimum rate would normally be notified generally to the public. The minimum rate of interest would be charged to very few customers. The vast majority of persons having overdrafts at the bank, quite irrespective of the security given for the overdraft, would be charged rates of interest which would be 1 per cent. or 1 1/2 per cent. above that described as the minimum rate. The precise rate charged would depend on the facts of each case and if there was any real risk attached to the account or if it was operated in an unsatisfactory manner it was within the discretion of the bank to increase the rate of interest charged. The interest was charged on the daily balances with monthly rests, that is, the interest was compounded monthly. Save in a few cases the bank does not notify the customer when it changes the rate of interest charged to him on his own account. The reason (which appears to me singularly unconvincing) for this lack of notification was said to be the great inconvenience that would result if the bank were required to notify and obtain the prior consent of the customer to any change in the rate of interest. This practice had apparently been in existence for about ten years and it was claimed that it had acquired the character of a trade usage which entitled the banks to make these charges without the prior agreement thereto of the customer.

Before turning to consider the issues raised on this appeal it is necessary to consider the law of East Africa in relation to a trade usage. A trade usage may be described as a particular course of dealing between parties who are in a business relationship, which course of dealing is so generally known to all persons who normally enter into that relationship that they must be presumed to have intended to adopt that course of dealing and to have incorporated it into their contractual relationship unless by agreement it is expressly or impliedly excluded. Before a course of dealing can acquire the character of a trade usage it must, first, be so well-known to the persons who would be affected by it that any such person when entering into a contract of a nature affected by the usage must be taken to have intended to be bound by it; secondly, be certain in the sense that the position of each of the parties affected by it is capable of ascertainment and does not depend on the whim of the other party; thirdly, be reasonable, that is, that the course of dealing is such that reasonable men would adopt it in the circumstances of the case; and, finally, be such as is not contrary to legislation or to some fundamental principle of law. A trade usage may be proved by calling witnesses, whose evidence must be clear, convincing and consistent, that the usage exists as a fact and is well-known and has been acted on generally by persons affected by it. A usage is not proved merely by the evidence of persons who benefit from it unsupported by other evidence. Where a particular usage has acquired sufficient general or local notoriety judicial notice may be taken of it under s. 60 of the Evidence Act. Where a trade usage is proved to exist then, unless expressly or impliedly excluded, it is presumed to

have been incorporated into the contract between the parties and this is so even though one of the parties may in fact be unaware of the usage so long as the circumstances are such that he ought to have been aware of it.

With these principles in mind I turn to consider the first main issue raised on the merchant's appeal and the cross-appeal, that is whether the bank can charge compound interest with monthly rests. The pleadings of the bank are by no means satisfactory. It appears from them that the claim to compound interest rests upon the usage of the bank, though there is also a very indefinite suggestion of some sort of agreement. As I have said, no question of estoppel now arises. I consider that the pleadings as they stand would not justify consideration of a case of an implied agreement to be inferred from a course of conduct followed over a number of years; and certainly no express agreement has been proved by the bank. The claim to compound interest, if it is to succeed, must therefore rest upon the trade usage. The trial judge has found that no custom (he must here be using the word custom as meaning trade usage) has been proved as a term of the contract, but as he seems to base his judgment in favour of the bank to some extent at least on the account having followed "the normal course of business of banks" I think it open to this court to examine the factual position afresh. I may say at once that the evidence for the bank, confined as it is to employees of the banks, would not be sufficient of itself to prove a trade usage in favour of the bank. It is, however, generally notorious that banks charge compound interest on overdrawn mercantile accounts and I consider that the notoriety of that general usage is such that judicial notice can be taken of it. It appears from the witnesses for the bank, and in this respect there is no disagreement or uncertainty in their evidence, that the practice in East Africa in respect of all such overdrafts is to calculate the interest on the daily balances and the total of the amounts so arrived at is debited at monthly rests to the account. It is in this respect, that is, in charging compound interest with monthly rests, that the practice in East Africa differs from that, for example, in the United Kingdom where the rests are either annual or six-monthly. The result of monthly rests is to increase the burden on the borrower, but such a practice appears to me to be certain and, despite the dislike of the law of compound interest, not contrary either to any legislation or to any fundamental principle of law. The practice also is reasonable in the sense that reasonable men might well adopt it. The only question therefore is whether the notoriety of the practice has been sufficiently proved. With some hesitancy I think that it has. There is not only the evidence of the employees of the bank; there is also the evidence of the merchant that for nearly ten years he had received accounts in a form which showed that interest was debited with monthly rests and at no time had he cavilled at this practice. The inference I would draw from this is that if this practice had not been well-known to the commercial community in East Africa it would have been challenged very early on by the merchant. For these reasons, though as I say with some hesitancy having regard to the unsatisfactory nature of the evidence for the bank, I consider that the bank has proved a trade usage to charge on overdrawn mercantile accounts compound interest calculated on daily balances with monthly rests.

Turning now to the second main issue of the merchant's appeal and the cross-appeal, that is, whether the bank can vary the rate of interest charged to the merchant without his prior agreement, the first thing to be noted is that nowhere in the pleadings is it alleged that there is any trade usage which would entitle the bank to do what it did in this case. Where a claim is based upon a trade usage then the pleadings should quite clearly aver not only that fact but the precise nature of the trade usage on which the claim is founded. This was not done by the bank and as a judgment should be related to the pleadings the bank cannot succeed on a claim which is not pleaded. As, however, the matter

was very fully and ably argued by counsel for the respondent and counsel for the first and second appellants, I think I should state that not only was the evidence for the bank confined as it was to bank employees, insufficient to prove a trade usage, but also the practice, as disclosed by the evidence of those witnesses, was such that it could not possibly have proved any trade usage enforceable by the courts as the practice did not have the qualities necessary for a trade usage. It was uncertain in the sense that the amount of interest charged to any customer might very well vary from bank to bank and within any bank might well vary with the employee of the bank determining the rate of interest to be charged. A practice cannot achieve the status of a trade usage unless it is consistent and not dependent upon the whim of an individual. Further, the practice was wholly unreasonable, as I cannot conceive of any reasonable and fair-minded man agreeing, when he borrows money, to a course of dealing in which the lender, without the prior agreement of the borrower, might alter at his will and without limit the rate of interest to be charged. It is of course always open to a lender to tell the borrower before the contract is made that he proposes to charge a particular rate of interest or that the rate of interest will be charged at a specific figure in relation to some other specified and announced figure. It will then be for the borrower to decide whether to enter into the contract containing those terms. Having entered into the contract, however, it is not open to a lender to vary the terms of the contract without the agreement of the other party. It is notorious that in the absence of agreement an overdraft is repayable on demand. If a bank considers that the agreed rate of interest charged on an overdraft is not sufficient to cover the existing risk it is open to the bank to call for the repayment of the amount outstanding and then to indicate that it proposes to continue the overdraft at a higher rate of interest if the customer so agrees. In such an event a new agreement is entered into at a new rate of interest. If the customer does not agree, then the bank cannot unilaterally change the rate of interest; all that it can do is to require the repayment of the overdraft and if this is not done take any necessary action to achieve repayment, such as suing or the realisation of any security. Finally, the practice claimed by the bank is contrary to the fundamental principle of the law of contract that persons who enter into a contract are bound by its terms and cannot unilaterally vary those terms.

From the pleadings, especially the reply, it appears that the bank bases its claim to vary the rate of interest as it did upon a rather indefinite agreement "to pay interest at the current bank rates ". No specific agreement has been proved, and, indeed, the evidence does not disclose what is meant by "current bank rates ". Before the courts will imply an agreement from a course of dealing between the parties to a contract it must be clear that each of those parties knew the precise nature of that course of dealing and by accepting it impliedly agreed to it. Nowhere in the evidence in this case does it appear that the merchant knew that the rates of interest were being varied at the whim of the bank; and it has been accepted that the mere receipt of the monthly statements showing interest debited monthly would not have disclosed such a position to the merchant. Accordingly I am satisfied that the bank has not succeeded in showing that the merchant agreed either expressly or impliedly to any variation in the rate of interest. It is, however, clear that both parties were aware that the original rate was 7 per cent. per annum and both parties agreed to that. Accordingly as the bank has not established any right to change that figure that rate of interest must continue to be the rate of interest which the bank could claim and the merchant must pay until the account is closed.

For the reasons I have given, in my opinion the bank is entitled to recover the compound interest at 7 per cent. per annum with monthly rests on the overdrawn account so long as it continued to be a current mercantile account,

as it is only in respect of such an account that a trade usage to charge compound interest has been established. It is possible that when the No. 2 account was opened the original account ceased to be a current mercantile account but with considerable hesitancy I shall assume that the original account continued to be a current mercantile account until May 26, 1965, when the account as a current mercantile account was closed and the bank brought suit to recover the amount standing to the debit of the account on that date. The moment an account ceases to be a current mercantile account then the right of a banker by trade usage to charge compound interest also ceases. (See *Crosskill v. Bower* (1).) A right to interest would normally only arise out of agreement and while there is in this case no specific agreement between the parties that the merchant should continue to pay simple interest on the amount owing by him after the account has been closed, nevertheless I consider that such an agreement must be implied in order to give business efficacy to the course of dealing between the banks and its customers. The rate of interest to be implied would, of course, depend upon the circumstances of the case and in this case I consider that that rate should be the rate of 7 per cent. per annum.

Turning now to consider the appeal of the guarantor, the issue is whether the bank by altering without the consent of the guarantor the terms upon which it extended overdraft facilities to the merchant had discharged the guarantor from liability under her guarantee. As the guarantee was entered into in 1959 the provisions of s. 133 of the Indian Contract Act as applied to Kenya continue to apply to the guarantee by virtue of the provisions of s. 4 of the Law of Contract Act (Cap. 23). Section 133 reads as follows:

“133. Any variance, made without the surety’s consent in the terms of the contract between the principal and the creditor, discharges the surety as to transactions subsequent to the variance.”

It appears to be agreed that this section merely sets out the common law of England on the position, but I should wish to reserve my views as to the effect of the variance on transactions prior to the variance. Counsel for the appellants has referred to the case of *National Bank of Nigeria Ltd. v. Awolesi* (2), the facts of which are remarkably similar to the facts of this case. In that case the Privy Council held that the act of the banker in requiring the second account to be opened without the consent of the guarantor discharged the guarantor from his liability. Reference was made to *Holme v. Brunskill* (3), where Cotton, L.J., said (3 Q.B.D. at p. 505):

“The true rule in my opinion is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet, that if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the court will not, in an action against the surety, go into an inquiry as to the effect of the alteration.”

Here the guarantor guaranteed her husband’s current mercantile overdraft account into which he was paying sums and out of which he was drawing sums. Without the knowledge or consent of the guarantor the bank in effect closed that account and prevented the merchant from depositing to the credit of that account sums which would normally have been so deposited. On the face of it that created a material alteration in the course of dealing between the bank and the merchant and on the face of it such a variation would be prejudicial to the surety. It is urged that the amount by which the guarantor was prejudiced is

trifling as in the end it amounted only to something under £20. This may be so, nevertheless it is not open to the bank without the consent of the guarantor to alter the terms of its dealing with the merchant and at the same time to require the guarantor to be bound by a guarantee relating to a different course of dealing. The fact that the bank itself treated the original account as something quite separate from the No. 2 account is shown by the fact that the amount which it required the guarantor to pay is the amount of the original account and not that amount reduced by the credits standing to the No. 2 account. It is also urged that the words "or make any other arrangements with the said debtor" in the guarantee distinguished this case from the *Awolesi* (2) case in which those words did not appear in the guarantee, though very similar words did. I do not accept the submission that those words would entitle the bank to change the whole nature of the account which the guarantor guaranteed and nevertheless impose upon the guarantor a liability for a debt arising in circumstances different from those which were in the contemplation of the parties at the time the guarantee was given. For these reasons in my view the guarantor is discharged from her liability under the guarantee in respect of all transactions as no submissions have been made, nor was the case at any time conducted on the basis, that any discharge would be in respect only of subsequent transactions.

The terms of the decree of the High Court in respect of the premises the title deeds of which were deposited with the bank have not been challenged on the appeal, save in so far as the amount of the charge and the rate of interest payable on that amount are concerned. Accordingly, I would, in the event of the bank, the merchant and the guarantor being unable to agree the amount of the debt owed by the merchant to the bank in accordance with the decision of this court within fourteen days of such decision, order an enquiry before the Registrar of the High Court to determine that amount, and I would declare that the premises stand charged with the payment of the amount so due and make an order for sale, with liberty to the bank to bid, in the event of the amount so due not being paid within thirty days of the date of the agreement or of the Registrar's certificate, as the case may be.

I would, for the reasons I have given, allow the appeal of the merchant and direct that the amount owed by him to the bank is to be determined by allowing the bank to charge compound interest on the overdrawn mercantile account at the rate of seven per cent. per annum on the daily balances with monthly rests until May 26, 1965, and thereafter on the amount due on that date together with interest at the rate of seven per cent. per annum simple interest. I would allow the bank as against the merchant one half of the taxed costs of the suit in the High Court. I would allow the merchant one half the costs of this appeal together with a certificate for two counsel and I would direct that the costs of the cross-appeal be taxed as part of the costs of the appeal. I would allow the appeal of the guarantor and direct that she is not liable to the bank under her guarantee, and thus has no personal liability to the bank for the amount owed by the merchant. As the guarantor was a necessary party to the suit by reason of the deposit of the title deeds of her property with the bank as security for the merchant's overdraft I would make no order for costs as far as she is concerned on the suit before the High Court. I would allow the guarantor the costs of this appeal with a certificate for two counsel and direct that the costs of the cross-appeal be taxed as part of the costs of the appeal. I would set aside the judgment and decree giving effect to the order of this court. I would give leave to apply to a single judge of this court for orders in the event of any difficulty being experienced in the working out of the terms of this order.

As Sir Clement De Lestang, V.-P., agrees it is so ordered.

Sir Clement De Lestang VP: I have had the advantage of reading in advance the judgment of my Lord the President with which I respectfully

agree and were it not for the fact that the court is not in full agreement on every aspect of this case I would not wish to add anything. It is however advisable that I should express my views on the matter on which there is a divergence of opinion and I shall do so as briefly as I can.

Leaving aside the question of estoppel which is no longer a live issue in this appeal the bank's case on the pleadings was:

- (1) that the merchant agreed either expressly or by implication to pay both interest at "the current bank rates " and compound interest; the expression "current bank rates " is not defined in the pleadings but appears in the light of the evidence to mean a rate varying between one per cent. and one and a half per cent. or even more over the minimum bank rate for the time being at the discretion of the bank having regard to the circumstances of the particular account;
- (2) Alternatively that it is the usage of bankers in East Africa to charge compound interest on overdrafts and that such a term must be imported into all agreements for overdrafts unless expressly or impliedly excluded and "furthermore that the rates of interest charged by the plaintiff bank, at all material times, are fair and reasonable. "

The merchant's defence was that it was agreed that he should pay seven per cent. simple interest only at all times. The learned trial judge rejected the merchant's version of the agreement and found:

- (1) That the "overdraft was arranged on the basis that the bank would make charges usually made to a customer of his financial status " and that the bank was clearly entitled to charge interest at the rate it did.
- (2) That "no custom has been proved as a term of the contract " whatever that may mean.

He made no mention of the claim in so far as it purports to be founded on the rates being fair and reasonable. I say 'purports' advisedly because it is not at all clear that such a claim was properly pleaded, or if so pleaded, not indeed abandoned at the trial. Clearly it was not argued in the court below and the bank's case there appears to have been that although the initial rate of interest was agreed at seven per cent. the bank was entitled, in accordance with the banking practice in East Africa, to vary the rate of interest from time to time without the prior consent of or prior notification to the customers of such variation and to charge compound interest on a monthly basis, a practice which it alleged was binding on the merchant by reason of his acquiescence thereof over a period of years.

In this court counsel for the respondent no longer relied on any express or implied agreement to pay interest at the "current bank rates " and frankly conceded that the evidence could not support such a case. He still relied however:

- (a) on an implied agreement to pay compound interest as charged;
- (b) on an alleged usage of banks in East Africa to charge interest at "the current bank rates " as well as compound interest, and
- (c) in default of such a usage on the universal custom of bankers to charge interest at fair and reasonable rates where there is no express or implied agreement.

I pause here to point out that a usage to charge interest at "the current bank rates " was not pleaded and for the reasons given by my Lord the President, with which I respectfully agree, neither was such a usage established. Therefore, leaving aside for the moment the question of compound interest, the only matter remaining for consideration on this aspect of the appeal and counter-appeal is the contention relating to fair and reasonable rate of interest as in (c) above.

In my view there is no room in this appeal for such a contention. The bank is only entitled to fair and reasonable interest when there is no express or implied agreement as to the rate of interest payable. This is not the case here. In the present case the representative of the bank who testified at the trial admitted that the rate initially agreed and applied for several months was seven per cent. This is what he said:

“In the present case there was an agreement that at the time overdraft was agreed interest would be at seven per cent. That is what defendant has said. . . . I am willing to accept it. The agreement in first instance was that initially – rate was seven per cent. “

Once a rate of interest is agreed upon even though it is not intended to apply for ever but only “initially “ it cannot, in my view, in the absence of usage or prior agreement be altered save by a new agreement express or implied. It is abundantly clear in the present case that the merchant did not agree expressly to any variation in the rate of interest and it is now conceded that he did not also acquiesce in such variation. That being the position the bank was not in my view entitled to charge a rate in excess of seven per cent.

As regards compound interest the position is different. Every merchant, if not everybody who has dealings with a bank, must know that it is the universal practice of banks to charge compound interest on overdrafts. How such interest is chargeable whether with monthly, half yearly or yearly rests is determined by custom or usage or the acquiescence of the customer. In the present case the merchant knew or ought to have known over a period of ten years that the interest was compounded monthly and he never protested against this system probably because he knew that it was the practice of the banks to do so in East Africa. In these circumstances he clearly acquiesced in the practice and must be taken to have impliedly agreed to it. Moreover as my Lord has shown this practice has the status of a usage in East Africa and as such must be imported into all overdraft agreements unless excluded expressly or by implication.

I agree with the order proposed by my Lord the President.

Duffus JA: The facts in this case are fully set out in the judgment of my Lord the President which I have had the advantage of reading in draft form.

I would first consider the case of the first appellant, Harilal Khimji Shah. It is admitted that this appellant borrowed money from the respondent bank by means of an overdraft on his current bank account over a period of some ten years. It is also agreed that the first appellant was to pay interest on this amount. The respondent bank brought this action in June, 1965, claiming to recover the balance then due on the current account. In this account interest was calculated on the basis of compound interest with monthly rests and the rate of interest varied according to what was “the current bank rate “ at the particular time. The defence pleaded that there was no agreement to pay compound interest and further that there was an express agreement to pay a fixed rate of interest at seven per cent. per annum simple interest on the amount of the overdraft. I agree with the judgment of the learned President on the question of compound interest, and I also consider that the bank has proved a trade usage to charge compound interest calculated on daily balances with monthly rests on an overdrawn mercantile account such as the account in this case.

I, however, find the question as to the rate of interest chargeable on the overdraft to be much more difficult and complex problem. On this question the learned trial judge found as follows:

“I do not believe the evidence of the first defendant as to what the contract was and I believe that the overdraft was arranged on the basis that the

bank would make the charges usually made to a customer of his financial status.”

The trial judge therefore rejected the defence that the overdraft should be on a fixed and permanent rate of interest at the rate of seven per cent. per annum. I am of the view that the judge was, on the evidence here, justified in his rejection of the first appellant’s case on this point. I would here refer to the letter from the first appellant’s advocates dated November 27, 1964, written on the instructions of the first appellant by which the advocates in reply to a letter of demand from the bank’s solicitors wrote enquiring what was the rate of interest debited to their client as from January 1, 1961 and stating that the interest had been the subject of dispute between the bank and their client for some time past. This letter never stated that the interest was payable at the rate of seven per cent. but instead stated that their client on “being satisfied as to the reasonableness of interest claimed “ would arrange to settle the balance due. There was further correspondence and another letter from the first appellant’s advocates dated December 29, 1964 which complained of the first appellant being charged an unusual rate of interest and here again, no mention was made of there being a fixed rate of interest of seven per cent. per annum.

The question then arose as to whether the trial judge was justified in his finding and what he really meant when he stated “the overdraft was arranged on the basis that the bank would make the charges usually made to a customer of his financial status “. The whole of this aspect of the case depends on what was the agreement expressed or implied between the parties as to the rate of interest payable. The bank has not established that there was any express agreement and the trial court has, in my view, correctly rejected the defence that there was an express agreement to pay interest at the rate of seven per cent. The respondent bank pleaded in its reply to the first appellant’s defence, inter alia, that there was an implied agreement to pay interest at the “current bank rate “, and later pleaded that the rates of interest charged by the bank were at all material times fair and reasonable. In his submission, counsel for the respondent, after conceding that the rate of interest claimed at nine and a half per cent. and ten per cent. would after January 3, 1963 have to be reduced, claimed that the bank was entitled to recover at the rate of interest claimed on three alternative grounds:

- (a) usage, or
- (b) by virtue of an implied agreement in that the first appellant acquiesced in the payment of a fair and reasonable rate of interest over the years, or
- (c) if there was no agreement express or implied, then the court should imply an agreement in this case for the payment of interest at fair and reasonable rates, and accept the evidence called by the bank as establishing that the rates actually charged were fair and reasonable.

On the question of usage, as my Lord the President points out, this has not been pleaded, though I should think it possible that a usage if properly pleaded and proved, could be established to show that there would be a variation of interest paid by or to a bank in accordance with a change of a recognised and established bank rate. This is not, however, a matter that can be considered here.

In his judgment my Lord the President has based his findings on this point on the fact that it has been clearly established, as undoubtedly it has been, that the original rate of interest was agreed at the rate of seven per cent. per annum and that the banks have not established any right to change this figure.

With great respect I am not satisfied that this is the position. This would, in my view, be in effect a finding that the rate of interest applicable for the entire period of the contract was at the rate of seven per cent. In my opinion

the correct position was that the loan was made on an implied agreement that the first appellant would pay interest at a fair and reasonable rate, and this rate would be the rate in existence at the time that the interest was due and calculated. The evidence establishes that this was done on the daily balances of the overdraft. The seven per cent. was the rate of interest accepted by the parties as being the fair and reasonable rate payable at the commencement of the overdraft.

I would here refer again to the pleadings. The bank's case refers to the payment of interest at the "current bank rate " and then later on avers that the rates of interest charged were at all material times fair and reasonable.

Evidence was given by two witnesses from the respondent bank and two other bank officials from other banks. There can be no doubt that some of the claims made by certain of these witnesses are completely untenable in law and disregard the basic fact that an overdraft in a bank is subject to the ordinary law of contract and that the first elementary essential in any contract is the agreement of the parties, whether this agreement is express, or has to be implied from the course of the dealings between the parties. These witnesses did, however, establish the fact that the rate of interest charged by banks in Kenya over this period of ten years did vary and in my view they also established as a fact that the rates of interest charged on the overdraft of the first appellant were calculated at a fair and reasonable rate in all the circumstances of this case up to January 3, 1963. Shortly these witnesses accepted, subject to variations as to dates, the rate of interest shown in para. 5 of the defence as being the minimum bank rates charged by the banks over the period stated. This minimum rate was only however allowed to those customers who were first class "risks ", i.e. Government or large commercial firms, and these witnesses agree that the rate of interest as charged against the first appellant by the respondent bank and which started at one and a half per cent. above the minimum rate and varied over the years as up to January 3, 1963 between one per cent. and one and a half per cent. were fair and reasonable rates or were normal rates. There was undoubtedly a variation of the interest charged as between one per cent. to one and a half per cent. above the minimum rate, but as the rates of interest as first agreed on between the parties was one and a half per cent. above the minimum any variation to one per cent. would be to the benefit of the first appellant and could not be said to be an unreasonable charge. In my view, this evidence called by the respondent bank must be accepted as establishing as a fact that the rate of interest as charged against the first appellant from time to time up to January 3, 1963 was fair and reasonable in the circumstances of this case. I would shortly here mention the question of the rate of interest payable after January 3, 1963. On this date the minimum bank rate fell from eight per cent. to seven per cent. but the bank instead of reducing the first appellant's interest rates to eight and a half per cent. continued to charge nine and a half per cent. and later on July 26, 1964, raised this to ten per cent. This was done without the first appellant's knowledge and consent, and was a departure from the original method of calculating what was a reasonable rate of interest at one and a half per cent. above the minimum rate. The bank explains this because of the overdraft showing signs of being protracted and difficult to collect. Counsel for the respondent quite rightly concedes that this rate of interest cannot be justified and that in any event, the rate of interest here must be reduced to eight and a half per cent. as from January 3, 1963. Clearly the banks have no power to charge a penal rate of interest or to change the method of calculating what is a reasonable rate of interest without the customer's consent.

I would refer again to the pleadings and consider what the bank meant by interest at the "current bank rates", and further interest at a "fair and reasonable rate".

In my view the position must be that the bank is claiming the right to charge interest at the rate dependent on the rate then current at the banks, that is at a rate calculated at a certain percentage above the then agreed minimum bank rate, and this must be a rate which in all the circumstances of the particular case was also fair and reasonable. This is also what in my view the first appellant meant in para. 5 of his defence when he claimed in the alternative that he should pay interest at the rates “customary and/or reasonable at the material time when the money was lent “.

I then come to the question as to what the trial judge meant when he said that “the overdraft was arranged on the basis that the bank would make the charges usually made to a customer of his financial status “. I here think that the judge is accepting the bank’s case that the charges would vary in accordance with the rates current at the bank and would not be at a fixed and continuous rate of interest as claimed by the defence.

In his second alternative submission counsel for the respondent relied on the fact that the first appellant had acquiesced in the interest charged from time to time, and that in so doing he accepted that this was the interest payable on the loan.

Counsel for the appellants submitted that for the doctrine of acquiescence to apply, the first appellant must have had full knowledge of all the facts, and counsel for the respondent concedes that it would have been impracticable for the first appellant to have ascertained the rate of interest from the figures shown for interest in his monthly statement. Counsel for the respondent, however, submitted that the first appellant accepted each month the figures shown for interest as being a reasonable amount of interest and not as being interest charged at any fixed rates of interest. He points out that the first appellant was a business man and must have made entries of his interest in his books from time to time for income tax purposes and that he would have full knowledge of exactly what interest was charged each month and of what were the various outstanding amounts of his overdraft for that month.

It appears to me that the first appellant did in fact accept this interest as being the amount properly and reasonably payable on his overdraft. Every month for approximately 10 years he had his monthly statement showing exactly the amount of the interest debited and the outstanding balances of his overdraft at the end of each day. The evidence shows that on each occasion he accepted this statement as being correct and accepted the amount of interest debited to his account and the overdraft was continued by the bank on this understanding. The first appellant might not have known the rate of interest but he did know the exact amount of interest charged each month and he also knew what was the overdraft on each day of that month, and he could at any time have discovered the rate of interest by enquiring at the bank, or could have had it calculated, or calculate it himself as in his evidence he said he eventually did. In my view the evidence here having regard to the acceptance by the first appellant of these monthly accounts and also having regard to the letter of the first appellant’s advocate of November 27, 1964, establishes as a fact that there was an implied agreement to pay interest at a fair and reasonable rate and that this fair and reasonable rate would vary according to the particular circumstances applicable at the time the interest became due. If this arrangement was not impliedly established by the evidence, then in my view in all the circumstances of this case, the court would imply that this was the agreement between the parties. I am also of the view that the evidence establishes that the interest charged by the bank was at a fair and reasonable rate and properly debited to his account up to January 3, 1963, and I would have allowed such interest, but ordered a reduction of interest to eight and a half per cent. as from that day.

My Lord the President has fully dealt with the other matters arising from this appeal, and with respect I agree with his judgment on these matters. I agree, therefore, that the appeal of the second appellant, the guarantor, be allowed, and as the learned Vice-President agrees with my Lord the President as to the rate of interest payable by the first appellant, I agree with the orders proposed by my Lord the President, including the order as to the costs.

Order accordingly.

For the appellants:

J. J. Patel and Co., Nairobi

J. M. Nazareth, Q.C., and *J. J. Patel*

For the respondent:

Hamilton, Harrison and Mathews, Nairobi

J. A. Mackie-Robertson, Q.C., and *J. N. Desai*

Darbar v Fatin and another [1967] 1 EA 526 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	27 April 1966
Case Number:	107/1964 (Nakuru) (100)
Before:	Miles J
Sourced by:	LawAfrica

[1] *Assignment – Fraudulent alienation – Whether assignment of hirer’s interest under hire-purchase agreement to wife can be set aside – 13 Eliz. I, c. 5 (English Law of Property Act, 1925, s. 172) (K.).*

[2] *Execution – Attachment – Hire-purchase – Whether hirer’s interest under hire-purchase agreement can be attached.*

[3] *Hire-Purchase – Attachment – Whether hirer’s interest attachable – Whether assignment of hirer’s interest can be set aside as a fraudulent alienation – 13 Eliz. I, c. 5 (English Law of Property Act, 1925, s. 172) (K.).*

Editor’s Summary

The plaintiffs had a decree against the first defendant, who was the hirer of a car under a hire-purchase agreement. After the decree, by arrangement with the hire-purchase company which owned the car, the second defendant (who was the wife of the first defendant) was substituted as hirer and she was entered in the registration book as joint owner of the car with the hire-purchase company. No change, however,

was made in the hire-purchase agreement under which the first defendant remained the hirer. The plaintiffs sued for an order setting aside this transaction on the ground that it was without consideration and was intended to delay, hinder and defraud the creditors of the first defendant or alternatively necessarily had this effect; alternatively for a declaration that the property in the car was liable to be attached to satisfy their decree against the first defendant. The hire-purchase agreement contained a prohibition against assignment by the hirer and a clause giving the owner a right to determine it if the car was seized in execution.

Held – the first defendant's property in the car as hirer was not capable of being seized in execution and the transaction could not therefore be liable to be set aside under 13 Eliz. I, c. 5.

Judgment for the defendants.

Cases referred to in judgment:

- (1) *Mathews v. Feaver* (1786), 1 Cox, Eq. Cas. 278; 29 E.R. 1165.
- (2) *Sims v. Thomas* (1840), 12 Ad. & El. 536; 113 E.R. 916.

- (3) *French v. French* (1855), 6 De G.M. & G. 95; 43 E.R. 1166.
- (4) *Neale v. Day* (1858), 28 L.J. Ch. 45.
- (5) *Stokoe v. Cowan* (1861), 29 Beav. 637; 54 E.R. 775.
- (6) *Re Mouat*, [1899] Ch. 831.
- (7) *Edmunds v. Edmunds*, [1904] P. 362.
- (8) *Ideal Bedding Co. Ltd. v. Holland*, [1907] 2 Ch. 156.
- (9) *Glegg v. Bromley*, [1912] 3 K.B. 474.
- (10) *Compania Colombiana de Seguros v. Pacific Steam Navigation Co. Ltd.*, [1964] 1 All E.R. 216.
- (11) *Helby v. Matthews*, [1895] A.C. 471.
- (12) *Re Button's Lease*, [1963] 3 All E.R. 708.
- (13) *London and South Western Railway v. Gomm* (1882), 20 Ch.D. 562.

[Editorial Note: Previous proceedings between the plaintiffs as attaching creditors and the second defendant as an objector are reported at [1964] E.A. 662.]

Judgment

Miles J: The plaintiffs in this case claim first, an order setting aside the alienation of a Peugeot 404 Saloon No. KCT 374 from the first defendant to the second defendant and, secondly, in the alternative, a declaration that the property in the car is liable to be attached to satisfy a decree in favour of the plaintiffs.

The material facts are not in dispute. The plaintiffs are the holders of a decree dated February 20, 1963, for Shs. 17,645/80 against the first defendant, in respect of the goods sold and delivered with interest and costs. The two defendants are husband and wife respectively.

The first defendant formerly owned another Peugeot 404 Saloon No. KCR 665 which he traded in in the month of October 1962 at a value of Shs. 11,438/-, in part payment of the car which is the subject of this suit. The purchase price of this new car was Shs. 19,593/08 and the balance, namely Shs. 8,155/08 was raised by means of a hire-purchase agreement dated October 15, 1962 with the United Dominions Corporation (E.A.) Ltd. (hereinafter called "the owner").

On or about July 23, 1963 by arrangement with the owner the second defendant was substituted for her husband, the first defendant, as hirer, and she was entered in the registration book (Exhibit 6) as joint owner with the owner. No change was made in the hire-purchase agreement under which the first defendant remained the hirer. The precise object of this peculiar transaction from the point of view of the owner is difficult to ascertain seeing that it had refused to accept the second defendant as hirer in the first instance. It is less difficult to discover a motive on the part of the defendants since the plaintiffs, as already mentioned, had obtained a decree against the first defendant. All the instalments payable under the hire-purchase agreement have now been paid.

In this action the plaintiffs impugn the validity of the transaction of July 23, 1963 on the ground that it was without consideration and was intended to delay, hinder and defraud the creditors of the first

defendant or alternatively necessarily had this effect. They accordingly contend that the purported or actual transfer was void.

(The learned judge, after dealing with another issue, continued):

The plaintiffs seek to avoid the transaction under the provisions of the English Statute of 13 Eliz. I, c. 5, which applies to this country today. The statute has been replaced in England by s. 172 of the Law of Property Act, 1925.

Counsel for the defendants, in a brief but effective argument, has drawn attention to the general principle on which the jurisdiction under this section is

exercised as set out in 17 Halsbury's Laws (3rd Edn.), p. 650, para. 1254, and in particular para. 1255 where the expression "property" is defined:

"The expression 'property' in the Law of Property Act, 1925, included anything in action and any interest in real or personal property, but since creditors cannot be defrauded by an alienation of property which was never within their reach, the provision applies only to such property as can be taken in execution. Thus, alienations or equitable revisionary interests, of policies of insurance and other choses in action, of the goodwill of a business and of the fruits of an action when recovered, can be set aside, and any enactment or procedure which makes new kinds of property liable to be taken in execution will extend the scope of the provision. If, however, at the date of alienation the property alienated was not of a kind liable to be taken in execution, a subsequent enactment making such description of property so liable will not benefit the creditors defeated by such alienation."

This then, is the test: Was the property in question at the date of alienation, liable to be taken in execution? Counsel for the defendants contends that in this case the car was not, by reason of the provisions of the hire-purchase agreement. It will be necessary to refer to these in due course.

Counsel for the plaintiffs in a careful and ingenious argument contends that the first defendant did at all times have an interest in the car which was capable, on completion of payments under the agreement, of ripening into full ownership and that this was an interest of which he could dispose. He has reinforced this argument by reference to a number of what he contends to be parallel cases.

In *Mathews v. Feaver* (1), it was held that an assignment of a bond for an inadequate consideration was fraudulent under 13 Eliz. I, c. 5. Natural love and affection was not regarded as adequate. In the instant case, as counsel for the plaintiffs points out, there was inconsistent evidence by the defendants as to whether natural love and affection were consideration for the transfer.

But in *Sims v. Thomas* (2) it was held that a bond in which the assignee had only a contingent interest at the date of assignment was not within 13 Eliz. I, c. 5.

In *French v. French* (3) the assignment of a contingent annuity by a debtor to his wife was held liable to be set aside under the statute.

In *Neale v. Day* (4) an assignment by an insolvent attorney of the goodwill of his business in consideration of a sum of money paid down and an annuity secured by bond to be paid to his wife for life with remainder to him was held to be void as against creditors.

Counsel for the plaintiffs contends that a hire-purchase agreement in which the hirer has a contingent interest is analogous to a policy of assurance which is within the statute (see *Stokoe v. Cowan* (5) and *Re Mouat* (6)).

A chose in action also comes within 13 Eliz. I, c. 5. In *Edmunds v. Edmunds* (7) sums due or accruing due to a medical man on contract in respect of his position as public vaccinator and registrar of births and deaths was held to be in this category; as also was an equitable revisionary interest under a will in *Ideal Bedding Co. Ltd. v. Holland* (8).

In *Glegg v. Bromley* (9) an assignment by a wife to her husband of any damages which she might recover in a pending slander action was held to be an assignment of property and not of a mere expectancy. Fletcher Moulton, L.J., said ([1912] 3 K.B. at p. 488), "It is clearly intended to assign the fruits of the action, so that whatever benefit comes from the action shall go to Mr. Glegg by way of further security." By parity of reasoning, counsel for the plaintiffs argues, the

first defendant assigned the fruits of the hire-purchase agreement which consisted of the right to demand the car when all the payments had been made.

In *Compania Colombiana de Seguros v. Pacific Steam Navigation Co. Ltd.* (10) an assignment of a right of action against a contract-breaker was held valid. Roskill, J., said ([1964] 1 All E.R. at p. 231):

“Where before 1873 equity would have compelled the assignor to exercise his rights against the contract-breaker or tortfeasor for the benefit of the assignee, those rights can, since 1873, be made the subject of a valid assignment and can, subject to due compliance with the requirements of the statute as to notice, be enforced at law.”

The present hire-purchase agreement is in what is generally known as *Helby v. Matthews* (11) form, i.e., it is a contract of hire with an option to purchase. It is well settled that an option to purchase confers an interest in the property, as was held in *Re Button's Lease* (12).

Plowman, J., quoted ([1963] 3 All E.R. at p. 713) the observations of Jessel, M.R., in *London & South Western Railway v. Gomm* (13):

“The right to call for a conveyance of the land is an equitable interest or equitable estate. In the ordinary case of a contract for purchase there is no doubt about this, and an option for re-purchase is not different in its nature. A person exercising the option has to do two things: he has to give notice of his intention to purchase, and to pay the purchase money; but as far as the man who is liable to convey is concerned, his estate or interest is taken away from him without his consent, and the right to take it away being vested in another, the covenant giving him the option must give that other an interest in the land.”

Plowman, J., then observed:

“So that to my mind it is well settled that whether or not an option to purchase land is a contract or a conditional contract, nevertheless it does create in favour of the person to whom it is given a chose in action or equitable interest in the land and, as such, a piece of property.”

Turning now to the specific instance of hire-purchase agreements, the position of the hirer is dealt with by the learned author of Goode's Hire-Purchase Law and Practice, at p. 12, as follows. After citing Lord MacNaghten's observations in *Helby v. Matthews* (11) to the effect that it was not the intention to confer upon the customer any proprietary right or any interest in the nature of a lien or any interest of any sort or kind beyond the right to keep the property and to use it for a month to come, the author says:

“Nevertheless, notwithstanding technical objections, the courts have over the years established the principle that the option to purchase conferred on the hirer by the agreement not only constitutes a contractual right to buy the goods but in fact gives the hirer a limited property in the goods; and that the value of that proprietary interest is to be measured at any given time by the total amount which has at that time been paid by the hirer under the agreement.”

I think, then, that counsel for the plaintiffs may be said to have established his point that the hirer under a hire-purchase agreement ordinarily acquires some kind of limited property in the subject-matter of the agreement, whether it be termed a chose in action or an equitable interest. This, however, is not of itself sufficient to carry Mr. Khanna home. It is not every form of proprietary interest whose transfer is caught by 13 Eliz. I, c. 5. It must be one that at the date

of alienation is capable of being seized in execution, and it is here that counsel for the plaintiff's argument breaks down. This aspect is dealt with in Goode's Hire-Purchase Law And Practice, p. 186:

"However, unless otherwise provided in the agreement, the hirer's option to purchase is assignable and can be sold under the writ or warrant, the purchaser thus acquiring the right to obtain full ownership by paying the balance of the instalments due. But modern hire-purchase agreements almost invariably prohibit any assignment by the hirer and such a prohibition effectively prevents a lawful sale by the sheriff or bailiff of the hirer's interest in the goods. A similar result is obtained by a clause providing that on seizure of the goods by way of execution the agreement shall automatically determine. In such a case the execution creditor cannot touch the goods even if there is no prohibition against assignment, for as soon as the goods are seized the agreement comes to an end and thereupon the hirer ceases to have any interest capable of being sold."

The agreement in the present case contains a prohibition against assignment although the owners did in fact consent to the transaction between the first and second defendant. It also contains a clause giving the owner a right to determine the agreement if the goods or any part thereof shall be seized under any execution or legal process issued against the hirer. The position, therefore, was that at the time of alienation, namely July 23, 1963, the car was not liable to be taken in execution. That is the material date and anything which happened thereafter is irrelevant. I would respectfully express my concurrence with the decision of Trevelyan, J., on this point. The result is that the plaintiff has no claim in law against the defendants.

Judgment for the defendants with costs.

For the plaintiff:

D. N. Khanna and K. J. Patel, Nakuru

For the defendants:

B. R. Paterson-Todd, Nakuru

Sekitoleko v Uganda [1967] 1 EA 531 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	21 June 1967
Case Number:	99/1967 (116)
Before:	Sir Udo Udoma CJ
Sourced by:	LawAfrica

[1] *Criminal Law – Alibi – Whether burden of proof of an alibi rests upon the accused*

[2] *Criminal Law – Burden of proof – Alibi – Whether burden shifts to accused to prove his alibi.*

[3] *Criminal Law – Robbery – Necessity of identifying which subsection conviction and sentence based*

upon – Penal Code, s. 273 (U.).

Editor's Summary

The appellant was charged with robbery contrary to s. 272 and punishable under s. 273 of the Penal Code. His defence was an alibi. In the course of his judgment the learned trial magistrate said that the burden of proving the alibi lay on the appellant. The appellant was convicted and sentenced to three years' imprisonment. He appealed.

Held –

- (i) as a general rule of law the burden on the prosecution of proving the guilt of a prisoner beyond reasonable doubt never shifts whether the defence set up is an alibi or something else. (*R. v. Johnson*, [1961] 3 All E.R. 969 applied; *Leonard Aniseth v. Republic*, [1963] E.A. 206 followed);
- (ii) the burden of proving an alibi does not lie on the prisoner, and the trial magistrate had misdirected himself;
- (iii) it was impossible to determine with exactitude the particular subsection of s. 273 of the Penal Code upon which the trial magistrate had based himself.

Appeal allowed. Conviction and sentence quashed.

Cases referred to in judgment:

- (1) *R. v. Thomas Finch* (1916), 12 Cr. App. Rep. 77.
- (2) *R. v. Johnson*, [1961], 3 All E.R. 969.
- (3) *Leonard Aniseth v. Republic*, [1963] E.A. 206.
- (4) *R. v. Chelumon Wero Olango* (1937), 4 E.A.C.A. 46.

Judgment

Sir Udo Udoma CJ: The appellant, Francis Sekitoleko, was convicted by the Chief Magistrate in the Magistrate's Court, Masaka, of robbery contrary to s. 272 and punishable under s. 273 of the Penal Code. He was sentenced to three years' imprisonment. The appeal is against conviction and sentence.

In his petition of appeal the appellant, who did not appear during the hearing of the appeal, has complained that the Chief Magistrate was wrong in law in not accepting his plea of alibi. He has maintained that he was innocent of the offence with which he was charged, tried and convicted, and because he was innocent he had to report himself voluntarily, when he learned that he was wanted by the police.

The case of the prosecution was that on August 6, 1966, Nowa Kizza sold his five bags of coffee, from which he realised a total sum of Shs. 400/-. The appellant saw him carrying the bags of coffee to the store for sale and said to him "well done". After the sale he bought a few things in the market and also

paid forty cents to the appellant for beer which he had bought from him on credit the previous day. There was a balance of the sum of Shs. 320/20 still left with him. He put the whole amount in his trouser pocket. That was at Bugonzi.

At about 7.30 p.m. the complainant was returning from Bugonzi with the money securely in his pocket. He was riding on his bicycle. On his way home he met the appellant and three other persons somewhere near the appellant's house. They were all on the main road. Nowa Kizza saw clearly the appellant whom he had known before and to whom he had paid forty cents after the sale of his coffee, among the group of people on the main road. Immediately Nowa Kizza cycled past the group of four men he was struck on the back while still on his bicycle. He fell down. As soon as Nowa Kizza was about to get up from the ground, the appellant struck him on the forehead with a stick, which was similar to a piece of wood generally used for chair making. Nowa Kizza raised an alarm; and, as the appellant attempted to strike him again, caught hold of the stick and a struggle ensued between both of them.

In the course of the struggle, the other three companions of the appellant joined in. They went directly for his clothes and succeeded in removing from his trouser pocket the sum of Shs. 320/20 by force, in consequence of which Nowa Kizza's trousers were torn. They also stripped him of his wrist watch by force, leaving him only with his watch strap still on his hand. When the appellant saw that his companions had succeeded in removing the money from Nowa Kizza's pocket, he snatched the stick from him; and they all started to run away.

The alarm raised by Nowa Kizza attracted first Matia Lubega, who was himself on the road returning from Bugonzi market. On arrival he was able to recognise the appellant, whom he had known before, running away from the scene of the incident with three other persons he could not recognise. The appellant was then wearing a white shirt and a pair of black trousers. He had a stick in his hand while running. Nowa Kizza reported to him what had happened to him.

Matia Lubega was frightened when he noticed that Nowa Kizza was bleeding from his forehead. Then Milton Kakoza also came to the scene. He met Nowa Kizza and Matia Lubega. He noticed that Nowa Kizza was bleeding from his forehead and that he had two wounds, one on his forehead and the other at the back of his head. Nowa Kizza reported to him how he had come to sustain those injuries. He took both Nowa Kizza and Matia Lubega and their bicycles to his shop which was nearby. He observed that Nowa Kizza's shirt and trousers were torn.

Matia Lubega then bandaged Nowa Kizza's head and took him to the Masaka hospital, where the latter was examined by Dr. Elias Lulume. Dr. Elias Lulume found that Nowa Kizza had bruises at the back of his head and on his forehead. He had also minor bruises over his back and on his left hand, which injuries Dr. Elias Lulume classified as "harm", and opined that the injuries were caused by a blunt instrument. The matter was reported to the police, in consequence of which the appellant was arrested when he reported at the police station at Masaka. He was charged with the offences stated above.

The appellant, in his defence, described himself as a butcher. He admitted that on the day in question he was at Bugonzi market. He said he was then with his brother. In keeping with his trade, he said he had slaughtered a cow and sold the meat there. He admitted meeting Nowa Kizza in the market at about 10 a.m. that day. He said he saw him when he bought meat and thereafter left the market while he remained behind. He himself did not leave the market until 3 p.m. when he went home. Later he had his lunch and thereafter went

to graze his goats and only finally returned home at 6.30 p.m. He then had his dinner at 8 p.m. and never went anywhere after that. He said he had known Nowa Kizza and Matia Lubega before the incident and that Matia Lubega was also a butcher.

The appellant then called Martin Ndugwa as his witness. The latter testified that the only thing he knew about the case was that he saw Nowa Kizza sell two bags of coffee for Shs. 74/-, and later heard of the case against the appellant.

In his judgment, the learned trial Chief Magistrate reviewed the evidence. He accepted the evidence given by Nowa Kizza whom he described as an impressive and truthful witness. He held that the appellant had been properly identified by the witness since he was well-known to him before the incident, and that Nowa Kizza had told his story in such a manner which compelled belief.

The learned trial Chief Magistrate rejected the evidence of the appellant. He contrasted the evidence of the appellant to the disadvantage of the latter.

In the course of his judgment, the learned trial magistrate said:

“As contrasted to this is the defence which amounts to nothing more than an alibi. The accused has called no witness to prove his alibi. The burden of proving the same lies on him. He has failed to prove the same. I do not believe that the accused stayed home from 3 p.m. to 8 p.m. as he claimed. The accused must have lied to the court.”

The above passage of the learned Chief Magistrate’s judgment constitutes a serious misdirection in law. The defence of an alibi put forward by the appellant had received scant attention by the learned trial Chief Magistrate. It is a wrong statement of the law that the burden of proving an alibi lies on the prisoner. It is the duty of a Criminal Court to direct its mind properly to any alibi set up by a prisoner; and, it is only when the court comes to the conclusion that the alibi is unsound that it would be entitled to reject it. (See *R. v. Thomas Finch* (1).)

As a general rule of law, the burden of proving the guilt of a prisoner beyond reasonable doubt never shifts whether the defence set up is an alibi or something else. That burden always rests on the prosecution.

In *R. v. Johnson* (2), the general principle of law applicable to defence of an alibi was enunciated. It was laid down as a general rule of law that, if an accused puts forward an alibi as an answer to a criminal charge, he does not thereby assume a burden of proving the defence; and that the burden of proving his guilt remains throughout on the prosecution.

There the appellant was charged with robbery with violence. He put forward the defence of an alibi. The jury disagreed and, at the retrial, the judge, in his summing-up, directed the jury that when the defence of an alibi was put forward there was a burden of proof on the accused person to satisfy the jury that the defence, which had been set up by him had on the whole been established. The appellant in that case was convicted as a result of the direction given by the learned trial judge.

On appeal, the conviction was quashed on the ground that the jury had been misdirected on the issue of the alibi.

In the judgment of the Court of Appeal, which was delivered by Ashworth, J., is to be found this passage ([1961] 3 All E.R. at p. 970), which is relevant to the instant case:

“As the counsel for the appellant submits, an alibi is commonly called a defence, but it is to be distinguished from some of the statutory defences such as the defence of diminished responsibility in the Homicide Act,

1957, where Parliament has specifically provided for a defence and has further

indicated that the burden of establishing such defence rests on the accused. It may be that the true view of an alibi is the same as that of self-defence or provocation. It is the answer which the accused puts forward and the burden of proof . . . in the sense of establishing the guilt of the accused, rests throughout on the prosecution. If a man puts forward an answer in the shape of an alibi, or in the shape of self-defence, he does not in law thereby assume any burden of proving that answer. So much, in the opinion of this court, is plain on the authorities.”

The principle enunciated in the above quoted passage of the judgment of the Court of Appeal in England has been accepted and applied in East Africa.

In *Leonard Aniseth v. Republic* (3), the appellant was convicted of murder. His defence at the trial was an alibi. Relying on certain observations of the Court of Appeal in *R. v. Chemulon Wero Olango* (4), the learned trial judge had said in his judgment:

“ . . . that the burden of proof with regard to alibi is on the person setting up that defence to account for so much of the time of the transaction in question as to render it impossible that he could have committed the imputed act.”

On appeal, it was held that the judge misdirected both himself and the assessors as to the onus of proof when dealing with the defence of an alibi. It was further held, however, that there was no failure of justice since both the judge and the assessors clearly accepted the evidence of the prosecution witnesses and had there been no misdirection both the judge and the assessors would still necessarily have arrived at the same conclusion as to the guilt of the appellant.

In the instant case, it is, of course, true also that the evidence against the appellant as regards identification, which was the main point of contest, was overwhelming since the appellant was a well-known person to Nowa Kizza and Matia Lubega.

There is, however, another point of law of some importance to which the learned trial Chief Magistrate did not direct his mind. The charge was laid under ss. 272 and 273 of the Penal Code. Under the present law as a result of the amendment which took effect as from February 18, 1966, s. 273 (which is the *penalty* section of the Code) now comprises two distinct and separate subsections, namely s. 273 (1) and s. 273 (2). And s. 273 (1) is again sub-divided into sub-subsections (a) and (b), while s. 273 (2) comprises three sub-subsections, namely, (a), (b) and (c). Each of the subsections of s. 273 provides for certain circumstances and carries different penalties. To bring an accused within the ambit of these sections certain conditions must be fulfilled.

This point is of some importance because a number of appeals have recently come before this court in which appellants have been convicted of robbery contrary to s. 272 and punishable under s. 273 without any indication as to the subsection under which such appellants were convicted. For the guidance of magistrates, I consider it expedient, since the provisions contained in the sections are new, that the whole of the provisions of s. 273 should be set out in this judgment.

The provisions are as follows:

“273(1) Any person who –

- (a) commits the felony of robbery on any public highway, shall be liable on conviction to imprisonment for a term not exceeding fourteen years and not being less than ten years;

- (b) commits the felony of robbery at any place, other than on a public highway, shall be liable for a term not exceeding fourteen years.
- (2) Notwithstanding the provisions of the preceding subsection where at the time of the commission of the felony of robbery the offender,
 - (a) is armed with any dangerous or offensive weapon or instrument;
 - (b) is in company with one or more persons;
 - (c) wounds, beats, strikes any person, at, immediately before or immediately after the time of the robbery, he shall be liable on conviction to suffer death.”

In view of the fact that s. 273 of the Penal Code now comprises two main subsections and several sub-subsections, it is impossible for this court to say with precision the particular subsection under which the appellant was sentenced to a term of imprisonment by the learned trial magistrate.

It was submitted by counsel for the respondent, that on the facts found by the learned trial chief magistrate, the appropriate subsection and sub-subsection of s. 273 of the Penal Code under which the appellant was sentenced was s. 273 (1) (a) since the offence was committed on the highway.

I do not think this submission is sound. If that were so then the sentence of three years’ imprisonment imposed on the appellant by the learned chief magistrate was illegal. The maximum sentence prescribed under s. 273 (1) (a) of the Penal Code is fourteen years’ imprisonment, while the minimum is fixed at ten years’ imprisonment.

The provisions of s. 273 (1) (a) of the Code would only apply where the offender was alone and not armed. That is not the position in the instant case. The evidence which was accepted by the learned trial chief magistrate was not only that the appellant was in the company of three other persons, but that he was himself armed with an offensive weapon, namely a stick. The stick with which the appellant was armed was of sufficient weight, and was described by the medical officer, who examined Nowa Kizza as a blunt instrument, to have caused the injuries which the medical officer described as “harm”.

On the other hand, if the sentence on the appellant was imposed under s. 273 (2) (a) and (b) of the Penal Code, the learned trial chief magistrate would have had no jurisdiction as the penalty prescribed thereunder is death.

It is therefore impossible for this court to determine with exactitude the particular subsection of s. 273 of the Penal Code upon which the magistrate had based his sentence on the appellant.

For the reasons given above, it would be unreasonable and unfair for this court to grant the application of the State Attorney for a trial de novo.

In the circumstances this appeal is allowed. The conviction and sentence are quashed.

Order accordingly.

The appellant did not appear and was not represented.

For the respondent:

Attorney-General, Uganda

A. G. Deobhakta (Senior State Attorney, Uganda)

Opar v Republic
[1967] 1 EA 536 (HCU)

Division: High Court of Uganda at Kampala
Date of judgment: 26 June 1967
Case Number: 89/1967 (118)
Before: Fuad J
Sourced by: LawAfrica

[1] Criminal Law – Threatening to injure with intent to intimidate or annoy – Meaning of “threaten” – Whether act of witchcraft sufficient – Penal Code s. 76 (a) (U.).

Editor’s Summary

The appellant stood by while another person made a hole in the outside wall of the complainant’s house and put into the house two pieces of wood from a bottle, which the complainant took as an act of witchcraft. The complainant remonstrated whereupon the appellant tried to cut the complainant with a panga. The appellant was convicted of threatening to injure contrary to s. 76 (a) of the Penal Code and sentenced to two years’ imprisonment. He appealed.

Held – that (although at least the offence of assault was committed) the evidence did not establish any threat to injure or assault.

Appeal allowed. Conviction and sentence quashed.

Case referred to in judgment:

(1) *R. v. Wyatt* (1921), 16 Cr. App. Rep. 57.

Judgment

Fuad J: The appellant was convicted on January 25, 1967, by a Magistrate Grade I of threatening violence contrary to s. 76 (a) of the Penal Code and sentenced to imprisonment for two years. From this conviction and sentence he now appeals to this court.

The facts that the magistrate accepted were, put quite shortly, that the appellant stood by whilst another (not before the court) made a hole in the outside wall of the complainant’s house and put two pieces of wood from a bottle into the hole. This was taken by the complainant as an act of witchcraft. When the complainant made a remonstrance the appellant attempted to cut him with a panga. The magistrate held that this act amounted to an offence under the relevant section, which is to the following effect:

“76 Any person who:

.....(a) with intent to intimidate or annoy any person
threatens to injure, assault, shoot or kill any person ; or
.....(b) , is guilty of an offence “

While it is clear that the appellant’s act amounted at least to the offence of common assault, I am of the opinion that it did not fall within the section under which he was charged and convicted.

It is an offence under s. 31 (1) of the Larceny Act, 1916 (of the United Kingdom), to threaten to publish a libel with certain intents. It was held in *R. v. Wyatt* (1), that the word “threaten” in the section was equivalent to “expresses an intention to” or “says that he will”. I have no doubt that s. 76 (a) of the Penal Code must be interpreted in the same way. I do not say that the offence cannot be committed by gestures that are clearly understood as a threat, but on the facts of this case the charge was misconceived. Counsel for the respondent did not support the conviction.

The appeal is allowed. The conviction is quashed and the sentence set aside. The appellant must be released from custody forthwith.

Order accordingly.

The appellant did not appear and was not represented.

For the respondent:

Attorney General, Uganda

V. M. Patel (State Attorney, Uganda)

Kanyomozi v Uganda
[1967] 1 EA 537 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	21 June 1967
Case Number:	173/1967 (120)
Before:	Sir Udo Udoma CJ
Sourced by:	LawAfrica
Appeal From:	Mengo Magistrate's Court

[1] *Criminal Law – Evidence – Co-accused – Evidence of one accused against another accused jointly tried for different offences not admissible – Evidence Act, s. 28 (U.).*

[2] *Criminal Law – Evidence – No case to answer – Evidence of co-accused used to convict accused – No evidence to convict accused – Evidence Act, s. 28 (U.).*

Editor's Summary

Before the magistrate's court at Mengo, Kampala, the appellant was jointly tried with one Tumwine. The appellant was charged with the theft of a bicycle and Tumwine was charged with receiving the bicycle knowing it to be stolen. Both the appellant and Tumwine were convicted of their respective charges and sentenced. Only the appellant appealed against his conviction and sentence. In the magistrate's court there was the sworn evidence of the co-accused Tumwine jointly tried with the appellant that the appellant had sold the bicycle to Tumwine and some doubtful evidence that the appellant had offered a bribe to the complainant (the owner of the bicycle) to drop the case (which on investigation directed by the Chief Justice proved to be untrue). The only evidence left against the appellant was the testimony of the co-accused who, by incriminating the appellant, was seeking to exculpate himself.

Held – the two accused were not being jointly tried for the same offence and the evidence of Tumwine

was not admissible evidence against the appellant under s. 28 of the Evidence Act (*Musa Luinda v. R.*, [1960] E.A. 470, applied.)

Appeal allowed. Conviction and sentence quashed.

Cases referred to in judgment:

(1) *Issa s/o Ramadhani v. R.*, [1962] E.A. 686.

(2) *Musa Luinda v. R.*, [1960] E.A. 470.

Judgment

Sir Udo Udoma CJ: The appellant, Zeverio Kanyomozi, was convicted by the Magistrate Grade I, Magistrate's Court, Mengo, of the theft of a bicycle contrary to s. 252 and punishable under s. 255 (*a*) of the

Penal Code. He was sentenced to three years imprisonment. He now appeals against his conviction and sentence.

The appellant was jointly tried with another person by name Alfred Tumwine, who was also convicted and sentenced to eighteen months imprisonment for receiving stolen property, knowing the same to have been stolen. Alfred Tumwine has not appealed against his conviction and sentence.

The case against the appellant and Alfred Tumwine may be briefly summarised as follows:

On August 14, 1966, George William Kiyimba, a student at Lubiri Senior Secondary School, parked his bicycle (a "Robin Hood") near the entrance of the Christ the King Church. He entered the church. The bicycle was locked. That was at about 11.30 a.m. On coming out of the church, his bicycle was nowhere to be seen. He immediately reported the loss to the police. A few days later he was going with a school mate to Natete. That was on September 6, 1966. By accident he saw Tumwine riding on a bicycle similar to his lost one. He at once recognised the bicycle as his. He was himself then on another bicycle. He overtook Alfred Tumwine and signalled him to stop. The latter refused to stop.

Kiyimba then rode his bicycle at great speed in pursuit of Tumwine, who was himself speeding, until they got to Natete. As Tumwine was about to ride the bicycle through Natete, Kiyimba jumped off his bicycle and caught hold of the bicycle which was then being ridden by Tumwine. The latter fell down.

On examining the bicycle, Kiyimba was satisfied that the bicycle, which was being ridden by Tumwine, was his lost bicycle. He told him so. The latter threatened to beat Kiyimba. He also there and then told him that the bicycle he was riding did not belong to him but to someone else.

A crowd collected and Tumwine was arrested and taken to the Natete Police Station with the bicycle. That was on September 6, 1966. Kiyimba there reported to Constable Mayende that he had found his lost bicycle with Tumwine. The latter said nothing.

Later that day, the appellant went to Natete Police Station. He invited Kiyimba to see him outside the police office, which the latter did. Kiyimba returned to the office later and reported to Constable Mayende that he had been offered Shs. 50/- to drop the case. Constable Mayende decided to go with Kiyimba back to the appellant, and did so. In the presence of Constable Mayende the appellant handed over Shs. 50/- to Kiyimba. Constable Mayende there and then seized the Shs. 50/- and arrested the appellant. He later sent the appellant and Tumwine to the Central Police Station, Kampala. On September 9, 1966, Constable Samwel saw Tumwine in the police cell at the central police station. He charged and cautioned him. Tumwine spoke to him. He told Constable Samwel that the bicycle had been sold to him by the appellant. At the request of Constable Samwel, Tumwine took the constable to the house of the appellant and there pointed out the appellant as the person who had sold the bicycle to him. The appellant was arrested and after due caution denied the allegation that he it was who had sold the bicycle to Tumwine. He also denied having known Tumwine before that day. The appellant and Tumwine were brought to the central police station. There the appellant was charged with the theft of the bicycle, while Tumwine was charged with receiving or retaining stolen property contrary to s. 298 (1) of the Penal Code.

At the trial the appellant, who described himself as a mechanic at the African Garage of Rubaga Village, denied the charge against him on oath. He denied also having sold the bicycle to Tumwine.

On that evidence, he was not cross-examined either by the prosecution or by Tumwine. Thereafter Tumwine gave his evidence. He swore that the appellant was known to him. He described himself as a dealer in charcoal. He said he had not known Kiyimba until the day he was arrested with the bicycle. He swore that the appellant had on August 14, 1966, come to him at Buloba, where he lived, and offered him the bicycle to buy. On enquiry the appellant had explained to him that he had had the bicycle for a long time and had therefore lost the receipt which was issued to him when he first bought the bicycle. He said further that the appellant had told him that if he bought the bicycle he would issue him with a document. They both then bargained as to the price and finally settled it at Shs. 60/-, which he immediately paid to the appellant. Thereafter he said they both entered into an agreement in respect of the bicycle.

On September 6, 1966, he said he was riding on the bicycle when he was accosted in the street by Kiyimba who claimed the bicycle to be his. He said that after his arrest he had explained to the police that the bicycle was sold to him by the appellant and had voluntarily taken the police to the appellant's house, where the latter was arrested.

Under cross-examination Tumwine said that he had to run away with the bicycle on the highway when accosted by Kiyimba, because he did not know him before; and that he did not know the bicycle had been stolen, although he had never before seen the appellant with a bicycle of any description.

The learned trial magistrate, in his judgment, took into consideration, quite rightly and innocently, the evidence given by Constable Mayende to the effect that on the arrest of Alfred Tumwine the appellant had offered a bribe of Shs. 50/- to Kiyimba to induce him to drop the case against Tumwine. He therefore argued that, if the story of the sale of the bicycle by the appellant was not true, how was it that the appellant should have sought, even when his name was never mentioned in connection with the bicycle, to pervert the course of justice?

The learned trial magistrate, however, rejected the evidence given by Tumwine in respect of the so-called agreement concerning the purchase of the bicycle as none was produced before him. He held that such agreement never existed and that Tumwine knew that the bicycle was stolen when he bought it.

In concluding his judgment the learned trial magistrate said:

"I am satisfied Kanyomozi (the appellant) stole the bicycle and sold it to Tumwine on August 14, 1966 the same day Kiyimba mentioned that his bicycle had got stolen."

On that conclusion, the learned trial magistrate found both the appellant and Tumwine guilty of the respective charges against them and convicted and sentenced them to terms of imprisonment. The appellant was convicted of the theft of the bicycle, whereas Tumwine was convicted of receiving or retaining the stolen bicycle.

On the evidence of the prosecution, the only probable link between the appellant and the bicycle, apart from the evidence given by Tumwine – a co-accused in an attempt to exculpate himself – is the offer of the bribe of Shs. 50/- to Kiyimba.

The learned trial magistrate, in his summary of the evidence of the prosecution on this aspect of the case, misdirected himself when he held that the story of the bribe of Shs. 50/- was corroborated by Kiyimba. In fact George William Kiyimba was never asked nor did he say anything about Shs. 50/-.

In the course of the hearing of this appeal, my suspicion was aroused about the bribe of Shs. 50/- said to have been offered by the appellant, because if that aspect of the story were true then there would have been no reason for Tumwine to have taken Constable Samwel to the appellant's house for his arrest,

since on

the evidence of Constable Mayende, he had already been arrested and sent to the central police station to be detained. I therefore caused enquiry to be made, especially as the money was not exhibited in the proceedings of the trial in spite of the fact that Constable Mayende had sworn that he had seized the money and taken custody of it.

The magistrate never during the trial insisted on the money being produced, if as testified to by Constable Mayende the money was still in his possession. There was no evidence that the money was ever passed to a superior authority of the police.

On examination of the police files in this case and upon other enquiries, counsel for the respondent was able to discover that the bribe of Shs. 50/- was not offered by the appellant but by a relation of Tumwine in an effort to save Tumwine from being prosecuted; and that the police constable, who gave evidence on this point, wrongly attributed to the appellant the giving of the bribe of Shs.50/-.

This piece of evidence was never brought to the notice of the learned trial magistrate. Had that been done, it is reasonable to suppose that the magistrate's attitude towards the appellant in respect to the case against him would have been different. The learned trial magistrate would then have realised that, apart from the story told by Tumwine to the police, which was oral in any event, there was no evidence whatsoever against the appellant when the case of the prosecution was closed. And it might well be that the learned trial magistrate would not have called upon the appellant for his defence.

The evidence in the case as a whole disclosed two coincidences which have a bearing on the case of the prosecution against the appellant. In the first place, in his evidence in chief, Kiyimba had sworn that his bicycle was stolen outside Christ the King Church in Kampala on August 14, 1966. That was also the day that Alfred Tumwine said the appellant had sold to him the bicycle in his own village of Buloba, which is outside Kampala. The bicycle was left outside the church at about 11.30 a.m. That was also the time Tumwine said the bicycle was brought to him at Buloba village by the appellant. It is obvious that the story of Tumwine that it was the appellant who had sold the bicycle to him could not be true.

To return to the case as it affects the appellant. It seems to me clear that at the close of the case for the prosecution, there was no case made out for the appellant to answer, there being then no legally admissible evidence on which the appellant could have been convicted by a reasonable court. The present discovery made by Counsel for the respondent has made it quite plain that Constable Mayende lied to the court when he swore that it was the appellant who had offered the bribe of Shs. 50/- to Kiyimba with a request that the case be dropped.

On this point I would like to refer to two East African cases.

In *Issa s/o Ramadhani v. R.* (1), the appellant therein was charged with breaking and entering a place of worship and committing a felony therein contrary to s. 296 (1) of the Tanzanian Penal Code. A co-accused was charged with receiving stolen property, namely a clock. When the prosecution closed its case the evidence against the appellant therein was that the clock and other property had been stolen from a Sikh temple. The clock was found in the possession of the co-accused, who at an identification parade had picked out the appellant as the person who had sold her the clock. On that evidence the magistrate put both the appellant and the co-accused on their defence.

After the appellant had given evidence denying the charge, the co-accused gave evidence that it was the appellant who sold her the clock and that that was after she had been assured that the clock was the appellant's property. The

magistrate accepted this evidence, acquitted the co-accused and convicted the appellant.

On appeal it was contended for the appellant that at the conclusion of the case of the prosecution there was in fact no evidence on which the appellant could properly have been convicted, and that the magistrate should then have acquitted the appellant in accordance with s. 205 of the Criminal Procedure Code of Tanzania. The respondent submitted that case law had established the principle that when the defence filled the gaps in the prosecution case an appellate court must look at the proceedings as a whole.

It was held by Spry, J., as he then was, that it is repugnant to all principles of justice to convict a person on the evidence of a co-accused, who in seeking to exculpate herself provided the prosecution with the only material evidence against the person convicted.

Then there is the decision of the Court of Appeal for Eastern Africa in *Musa Luinda v. R.* (2) (a Uganda case) in which one Kagoro and others including the appellant therein were jointly charged and tried by a magistrate for receiving stolen property on September 27 and 28, 1958 respectively. At the trial two unequivocal confessions by Kagoro of receiving stolen property were admitted in evidence against the appellant and he was convicted.

He then appealed to the High Court but his appeal was dismissed on the ground that Kagoro's confessions were properly taken into consideration as against the appellant.

He then appealed again to the Court of Appeal for Eastern Africa. There his contention was that under s. 28 of the Evidence Act such confessions are only admissible against an accused person if he and the person making the confessions are "being tried jointly for the same offence". It was further submitted that the charges preferred against the appellant and Kagoro were of receiving different amounts of money on different dates and in different places, though the sum alleged to have been received by the appellant was a portion of that received by Kagoro.

In the judgment of the Court of Appeal, which was delivered by Gould, J.A. as he then was, after quoting a passage in the judgment of Sir Audley McKissack, C.J., which was in the following words:

"As I have already said, the magistrate relied on Kagoro's statement implicating Kigundu, in addition to relying on the evidence of two other accomplices. He took this statement into account against Kigundu, under s. 28 of the Evidence Ordinance, which is as follows:

28. When more persons than one being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the court may take into consideration such confession as against other persons as well as against the person who makes the statement":

the court then went on to hold that the magistrate was in error in the above passage of his judgment because Kagoro and Kigundu were not being tried jointly "for the same offence".

Kigundu was being tried for theft whereas Kagoro was being tried for receiving and that that was not sufficient to satisfy the provisions of s. 28 of the Evidence Act. Therefore the statements made by Kagoro could not be taken into account as against Kigundu.

The court thereupon held:

1. That the appellant and Kagoro, though charged with offences of the same kind, were not tried jointly for the same offence; and therefore confessions of Kagoro were wrongly admitted as against the appellant; and
2. Though there was a good deal of evidence (which is not the case in the instant appeal) against the appellant in the case apart from the confessions, it could not be said that the judgment of the magistrate would necessarily have been the same had he excluded the confessions from consideration; therefore, the court could not say that the evidence accepted against the appellant occasioned no miscarriage of justice.

It is plain that the facts and circumstances present in the instant case are on all fours with the facts and circumstances which were present in the case of Kagoro and Kigundu. The appellant was charged with theft while Tumwine was charged with receiving. They were both jointly tried by the magistrate and convicted on their respective charges. The evidence relied upon for the conviction of the appellant by the magistrate was the evidence given by Tumwine, whose evidence was not admissible against the appellant, since the whole case did not come within the ambit of the provisions of s. 28 of the Evidence Act.

That being so, it is very clear that the learned trial magistrate was wrong in law to have convicted the appellant. The appeal by the appellant is therefore allowed. His conviction and sentence are quashed. It is ordered that he be released forthwith.

Appeal allowed.

The appellant did not appear and was not represented.

For the respondent:

Attorney-General, Uganda

A. G. Deobhakta (Senior State Attorney, Uganda)

Murimi v Republic [1967] 1 EA 542 (CAD)

Division:	Court of Appeal at Dar-es-Salaam
Date of judgment:	7 June 1967
Case Number:	50/1967 (125)
Before:	Sir Charles Newbold P, Duffus and Spry JJA
Sourced by:	LawAfrica
Appeal from:	The High Court of Tanzania – Platt, J.

[1] Appeal – Criminal law – Principles upon which appellate court should act – Whether error of trial court has occasioned failure of justice – Failure to allow no case to answer – Criminal Procedure Code,

s. 346 (T.).

[2] Criminal Law – Evidence – No case to answer – Meaning of “prima facie” case under Criminal Procedure Code, s. 205 (T.).

[3] Criminal Law – Evidence – Court’s power to call a witness essential to a just decision – Whether power should be exercised after close of prosecution case to call witness against accused – Failure to make out a “prima facie” case – Criminal Procedure Code, ss. 151 and 205 (T.).

[4] Witness – Power of court to call – Whether power should be exercised after close of prosecution case to call witness prejudicial to accused – Criminal Procedure Code, s. 151 (T.).

Editor’s Summary

The appellant was charged with stealing by a servant contrary to s. 271 of the Penal Code and was tried by the District Magistrate of Tarime and convicted.

His appeal to the High Court was dismissed. On appeal to the Court of Appeal the question arose as to whether the prosecution had established a prima facie case against the appellant which was sufficient to have justified the trial magistrate requiring the appellant to enter into his defence. The material facts established by the prosecution were that on April 30, 1966, the appellant went to the office of the manager of a sisal factory to have the balance of union funds in his possession checked against the books. At the office the appellant saw the assistant manager, one Premini, who reported the fact to the manager. The manager saw the appellant and arranged to meet him later the same day to check the books at the appellant's store. When the manager wanted to check the books the appellant could not be found, but the police found the appellant the next day near his home. The books were then checked and a balance of Shs. 2,827/- should have been in the appellant's possession. The appellant alleged that he had given the money to Premini the day before. The prosecution called the manager who gave evidence, but did not call Premini. The trial magistrate considered the manager's evidence sufficient to require the appellant to enter into his defence. The appellant gave his evidence on oath and expressed a wish to call certain witnesses, including Premini. After an adjournment Premini came to give evidence. Before he gave his evidence the appellant said he did not now want Premini to give evidence as his evidence would not assist his case. The magistrate himself then called Premini as a witness (under s. 151 of the Criminal Procedure Code). Premini testified that he had not received the money. The magistrate thereupon convicted the appellant.

Held –

- (i) the magistrate should have acquitted the appellant as the prosecution had failed to make out a case sufficient to require the accused to enter into a defence;
- (ii) s. 151 of the Criminal Procedure Code allows a court to call a witness if his evidence appears to be essential to a just decision and this is so even if it results in strengthening the prosecution case; but s. 151 (permissive in terms) must be read with s. 205 (mandatory in terms) of the Criminal Procedure Code, and s. 151 should not be used to empower the trial court, immediately after the prosecution has closed its case, to call a witness in order to establish the case against the accused, except possibly when the evidence is of a purely formal nature;
- (iii) the Appeal Court will not reverse a conviction on account of any error by the trial court unless the error has in fact occasioned a failure of justice, but the error of the trial magistrate in refusing to acquit the accused under s. 205 had occasioned such a failure of justice.

Appeal allowed; conviction, sentence and other orders quashed.

Cases referred to in judgment:

- (1) *Ramanlal Bhatt v. R.*, [1957] E.A. 332.
- (2) *Boniface v. R.*, [1957] E.A. 566.
- (3) *Manyaki v. R.*, [1958] E.A. 495.
- (4) *R. v. Kulukana Otim*, [1963] E.A. 253.
- (5) *Karioki v. R.* (1934), 1 E.A.C.A. 160.
- (6) *R. v. Kinanda bin Mwaisumo* (1939), 6 E.A.C.A. 105.

(7) *D. M. Patel v. R.* (1951), 18 E.A.C.A. 188.

(8) *R. v. Abbott*, [1955] 2 All E.R. 899.

C.A.V.

Judgment

Duffus JA, delivered the following judgment of the court: The appellant was charged and convicted by the District Magistrate of

Tarime on a charge of stealing as a servant contrary to s. 271 of the Penal Code. His appeal to the High Court was dismissed and he now appeals to this court on questions of law.

The prosecution case was that the appellant was employed by the Victoria Federation of Co-operative Unions as the secretary of a sisal buying post and as such he had the custody of, and had to account for, various sums of money. On April 30, 1966, he went to the office of the manager of the sisal factory for the purpose of having the balance of moneys in his hands checked and there he saw the assistant manager, a Mr. Premini Mhowero who is referred to in the record as Mr. Premini. Mr. Premini was not called as a witness by the prosecution; but according to the manager, who was called, *Premini came and told him that the appellant had come and brought his money*. The manager then went and saw the appellant and told him that he could not count the money as the appellant had not brought his account books. It was arranged that the manager would go with the appellant later that day to the appellant's store to carry out the check. The appellant went to the local shops and when the manager was ready to go he could not find or trace the appellant either that day or the following morning. The manager then made a report to the police station; two constables went with the manager and later that same day they met the appellant near his home. There is no evidence really to suggest that the appellant had absconded or been hiding. They then proceeded to the appellant's store and checked his books, and these showed that he should have had a balance in hand as union funds of Shs. 2,827/-. The appellant then apparently immediately explained that he had left this amount with the assistant manager, Premini, when he went to the estate office the previous day. The manager told the police that the appellant was lying and ordered his arrest, and he was duly arrested and thus charged and brought before the magistrate.

The prosecution relied on the evidence of the manager only and did not call the assistant manager, Premini, whom the appellant alleged he had left the money with. The prosecution case therefore established that the appellant should have had Shs. 2,827/- in his possession for the union; but they failed to prove that his explanation that he had left this amount with the assistant manager, Premini, on the previous day was untrue. As the learned judge on hearing the first appeal points out, the manager's evidence was only to the effect that he did not "think" that the appellant had left the money with Premini and we agree that if there had been no further evidence after the close of the prosecution's case, that the trial magistrate would have had to acquit the appellant. The prosecution had therefore failed to establish a prima facie case against the appellant.

We would here refer to the following passages from a judgment of this court in the case of *Ramanlal Bhatt v. R.* (1) ([1957] E.A. at p. 334) which fully explains what is meant by a prima facie case.

"Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution, the case is merely one 'which on full consideration might *possibly* be thought sufficient to sustain a conviction'. This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case.

Nor can we agree that the question whether there is a case to answer depends only on whether there is 'some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence'. A mere scintilla of evidence can never be enough: nor can any amount of worthless

discredited evidence. It is true, as Wilson, J., said, that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by a 'prima facie case', but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence."

The magistrate, however, decided that the prosecution had made out a case against the accused person sufficient to require him to make a defence, and acting under the provisions of s. 206 of the Criminal Procedure Code called for the defence.

The appellant then gave sworn evidence, and he confirmed the fact that he had left the money with Premini. After giving evidence he gave the names of four witnesses whom he desired to call, and he included the name of the assistant manager, Premini. The case was adjourned and on the resumption the first witness called was Premini but before he gave evidence the appellant made it clear to the court that he did not want to call Premini as his witness as he knew that his evidence would not assist his case, and he said, with every justification, that he thought that he would have been called by the prosecution.

The magistrate, however, decided that the court would itself call Premini by virtue of the provisions of s. 151 of the Criminal Procedure Code, and Premini gave evidence. Not unexpectedly he completely denied receiving the money from the appellant and this provided the missing link in the prosecution's case. After he had given evidence the defence called two witnesses who did not deal with the alleged payment to Premini, but only explained how the appellant had come by certain sums of money traced to his possession.

In the final result there can be no doubt that the case against the appellant depended on the evidence given by Premini, and that it was a direct result of his evidence that the magistrate convicted.

The question, therefore, that arises here is, first, whether a trial court is justified in a criminal trial where the prosecution has failed to establish a prima facie case, to call for the defence under s. 206 of the Code; and secondly, in such a case, when an accused person gives evidence which in no way incriminates him, whether the court should at that stage by virtue of its powers under s. 151 call a witness whose evidence may complete the prosecution's case. It is to be noted here that the payment to Premini formed part of the prosecution's case and that Premini was not called to deal with or clarify any new matter arising out of the defence.

Section 151 reads as follows:

"151. Any court may, at any stage of an inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case."

There are numerous decisions of the High Court of Tanzania and of this court to the effect that it is the duty of the trial court under the latter part of the provisions of s. 151 to call a witness if his evidence appears to the court to be essential to the just decision of the case; and this is so even if the evidence results in strengthening the prosecution's case. (See *Boniface v. R.* (2), *Manyaki v. R.* (3) and *R. v. Kulukana Otim* (4).)

The provisions of s. 151 must, however, be read and considered together with the other provisions of the Code and in particular in so far as this case is concerned with ss. 205 and 206. The relevant portion of s. 205 states:

“205. If at the close of the evidence in support of the charge, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, . . . the court shall dismiss the charge and acquit the accused person.”

Section 206 provides that if it appears to the court that a case is made out the court then calls upon the accused for his defence in accordance with this section.

The provisions of s. 205 are mandatory and if at the close of the prosecution's case a prima facie case has not been made out the accused person is entitled to be acquitted. We do not consider that s. 151 was designed, nor should it be used, to empower the trial court immediately after the prosecution has closed its case to call a witness in order to establish the case against the accused, except possibly, when the evidence is of a purely formal nature. The onus is on the prosecution to prove its case and the Criminal Procedure Code provides that an accused shall be acquitted if at the end of the prosecution's case this has not been done. We would here refer to several decisions of this court on the question as to whether an appeal court should sustain a conviction when a prima facie case had not been made out at the close of the case for the prosecution but where the defence had been called for and had then called evidence establishing the guilt of the accused. In particular we refer to the decision of this court in *Karioki v. R.* (5), *R. v. Kinanda bin Mwaishumo* (6) and *D. M. Patel v. R.* (7).

We also considered the various English cases on which these decisions were based, and also a later case of *R. v. Abbott* (8).

The previous decisions of this court do not in any way detract from the fact that the law requires a trial court to acquit an accused person if a prima facie case has not been made out by the prosecution. If an accused person is wrongly called on for his defence then this is an error of law. On appeal, however, an appeal court has to examine the case as a whole and to consider all the evidence produced at the trial court, and, in accordance with the provisions of s. 346 of the Code, will not reverse a conviction on account of any error by the trial court unless such an error has in fact occasioned a failure of justice.

In this case the trial magistrate was wrong in law in not acquitting the appellant when at the close of the case for the prosecution no prima facie case had been made out. The position was in no way altered as a result of the evidence given by the appellant; there was still no sufficient evidence upon which he could be convicted. The evidence of Premini was not therefore “essential to the just decision of the case” and in our view the trial magistrate was wrong in law in these circumstances in utilizing the provisions of s. 151 in order to call Premini. It would have been different if there had been barely sufficient evidence to convict the appellant which evidence could have been confirmed or demolished by the evidence of Premini.

The question then arises as to whether we should apply the provisions of s. 346 to this case. There was no prima facie case against the appellant at the close of the case for the prosecution. There was still no sufficient evidence to convict him after he had given evidence. For the trial magistrate in these circumstances to call Premini was in effect either to place upon the appellant the burden of proving his innocence in a case where the prosecution had failed to prove his guilt or to put the court in the position of undertaking the task of the prosecution. Either of these positions is so fundamentally contrary to our system of justice that we are satisfied that the errors of law in this case are such as have occasioned a

failure of justice. Accordingly we allow the appeal, quash the conviction and set aside

the sentence and the orders for compensation and for the payment out to the complainant of the money seized from the appellant or his family.

Appeal allowed.

The appellant did not appear and was not represented.

For the respondent:

Attorney-General, Tanzania

K. R. K. Tampi (Senior State Attorney, Tanzania)

Ajit Singh and others v Harnam Singh
[1967] 1 EA 547 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	18 May 1967
Case Number:	27/1966 (126)
Before:	Sir Charles Newbold P, Sir Clement de Lestang VP and Duffus JA
Sourced by:	LawAfrica
Appeal from:	High Court of Kenya – Dalton, J.

[1] Damages – Apportionment where awarded against several defendants in same suit – Observations as to necessity for.

[2] Damages – Libel – Damages awarded to claimant in respect of same document in previous action against different parties – Relevancy of damages to new action against other parties.

[3] Libel – Damages – Whether award of damages in one suit is relevant in mitigation of damages in another suit.

[4] Libel – Qualified privilege – Son displaying in his shop window a libellous circular sent to his father – Whether father entitled to defence of qualified privilege – Circular concerning principal of Sikh school appointed on recommendation of father.

Editor's Summary

About May 18, 1960, the President of the Sikh Community at Nakuru published a circular in the Gurmukhi language defamatory of the respondent to leaders of the Sikh Community throughout Kenya. In September, 1958, the respondent had been appointed by the president on the recommendation of the second appellant at the request of one Dr. Jodh Singh to be principal of the Sikh Girls School at Nakuru.

On April 9, 1960, the respondent's services were terminated and thereafter the president issued the defamatory circular. The circular, after setting out the circumstances in which the plaintiff was appointed, continued:

"It was little negligence on the part of the committee that it did not make inquiries at Kisumu where this man had worked previously. As a result of this man's employment, the damage which Sikh Girls School, Nakuru, Education Committee, Sikh Temple Managing Committee and citizens of Nakuru in general, have suffered defies description or we cannot put in words. So with these few words I wish to remind you or alert you that you also should beware of such persons and do your best to protect your established Institutions from such persons and at the same time take trouble to keep us informed.

In case you need more information, you can contact President Sikh Temple, Nakuru or Manager, Sikh Girls School, at any time at the following address."

In an earlier action (C.S. No. 886 of 1960) the plaintiff had sued the president for libel and had been awarded Shs. 6,000/- damages, and in assessing the damages the judge in that case took into account the innuendo that the plaintiff had done something morally wrong, and also that there had been the wide circulation of the libel throughout Kenya including republication of the circular by addressees of the circular to other persons. The circular was sent by post to the second appellant care of his son the first appellant, a watchmaker having a shop in River Road, Nairobi. At the shop the son, the first appellant, handed the circular to his father, the second appellant. The father explained the contents of the circular to his son who was instructed by his father to show it to Dr. Jodh Singh. The next day the father brought Dr. Jodh Singh to the son's shop and there the father read the circular to the doctor. After the father and the doctor left the shop the son displayed the circular in the shop window to be read by anyone literate in the Gurmukhi language. The respondent raised separate actions for libel against the father and the son and the suits were consolidated. The trial court held that the father had published the circular to the son and to Dr. Jodh Singh (if publication had been restricted to this the father would have been entitled to the defence of qualified privilege) and that both the father and the son had published the circular to any passer-by by the son displaying the circular in the window. On this latter ground of fact the court rejected the defence of qualified privilege raised by the appellants. The court (in a single decree) found that the circular was libellous of the respondent and ordered that the appellants pay the respondent Shs. 6,000/- damages with interest and costs. The father appealed on the ground that he was not responsible for the display of the circular in the shop window and therefore his part of the publication to the son and to Dr. Jodh Singh was restricted and therefore privileged. Both appellants appealed against the quantum of damages on the grounds that (a) the innuendo, viz.: that the plaintiff had done something morally wrong was not proved; (b) republication of the libel was virtually contemporaneous with the original publication in respect of which the respondent had already been compensated in C.S. No. 886 of 1960.

Held –

- (i) (Newbold, P. dubitante) evidence was sufficient to support the finding of fact that the father procured the display of the circular in the shop window and therefore the father was not entitled (as he would probably otherwise have been) to the defence of qualified privilege;
- (ii) as to damages: (a) the innuendo (proved in C.S. No. 886 of 1960) was not proved in this case; (b) compensation already received by the plaintiff in C.S. No. 886 of 1960 was irrelevant in considering damages in this case; (c) in C.S. No. 886 of 1960 the judge had expressly excluded consideration of the effect of the publication by display in the shop window when awarding damages;
- (iii) the circumstances in this case were different from those in C.S. No. 886 of 1960;
- (iv) the award of Shs. 6,000/- damages in this case should be reduced to Shs. 3,000/- based upon the republication by the appellants.

Observation (per De Lestang, V.-P.): In a consolidated suit for libel the damages were correctly assessed as one sum but that sum should have been apportioned as well as the costs between the individual defendants.

Appeal allowed in part. Damages reduced.

Cases referred to in judgment:

(1) *Saunders v. Mills* (1829), 6 Bing. 213; 130 E.R. 1262.

(2) *Dingle v. Associated Newspapers*, [1960] 1 All E.R. 897.

C.A.V.

Judgment

Sir Clement De Lestang VP: This is a joint appeal by two defendants in two separate suits for libel filed in the High Court of Kenya by the same plaintiff against them individually. The suits were consolidated and at the conclusion of the hearing one judgment only was delivered pursuant to which a single decree was issued ordering the defendants to pay Shs. 6,000/- damages with interest and costs to the plaintiff. The appeal arises in this way: In 1958 at the request of one Dr. Jodh Singh, the defendant Hari Singh s/o Harnam Singh (whom I shall call Hari Singh hereinafter) recommended to his old friend and ex-pupil Tika Singh, who was at all material times the President of the Sikh Temple at Nakuru, the appointment of the plaintiff as Principal of the Sikh Girls' School, Nakuru. The plaintiff was appointed in September, 1958, and held the position until his services were terminated on April 9, 1960. On or about May 18, 1960, Tika Singh prepared a circular in the Gurmukhi language which was defamatory of the plaintiff and published it to the leaders of the Sikh Community throughout the country. That circular was in the following terms:

“God is one. His name is ‘Satya’.

Accept my greetings full of love. You know that school committee has considered the engagement or employment of befitting or suitably qualified principal for the Sikh Girls' School, Nakuru *in 1958*, which is being run under the auspices or patronage of Sikh community. For that post *many* important, influential and respected person or persons on the managing bodies of Sikh institutions from Nairobi had sent in their recommendations on telephone about a person named Harwant Singh who is a Bachelor of Arts and Teaching, recites five holy prayers daily and takes five minutes to greet another (in strict Sikh way of greetings). School committee itself having inspected his degree and been impressed by his nobility, assigned him the duties of the principal.

It was little negligence on the part of the committee that it did not make inquiries at Kisumu where this man had worked previously. As a result of this man's employment, the damage which Sikh Girls' School, Nakuru, Education Committee, Sikh Temple Managing Committee and citizens of Nakuru in general, have suffered defies description or we cannot put in words. So with these few words I wish to remind you or alert you that you also should beware of such persons and do your best to protect your established institutions from such persons and at the same time take trouble to keep us informed.

In case you need more information, you can contact President Sikh Temple, Nakuru or Manager, Sikh Girls' School, at any time at the following address.

Servant of the Community.

Sd.: – Tika Singh

c/o Sikh Temple, Nakuru

Post Office 53, Nakuru.”

The other defendant, to whom I shall henceforth refer as Ajit Singh, is the son of Hari Singh. He had a shop in River Road, Nairobi, in premises belonging to his father in which he carried on the business of watch-maker in partnership with his brother under the name of Channa Watch Company. Hari Singh was in the habit of using his son's postal address and of calling at the shop to collect his mail every few days. On one such occasion in May, 1960 a copy of the

circular sent by Tika Singh to him had arrived at the shop and been opened by his son Ajit Singh who, not being able to read or write Gurmukhi, handed it to his father. Hari Singh read the document and told Ajit Singh what it was all about. He then left it with him to be shown to Dr. Jodh Singh. On the following day Hari Singh and Dr. Jodh Singh visited the shop at the same time and Hari Singh read the document to him and then left leaving the circular behind. After Hari Singh's departure Ajit Singh, whether acting under the influence of Dr. Jodh Singh as he said he was or on his own, displayed the circular in the show window of the shop where it remained until removed three to five days later on the instructions of Hari Singh. During the time that it was exhibited it could of course be read by anyone literate in the Gurmukhi language.

On these facts it cannot be doubted and it is indeed not contested that Hari Singh published the libel to Ajit Singh and to Dr. Jodh Singh and that Ajit Singh published it to Dr. Jodh Singh and any passer-by who could read the Gurmukhi language. Among the defences pleaded by the defendants, however, was that of qualified privilege, but the learned judge rejected that defence in regard to both defendants on the ground that it could not apply to the republication of the circular by displaying it in the shop window. He held that Hari Singh was as responsible as Ajit Singh for the displaying of the circular because he had "left the document in the shop so it could be published to all who passed by and could read Gurmukhi."

Counsel for the defendants accepted the learned judge's view that publication of the circular in the circumstances which I have stated was not privileged. This is no doubt the reason why Ajit Singh has not appealed against this aspect of the case. Hari Singh, however, appeals against the rejection of his defence of qualified privilege on the ground that the finding in regard to his responsibility for the display of the circular is not supported by the evidence and is wrong and that publication to Ajit Singh and Dr. Jodh Singh was privileged.

The first question therefore for decision is whether or not there is evidence to support the finding that Hari Singh procured the display of the circular in the shop window. The only direct evidence on the matter was given by the defendants themselves. It is to the effect that the circular was displayed by Ajit Singh and Dr. Jodh Singh on the insistence of the latter and that Hari Singh had nothing to do with it. The learned judge dealt with the matter thus in his judgment. He said:

"It is clear from the evidence that the day after he had received the document from his son, Hari Singh read it to Ajit Singh and Dr. Jodh Singh. The document was then left in the shop by Hari Singh and it was posted up in the shop window in view of passers-by. Hari Singh, who was most unimpressive in the witness box, as was his son Ajit Singh, said that the only reason he gave the document to Ajit Singh was for him to give it to Dr. Jodh Singh but then he said that it was because he was excited he left the shop and went away and did not take the circular with him after reading it to Dr. Jodh Singh. Earlier in cross-examination he said that he told Ajit Singh to hand the document to Dr. Jodh Singh so that he could read it but it appears that he had just read it to Dr. Jodh Singh who did not have his spectacles with him. Ajit Singh's evidence was that the document was on Dr. Jodh Singh's insistence though he, Ajit Singh, did not think it was good to display it, placed that day in the shop window. The two defendants would have the court believe that it was not until four or five days later when Hari Singh called back at the shop that he saw the document in the window and had it removed. He did not say this in the previous case, though admittedly he was not questioned at great length, but I have little doubt in my mind that after publishing the document to his son and

Dr. Jodh Singh, Hari Singh left the document in the shop so it could be published to all who passed by and could read Gurmukhi.”

It would seem, as counsel for the defendants pointed out, that the learned judge was confusing the events of two days where he appears to bracket the handing over of the document to Ajit Singh to be given to Dr. Jodh Singh and the leaving it with them in the shop as happening on the same day. I do not, however, think that this was such a serious misdirection as would of itself vitiate the learned judge’s finding. It is necessary to consider the picture as a whole. Here is a man who receives a circular which he reads and finds defamatory of the plaintiff. He leaves it with his son to give to Dr. Jodh Singh. Next day he meets Dr. Jodh Singh in his son’s shop and reads the circular to him. When he leaves he does not take the circular with him and it is immediately displayed by his son, with or without the active participation of Dr. Jodh Singh. Unless a satisfactory and acceptable explanation were given clearly exonerating Hari Singh from responsibility for the display of the circular the possibility that it was done, if not by his direction but at least with his concurrence, cannot be lightly dismissed. An explanation was indeed given which rests entirely on the evidence of Hari Singh and his son, but as I have pointed out the learned judge found them to be unimpressive witnesses and rejected their evidence. Whether in these circumstances Hari Singh left the circular behind for the purpose of its being published as it was, is a matter of inference from the circumstances as a whole and I am not prepared to say that the inference which the learned judge drew is an unreasonable one.

It follows in my view that the learned judge was right to dismiss the defence of qualified privilege of both defendants and it is therefore unnecessary to decide whether the publication to Ajit Singh and Dr. Jodh Singh was privileged except in so far as it may have affected the quantum of damages with which I shall now deal.

Both defendants appeal against the quantum of damages and in order to understand their appeal it is necessary to explain that before the present suits were filed the plaintiff had sued Tika Singh in respect of the same libellous circular and had been awarded Shs. 6,000/- damages by Peley Murphy, J., in Civil Case No. 886 of 1960. By his plaint in that suit the plaintiff had alleged that the circular was published to a named person and to “several other persons in Nairobi and other places in Kenya and was displayed in various parts of the city of Nairobi, and other places in Kenya where it was read by several persons . . . and that the document was intended by the defendant to be widely disseminated”. He also pleaded that the words meant and were understood to mean “that the plaintiff is an undesirable person as a school teacher, lacks the essential and elementary qualities of a school teacher, that he is deprived of the morality of a school teacher and should not be employed as such by any Sikh or other institution.”

It is clear in my view from Peley Murphy, J.’s judgment that in assessing the damages he took into account the wide dissemination of the libel among the Sikh community throughout Kenya including the republication of the circular by the addressees to other persons. He said this:

“In my view the wide dissemination of the circular to prominent members of the Sikh community throughout Kenya cannot be said to be privileged. Moreover, the fact that the circular was re-published to persons other than the addressees was, in my view, the natural and probable result of the original publication.”

It is equally clear that he also took into account the innuendo pleaded including the allegation that the plaintiff, as principal of the school, had done something morally wrong. I quote what he said:

“There is evidence that at least one person to whom the circular was published understood it to mean that the plaintiff as principal of the school had done something morally wrong. I do not think that the conclusion drawn by that witness is surprising. The words used by the defendant are open to such interpretation. I am of the opinion that the innuendo complained of has been established and that the plaintiff has been injured in his credit and reputation by the publication.”

In the present case the innuendo pleaded was substantially the same as in the previous case and in finding the words libellous of the plaintiff the learned judge said:

“In my view such words are defamatory of the plaintiff since they clearly disparage him in the way of his profession imputing that he is unfit for his profession owing to want of ability, learning or some other qualifications. I am of opinion that the innuendo complained of has been established and that the plaintiff has been injured in his credit and reputation by the publication.”

In awarding Shs. 6,000/- damages the learned judge did not, however, indicate how he arrived at that figure except to say that he considered the amount of Shs. 6,000/- awarded by Peley Murphy, J., in the previous case a very reasonable and proper sum and proposed to make a similar award. He did, however, take into account the conduct of the defendants, namely their knowledge that the publication of the libel in the shop window was wrong and their refusal to apologise.

Counsel for the defendants, while conceding that the circular was libellous in the natural meaning of the words used therein contended that the plaintiff should only have been awarded nominal damages because (a) the innuendo was not proved and (b) the republication of the libel by the defendants was virtually contemporaneous with the original publication for which the plaintiff had already been fully compensated.

The innuendo was clearly not proved and I think I am right in saying that counsel for the plaintiff did not seek to argue the contrary. He contented himself with contending that there was no difference between the natural meaning of the words in the circular and the meaning attributed to them by the innuendo. With respect I am quite unable to agree with this proposition. It is sufficient to read the words of the circular and the innuendo to see that it is not so and one example only will suffice to demonstrate this. The words in their natural meaning do not allege immorality on the part of the plaintiff whereas it is alleged in the innuendo that the words were understood to mean that the plaintiff “is deprived of the morality of a school teacher, etc.” To the extent therefore that the learned judge was influenced by the innuendo in assessing the damages, he erred in my view.

As regards the argument that the plaintiff had been fully compensated, the law is stated in *Gatley on Libel and Slander* (5th Edn.) at p. 620 thus:

“The defendant cannot prove in mitigation of damages that some other person or persons have on previous occasions published the same libel, for the fact that others have defamed the plaintiff is wholly irrelevant.”

This rule is derived from *Saunders v. Mills* (1) and was expressly approved in *Dingle v. Associated Newspapers* (2) where, after referring with approval to the

passage from Gatley which I have just quoted and referring to *Saunders v. Mills*, Sellers, L.J. said ([1960] 1 All E.R. at p. 906):

“The general rule so stated is established law and I see no ground for acceding to the defendants’ counsel’s request to hold that *Saunders v. Mills* should be reversed even if it were possible so to do with an authority so old and so frequently applied over the years. At common law a defendant could not in mitigation of damages give evidence to show that the plaintiff had already commenced an action or recovered damages against some other person or persons for other publications of the same libel. It was irrelevant.”

Moreover, as counsel for the respondent has pointed out, Peley Murphy, J. expressly excluded from his award the republication of the libel by the defendants. He said this:

“I do not, however, consider that the defendant could have anticipated that Ajit Singh would display the circular in his shop window and I am of opinion that that particular republication to a much wider public was not the natural and probable result of the original publication. I find that the defendant intended the circular (or its contents) to be widely disseminated among the Sikh Community throughout Kenya and that it was so disseminated.”

Counsel for the appellants also contended that the publication to Ajit Singh and Dr. Jodh Singh was privileged and that Peley Murphy, J. had taken such publication into account in his assessment of damages. From these premises he submitted that the learned judge erred in taking into account such publication. While I agree with the premises upon which the contention of counsel for the appellants is founded I am unable to agree with his conclusion for the simple reason that the learned judge did not in my view rely on such publication. If I am wrong on this I have no doubt that such publication did not materially affect the quantum of damages in the circumstances of this case.

In the result I am of the opinion that in assessing damages the learned judge was wrong to take into account the innuendo which was not proved. He was also wrong to follow blindly the award made by Peley Murphy, J. in quite different circumstances. Bearing in mind the fact that Peley Murphy, J.’s award was based on a wide publication to the Sikh community throughout Kenya and on a grave innuendo I consider that the award of Shs. 6,000/- for the republication by the defendants was excessive and should be reduced. I would accordingly allow the appeal in so far as the quantum of damages is concerned and substitute Shs. 3,000/- for the Shs. 6,000/- awarded leaving undisturbed the order for costs. As both parties have partly succeeded and partly failed in this appeal I would award the appellants one half of the costs of the appeal with a certificate for two counsel. I would make no order as to costs in regard to the cross-appeal.

Before leaving this case I would like, however, to make an observation on the order made by the court below. It is this. In a consolidated suit for libel while it is perfectly correct to assess the whole amount of damages awarded in one sum it is necessary to apportion the damages as well as the costs between the individual defendants. This was not done in the present case and as the point was neither taken nor argued I have ignored it in the appeal.

Sir Charles Newbold P: I have had the advantage of reading, in draft, the judgment of Sir Clement De Lestang, V.-P.

As far as the question of damages is concerned I agree with what he has said. As far as the question of liability of Hari Singh is concerned, I would myself have arrived at a different conclusion for the following reasons.

I am satisfied that the publication by Hari Singh to Jodh Singh and to Ajit Singh was a publication which was protected by qualified privilege and as no malice has been proved against Hari Singh he is not liable for any damages in respect of that publication. The privilege attaching to the publication to Jodh Singh is based upon the fact that Hari Singh had recommended the plaintiff as a teacher following upon representations made by Jodh Singh and if, therefore, there was any suggestion that the plaintiff was not a satisfactory teacher there was a community of interest between Hari Singh and Jodh Singh to give and receive any such information. The privilege attaching to the publication to Ajit Singh is based upon the fact that Hari Singh and Ajit Singh were the grandfather and father of children who were in a school at which the plaintiff was a teacher. Even if the plaintiff was not a teacher of the children at any particular time, he could become such a teacher and in any event he was a teacher in their school. There was clearly a community of interest between Hari Singh and Ajit Singh to give and receive information about any such teacher in respect of his position as a teacher.

This leaves for consideration, as regards the liability of Hari Singh, the publication by displaying the defamatory circular in the shop window. The judge found as a fact that Hari Singh procured such publication. If, in fact, that is the position then Hari Singh is clearly liable, as a publication of that nature to the world at large could not possibly be protected by qualified privilege. The only direct evidence as to Hari Singh's responsibility for displaying the circular in the window comes from Hari Singh and Ajit Singh themselves and that evidence is to the effect that Hari Singh had nothing to do with the act of posting the circular. That evidence was not believed by the trial judge and as this disbelief is related to the credibility of witnesses I do not consider that this court should do other than discard their evidence. Even, however, if their evidence is disbelieved it still leaves no evidence connecting Hari Singh with the actual publication of the circular in the window except the inference that because the circular had been sent to Hari Singh and because it was subsequently displayed in the window of Ajit Singh's shop (not, be it noted, Hari Singh's shop), therefore Hari Singh must have been concerned in that display. As this is an inference of fact this court is in as good a position to draw it as the trial judge. It is an inference which is possible from the facts; but inasmuch as the onus is on the plaintiff to prove that Hari Singh was responsible for that publication, an onus to be discharged on a balance of probabilities, I would not myself draw this inference unless on the balance of probabilities it should be drawn. To my mind the evidence from which the inference is to be drawn is so evenly balanced as not to permit of this inference being drawn on a balance of probabilities. I would accordingly not draw it myself and consider that the judge was wrong in drawing it. As, however, my brethren are of a different view and I am not so convinced of the correctness of my view as to dissent I think that I should merely express my doubts as to whether the decision was correct.

For these reasons I agree with the order proposed by Sir Clement De Lestang, V.-P. and it is ordered accordingly.

Duffus JA: I have read and I agree with the judgment of the learned Vice-President and with the order that he proposes.

I would, however, shortly consider the question as to the responsibility of the second appellant, Hari Singh, for the publication of the defamatory letter in the shop window. It was established that this letter was posted to and duly received by the second appellant on these shop premises and that he read this letter to his son, the first appellant, on the day he received it and then to Dr. Jodh Singh on the following day. On both occasions the second appellant left the letter in the shop. On the second occasion he just left it on the counter and then

immediately after this the letter is displayed in the shop window. The circumstances showing how the letter came to be so displayed would be facts within the peculiar knowledge of both the appellants and the trial judge rejected their explanation that this was done by the first appellant without the second appellant's knowledge and consent. In his judgment the learned judge said:

“... but I have little doubt in my mind that after ‘publishing’ the document to his son and Dr. Jodh Singh, Hari Singh left the document in the shop so it could be published to all who passed by and could read Gurmukhi.”

In the circumstances of this case and on his findings on the facts the learned judge was, in my view, justified in coming to the conclusion that the second appellant was a party to the display of the defamatory letter in the shop window and I agree, therefore, with my Lord the Vice-President that the judgment of the trial court as to the liability of the second appellant on this issue should be upheld.

Appeal allowed in part with one-half costs.

For the appellants:

J. A. Mackie-Robertson, Q.C., Satish Gautama and B. D. Bhatt, Nairobi

For the respondent:

J. K. Winayak & Co., Nairobi

J. M. Nazareth, Q.C. and J. K. Winayak

Hassanali Issa & Co v Jeraj Produce Store [1967] 1 EA 555 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	8 May 1967
Case Number:	18/1967 (129)
Before:	Sir Charles Newbold P, Duffus and Spry JJA
Sourced by:	LawAfrica
Appeal from:	The High Court of Tanzania – Hamlyn, J.

[1] *Appeal – Right of appeal – Second appeal from magistrate in civil case – Whether appeal lies from High Court of Tanzania to Court of Appeal irrespective of value of subject-matter provided leave given by High Court or Court of Appeal – Appellate Jurisdiction Act, s. 7 (1) (c) and Civil Procedure Code, 1966, ss. 98 and 99 (I.).*

[2] *Bill of Exchange – Consideration – Alleged inadequacy of – Whether relevant as a defence to an action on a bill.*

[3] *Bill of Exchange – Duress – Whether can be a good defence to an action on a bill – Observations.*

[4] Bill of Exchange – Undue influence – Whether can be a good defence to an action on a bill – Observations.

[5] Contract – Duress – Defence of – Whether exercise of legal right can amount to.

[6] Contract – Storage charges – Whether agreement to pay implied into customer's contract with garage.

[7] Contract – Undue influence – Defence of – General observations as to – Whether available against repairer exercising possessory lien for repair charges.

[8] Evidence – Affidavit – Affidavit filed in support of application for leave to defend – Whether can be used as evidence in support of the defence subsequently filed or whether evidence to be adduced in support in the usual way.

[9] Lien – Repairer’s possessory lien – Garage proprietor’s lien for repair charges – Whether extends to storage charges – Rights generally.

Editor’s Summary

The plaintiff, who carried on a garage business, at the defendant’s request repaired the defendant’s motor cycle and then stored it in his garage pending collection by the defendant. After about two years the defendant wished to collect it but the plaintiff refused to release it unless a sum of Shs. 716/50 was paid, which was made up of repair charges plus storage charges fixed at Shs. 100/-. The defendant gave the plaintiff a cheque for Shs. 716/50 and obtained the release of the motor cycle, but then stopped payment of the cheque. The plaintiff sued the defendant on the dishonoured cheque in the Magistrate’s Court and applied for summary judgment but the defendant on affidavit obtained leave to defend. The magistrate, having framed various issues, found in favour of the defendant and ordered the plaintiff to pay the costs, but then directed payment out to the plaintiff of the sum of Shs. 251/50 deposited by the defendant in court. On appeal to the High Court the plaintiff’s appeal was dismissed with costs. On a second appeal to the Court of Appeal the main points dealt with were:

- (a) whether the appeal court had jurisdiction to hear a second appeal for the amount concerned;
- (b) the purpose of an affidavit filed in support of an application for leave to defend filed by the defendant in the Magistrate’s Court under O. 37 of the Indian Civil Procedure Code (since January, 1967, O. 35 of the Tanzania Civil Procedure Code);
- (c) proof and onus thereof in an action on a bill of exchange;
- (d) whether duress was a valid defence to the plaintiff’s suit on the cheque;
- (e) whether demand for payment by the plaintiff was made under undue influence and if so whether it was a valid defence to the plaintiff’s suit on the cheque;
- (f) whether it is a defence if the cheque was not given for an adequate consideration;
- (g) whether the claim for storage charges was enforceable.

Held –

- (i) Since January 1, 1967, the Court of Appeal has jurisdiction to hear second appeals in civil suits whatever their value, with the leave of the High Court or of the Court of Appeal itself (Appellate Jurisdiction Act, s. 7); and the former restriction on a second appeal in suits of a value less than Shs. 750/- under the Indian Civil Procedure Act, s. 102 no longer applies (since by virtue of the Tanzania Civil Procedure Code, 1966, s. 98 of the Indian Civil Procedure Act ceases to apply to Tanzania and by the Tanzania Act, s. 99 all proceedings instituted under the Indian Act continue under the Tanzania Civil Procedure Code);
- (ii) in cases under O. 35, the plaintiff is entitled to judgment unless the affidavit raises triable issues entitling the defendant to defend. If the court grants leave to defend, the affidavit forms part of the record but it is never evidence in support of the defence, which has to be adduced in the ordinary way;

- (iii) a holder of a bill (includes a cheque) is prima facie a holder in due course, but, if it is admitted or raised in the defence and proved that the issue of the bill is affected with inter alia duress force or illegality the burden of proof shifts back on to the holder:
- (iv) duress was pleaded and if proved would have been a valid defence. Duress was not proved in the magistrate's court and on appeal it was conceded no duress

existed. The plaintiff was entitled to exercise his possessory lien by refusing to release the motor cycle until the repair charges were paid for. There cannot possibly be duress where a person is exercising a legal right;

- (v) undue influence only arises in contract where one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage. A defence of undue influence was not raised in the magistrate's court and, if it had been, on the facts such a defence would have failed;
- (vi) any alleged inadequacy of consideration is irrelevant and is not a valid defence to an action on a bill; although not where there is a total absence of consideration;
- (vii) storage charges are impliedly payable at a reasonable rate for the period a vehicle (such as a motor cycle) is being stored as opposed to the period when a vehicle is being repaired.

Appeal allowed; judgment and decree of resident magistrate and of the High Court set aside with costs to the appellant in both appeals and in the Resident Magistrate's Court.

[**Editorial Note:** This reverses the judgment of the High Court reported ante, p. 447.]

Cases referred to in judgment:

- (1) *Oliver v. Davis*, [1949] 2 All E.R. 353.
- (2) *Harris v. Vallarman*, [1940] 1 All E.R. 185.
- (3) *Hinnawi v. Faruqi*, [1936] 1 All E.R. 638.

Judgment

Sir Charles Newbold P: This is a second appeal against a decision of a judge of the High Court of Tanzania given on appeal to him from a decision of a resident magistrate.

Broadly the facts are that the defendant in the suit was the owner of a motor cycle which was damaged in an accident some time in 1963 and the defendant took the motor cycle to the plaintiff and left it with the plaintiff with instructions not to repair it until he received further instructions. Nothing appears to have been done for about two years until 1965 when it seems that instructions were given by the defendant to repair the motor cycle. The precise nature of these instructions is to some extent in dispute. It is not clear whether an estimate which had been given by the plaintiff of the cost of the repairs was communicated to the defendant before the defendant gave instructions for the repairs to be carried out. But it is clear, and I do not think it is disputed, that the defendant's brother authorised by his signature on the job card the repairs to be carried out. It has not been suggested in any way that the defendant's brother was not, when giving that authorisation, acting as the agent for the defendant. I should also make it clear that when I use the term "defendant" strictly the defendant is a firm and the cycle belonged to the firm, but all correspondence and actions in relation to the cycle have been directed to and undertaken by a Mr. Bhanji.

The plaintiff undertook the repairs and subsequent thereto the defendant came to the plaintiff's garage and sought to take away the motor cycle which had been repaired. The plaintiff refused to allow the defendant to do this without paying for the cost of the repairs and for storage charges. The evidence is

that on the plaintiff refusing to part with the cycle except on payment of these charges the defendant, that is Mr. Bhanji, signed a cheque for the amount of the plaintiff's bill, took away the cycle and on the following day instructed his bank not to

honour the cheque. The plaintiff, after some little correspondence, filed a suit against the defendant under the then existing O. 37, r. 1, for the amount due on the cheque, gave particulars of the dishonour and also set out the particulars for which the cheque had been given.

The resident magistrate, on an affidavit being filed seeking leave to defend, which affidavit contained various allegations, one of which was that the cheque had been given under duress, granted leave to defend. The defendant filed a defence which asserted first, that the cheque was given under duress; secondly, that the plaintiff failed to carry out the work in accordance with the instructions of the defendant; thirdly, that the plaintiff had refused to part with the cycle unless the plaintiff was paid; fourthly, that there was no contract between the parties, which would sustain the claim for storage charges; and fifthly, if I understand the implication in the defence generally, that the charges were unreasonably high.

When the case came before the resident magistrate there was a dispute between the parties as to what issues should be framed. The defendant claimed that the issues which should be framed should include issues as to whether there was any consideration for the amount, whereas the plaintiff claimed that on the defence the issues should be:

- (1) Was the cheque given under duress?
- (2) If so, was there any agreement in respect of the amount to be paid?
- (3) If not was the charge for the work done reasonable?

The resident magistrate did not accept in detail either of the issues submitted to him but he did frame the following issues:

- (1) Was there consideration?
- (2) Was there agreement regarding goods supplied and work done on defendant's vehicle?
- (3) What relief are the parties entitled to?

At the end of his judgment the resident magistrate stated that he found in favour of the defendant, but in the course of his judgment he appeared to state that the plaintiff was entitled to Shs. 251/50 cents. The decree ordered the plaintiff to pay to the defendant the costs of the suit with interest thereon and it was also ordered that the sum of Shs. 251/50 cents which had apparently been deposited in court by the defendant was to be paid out to the plaintiff.

From this judgment the plaintiff appealed to the High Court which dismissed the appeal with costs. From this decision the plaintiff has appealed to this court on a number of grounds, the main one of which may be set out as follows: that the courts below had completely misdirected themselves on the question which they had to decide and on the manner of approach to that question.

Before I turn to deal with the appeal itself I should, I think, deal with an issue very properly raised by counsel for the respondent at a somewhat late stage, that is, the issue of jurisdiction of this court to hear this second appeal. The legislation relating to civil procedure up to December 31 last year and the legislation in force at the time that this matter came before the resident magistrate's court was the Indian Civil Procedure Act. There was a section – s. 102 – which provided that no second appeal shall lie in a suit where the amount of value of the subject-matter did not exceed 500 rupees. Counsel for the respondent properly drew the attention of this court to a judgment of this court in Civil Appeal No. 29 of 1965, which was followed by a similar decision in Civil Appeal No. 30 of 1965, wherein this court held that s. 102 of the Civil Procedure Code was still in force with the result that a second appeal to the court

in a suit involving less than Shs. 750/-, which was then taken to be the equivalent of 500 rupees, was incompetent even with the leave of the High Court.

Without wishing to raise in this appeal the present position in relation to the principle of stare decisis, that is the extent to which this court may be bound by previous decisions of this court, it seems to me that the position in the present case is very different from the position at the time of the judgment in Civil Appeal No. 29 of 1965. In the first place, it is so notorious that judicial notice may be taken of it, the rupee has been devalued subsequent to October 13, 1965, the date on which that decision was given, with the result that the equivalent of 500 rupees may not now be Shs. 750/-; but even more important is the point that s. 102 no longer exists, and it was on the existence of that section that the previous decision of this court was given. As from January 1, 1967, civil procedure in Tanzania is governed by the Civil Procedure Code, 1966, and there is no equivalent section to what was s. 102 of the Indian Civil Procedure Act. By s. 98 of the Tanzania Civil Procedure Code, 1966, the Indian Code of Civil Procedure ceases to apply to Tanzania and by s. 99 of the Civil Procedure Code, 1966, all proceedings instituted under the Indian Code of Civil Procedure shall be continued under the Tanzania Code. That, in my view, creates completely different conditions which entitle this court on this appeal to come to its own conclusion as to whether there is jurisdiction to hear this appeal. The jurisdiction of this court stems from the Appellate Jurisdiction Act (Ch. 451). Section 7 of that Act deals with the jurisdiction on civil appeals and by s. 7 (1) (c) it is provided that this court, with the leave of the High Court or of this court, has jurisdiction to hear appeals "against every other decree, order, judgment, decision or finding of the High Court". The words "every other" must be read in the light of paras. (a) and (b) of that subsection which refer to decrees and orders of the High Court made under its original jurisdiction. In my view s. 7 (1) (c) gives to this court jurisdiction to hear second appeals on the civil side where leave to that effect has been granted by the High Court or, by reason of a subsequent amendment, by this court. In this case leave to appeal was granted. In these circumstances I am satisfied that this court has jurisdiction to hear this appeal and that the previous decision of this court in Civil Appeal No. 29 of 1965 is no longer applicable to the circumstances as they exist in Tanzania as from January 1, 1967.

Having dealt with this preliminary point of jurisdiction, I turn now to consider the questions raised on the appeal. With respect to the judge of the High Court and the resident magistrate, in my view they have both completely misunderstood the legal position in a case where a plaint is brought upon a bill of exchange or, as in this case, a cheque. They have not only misunderstood the position which arises where leave to defend is given in a case brought under what used to be O. 37 of the Indian Civil Procedure Code and is now, I think, O. 35 of the Tanzania Civil Procedure Code. They have further misunderstood the law in relation to whether the court hearing a case can refer to any affidavit filed in interlocutory proceedings in that same case. As I have said, the suit was filed under O. 37, it being a suit upon a cheque which was dishonoured. Under that Order and the equivalent Order under the present Code in Tanzania, the plaintiff is entitled to enter judgment unless the defendant obtains leave to defend; and he must apply to a judge for that leave. In that application the defendant files an affidavit setting out the various matters and if the resident magistrate or the judge is of the view that that affidavit raises triable issues then the resident magistrate or judge grants leave to defend, which leave may be granted either unconditionally or conditionally. Having obtained leave to defend, then the affidavit upon which that leave was granted remains, of course, upon the record but it is in no circumstances evidence in the case itself. The defendant having obtained leave files his defence and the proceedings then continue in precisely the same way as if the suit had not been filed under that particular Order. When I say that the proceedings continue in precisely the same way, I mean that they continue in precisely the same way they would have continued,

with the onus in precisely the same place as the onus would have been, if the proceedings had not been brought originally under O. 37. It is true that, broadly, the onus is upon a plaintiff to prove his case, but there are certain circumstances in which, by reason of the facts alleged or by reason of the facts pleaded in the defence, the case for the plaintiff is *prima facie* established and the onus then passes to the defendant immediately and the plaintiff has not got to prove anything unless and until the onus shifts back to him. In this case, inasmuch as the suit was upon a cheque and inasmuch as the cheque was admittedly given, the onus was then on the defendant to show some good reason why the plaintiff was not entitled to have judgment upon the cheque admittedly given and for the figure set out in that cheque. This position stems from s. 30 of the Bills of Exchange Act (Ch. 215), which provides that the holder of a bill is *prima facie* deemed to be a holder in due course; but if in an action on the bill it is admitted or proved that the issue is affected with duress or illegality then the burden of proof is shifted unless certain events, which are irrelevant for this purpose, take place. The position therefore is that where there is a suit on a cheque and the cheque has admittedly been given the onus is on the defendant to show circumstances which disentitle the plaintiff to a judgment to which otherwise he would be entitled. One of these circumstances is duress; and that was pleaded.

May I here dispose of the question of duress, because it would seem that it is no longer an issue in the case by reason of the fact that it is now conceded that duress did not exist. May I say here at once that that concession is in my view perfectly proper and inevitable. There cannot possibly be duress where a person is exercising a legal right. In this case the plaintiff, a craftsman, had carried out repairs to a motor cycle and the motor cycle was in his possession. In common law he has what is known as a possessory lien for the payment of the cost of those repairs; that is, he was entitled to retain the article which he had repaired in his possession until he was paid for the repairs or until a court ordered him to deliver up the article. In this case, as I say, what the plaintiff sought to do was to say that he would not deliver up this motor cycle until the amount which he claimed as his charges had been paid. He was asserting a right which he had and in these circumstances the assertion of that right cannot possibly constitute duress. As I have said, however, the question of duress is no longer of importance.

The issues now before the court on this appeal are first, whether the resident magistrate and the judge of the High Court were correct in law in giving judgment on the basis that there had been insufficient consideration and that the charges were greatly in excess of what would be a reasonable charge for the work, and, secondly, an issue which was raised at the last possible moment by the respondent, whether the demand of the plaintiff was not made under undue influence on the defendant.

May I dispose first of the question of undue influence. Undue influence is defined in the Law of Contract Act (Ch. 433), as existing "where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other". Counsel for the respondent has submitted that the plaintiff in this case was in a position to dominate the will of the defendant by reason of the fact that he had possession of the motor cycle and refused to deliver it up without payment of his charges and that he used that position to obtain an unfair advantage. I reject that submission entirely. In the first place I doubt very much whether it is open to counsel for the respondent to raise this at this stage because I do not consider that the defence raised it specifically or that the facts set out in the defence were such as could found a claim in law that there existed undue influence. Secondly, I would like to emphasise that where you have adult persons who are not either in a fiduciary relation one to the other or in a particular relationship,

such as parental relationship or the relationship of borrower and lender, I find it difficult to conceive of there being any undue influence between persons who are entering into a perfectly normal commercial relationship. It is, of course, dangerous to set out, in relation to the facts of a particular case, a definition which may subsequently be taken to cover facts wholly dissimilar. But I will say that on the facts of this case, where a craftsman refuses to part with an article in respect of which he has a possessory lien for his charges, then those facts cannot, in respect of an adult, under any circumstances as I can see them at the moment, constitute undue influence. On the facts of this case I have no doubt whatsoever that there was no undue influence.

The other main point which was urged by counsel for the respondent was the adequacy or otherwise of the consideration. This brings me back to what I have already described as a complete misconception by the resident magistrate and the judge of the position; and this misconception stems, I think, from the issues which were framed. I agree entirely with counsel for the appellant that the resident magistrate framed completely wrong issues on the facts as they were before him. I have no doubt whatsoever that the issues which should have been framed were those, or ones very similar to those, which counsel for the appellant submitted should have been framed. That is, first, was the cheque given under duress? As I say the question of duress no longer arises, but in any similar case where it is suggested that a cheque was given in circumstances which would vitiate it by reason of duress or undue influence or anything of that nature, then of course the first issue must be whether the cheque was given under those circumstances. If it was not, then, save in exceptional circumstances, the case is disposed of because where a cheque has been given the plaintiff is entitled to recover the amount given on that cheque where it is improperly dishonoured. That is the first issue which should have been framed on the pleadings in this case. If the answer to that issue was that there was no duress, then judgment should have been given for the plaintiff.

The second issue then only arises if the answer to that first issue is in the affirmative, that is, was there an agreement? If there was an agreement between the parties to pay the amount then that would have itself resulted in judgment for the plaintiff unless there were some circumstances which would have vitiated the agreement. The third issue which should have been framed was, if there was no agreement was the amount reasonable? We need not go into that here as it does not arise.

As I have said, the first issue which the resident magistrate should have framed was, was there duress; and having come to the conclusion that there was none he should then have given judgment for the plaintiff. Counsel for the respondent has urged that this is not so; that the court should have enquired into the adequacy or otherwise of the consideration and he has referred to s. 27 of the Bills of Exchange Act in support of that submission and he has also referred to the cases of *Oliver v. Davis* (1) and *Harris v. Vallarman* (2). The *Oliver v. Davis* case when examined does not, in my view, provide any support for counsel for the respondent's submissions. It is true that taken out of their context the particular passages to which counsel referred would seem to provide some support to him, but the facts of that case were these. There was a suit on a cheque and the defence was, first, fraud, and secondly a total failure of consideration. The defence of fraud was abandoned and on appeal the sole question raised was, was there a total failure of consideration? Under s. 30 of the Tanzania Bills of Exchange Act, a holder of a bill is prima facie deemed to be a holder in due course, but that, of course, is a presumption of fact which may be rebutted. It may, for example, be shown that no consideration was given, in which event the plaintiff would not be able to succeed on the cheque. Considerations of this sort apply, for example, in the case of accommodation bills. The decision in the

Oliver v. Davis (1) case related to the question of whether an antecedent debt could provide any consideration for a cheque. That case has no relevance where there is admittedly some consideration and the sole question is whether the consideration is adequate. Similarly, in the *Harris v. Vallarman* (2) case the issue there was quite different from the issue in this case. Indeed, if one examines the judgment in that case it is against the respondent. In that case there was a suit upon a bill of exchange given in respect of certain goods, and the defendant sought to set off the damage which he had suffered as a result of the goods not being up to standard against the amount which he had to pay upon the bill of exchange. The plaintiff tried to have that set off struck out, and it was held, quite properly in my view, that the defendant was entitled to have it maintained in the proceedings. If he proved the facts founding the set off then he was entitled to set off against the amount which he owed on the bill of exchange the amount of the unliquidated damages which flowed from the goods not being up to the required standard. Neither of these cases is, in my view, applicable to the facts of the present case. There is, however, a judgment of the Privy Council to which counsel for the respondent referred which makes it clear that on a bill of exchange inadequacy of the consideration is not a matter to be enquired into.

In the case of *Hinnawi v. Faruqi* (3), Lord Alness, delivering the judgment of the Board, said ([1936] 1 All E.R. at p. 639):

“With regard to the first ground of appeal, their Lordships are satisfied that consideration was given for the promissory note, and that the judgment of the Court of Appeal on that point is unassailable. They are further of opinion that, having regard to the terms of the promissory note, the alleged inadequacy of consideration affords no relevant answer to a demand made upon it.”

In other words once there is, in fact, consideration and once, in fact, a cheque has been given based upon some consideration, then in a suit upon that cheque the court cannot go into the question as to whether or not the consideration was sufficient. Let me make it clear that it can go into the question as to whether or not there was consideration; but if, as in this case, there was admittedly some consideration then the fact that the parties had agreed to a sum and that agreement is manifested by the signing of the cheque shows that the plaintiff is entitled to recover that sum unless, as I say, there are some special considerations such as fraud or duress.

That was the basic issue which the resident magistrate and which on appeal the judge of the High Court was required to consider and neither of them did so. If they had done so then, in my view, there is no doubt whatsoever that judgment must have been given for the plaintiff.

I would like to say a word here about the question of storage charges. The consideration for this cheque fell into two parts; first, in respect of materials and labour supplied for repairing this motor cycle and, secondly, in respect of the storage charges. Now it is quite clear that the owner of a vehicle which goes into a garage for repairs does not normally expect to pay storage charges in respect of the period when the vehicle is in the possession of the garage for the purpose of repairs. Where, however, the vehicle is left, not for the purposes of repair but for the purpose of storage only, and a decision is later to be taken as to whether any repair is to be done and if so, what the repairs are to be, then I think there must be taken to be an implied agreement between the parties (unless, of course, there is some express provision to the contrary) that the person who is undertaking the storage is entitled to a reasonable sum in respect of that storage. That such an implied agreement is not unreasonable is shown here, I think, by the evidence of the defendant himself who stated that the plaintiff could have charged storage if he had so desired and he would have paid. That shows the

defendant himself recognised that he would normally have to pay storage charges for the period when the motor cycle was being stored as opposed to being repaired. That period in this case was about two years and there is some evidence as to what storage charges normally were charged by the plaintiff. Certainly for my part as I say, one should imply an agreement to pay reasonable storage charges and even if, at this stage, one had to go into the question of what was reasonable I could only consider that there is no reason at all for me to think that the resident magistrate, as a matter of fact, would not have found the sum of Shs. 100/- which was the storage charge in the amount of the cheque, a reasonable sum.

I do not think that I need deal with any of the other grounds of the appeal in detail. As I have said, in my view the resident magistrate and the judge of the High Court on first appeal entirely misconceived the proper issues which were before the court. On the facts before the court the cheque for the amount claimed had admittedly been given and as there were no facts which would lead the resident magistrate to consider that that cheque had been vitiated, the resident magistrate should have entered judgment for the plaintiff for that amount. I would accordingly allow the appeal.

I would, in allowing the appeal, make the order that the decision of the judge on first appeal should be set aside and that the decision of the resident magistrate should be set aside. I may here say that the decision of the resident magistrate is strange in the extreme because he has entered judgment apparently for the defendant but has directed the sum of money to be paid to the plaintiff. Be that as it may, I would set aside the judgment of the resident magistrate and the decree entered thereon and substitute therefore a judgment and decree giving to the plaintiff judgment on his plaint for the sum of Shs. 716/80 cents with interest thereon from the date of the suit to the date of the decree of the resident magistrate, that is October 3, 1966, at nine per cent. per annum and thereafter until payment at six per cent. per annum together with an order that the plaintiff have the costs of this suit.

As far as the costs of the first appeal are concerned the order I would make is that the plaintiff should be entitled to his costs.

Duffus JA: I agree with the judgment of my Lord President.

I agree that this court has jurisdiction, by virtue of s. 7 (1) (c) of the Appellate Jurisdiction Act.

On the appeal itself my Lord President has dealt fully with the question of s. 30 of the Bills of Exchange Act and I agree that in this case the resident magistrate should have entered judgment for the plaintiff as he had proved that he was the holder of the bill and was deemed to be a holder in due course and the defendant did not prove that the bill was affected by fraud, duress, force or illegality and that accordingly judgment should have been entered for the plaintiff on the cheque.

I would add a few words about the merits of the case. These were fully gone into before the resident magistrate and in my view there was the clearest possible documentary evidence to show that the plaintiff was fully entitled to the amount that he charged for the repairs. It is only surprising that the defendant saw fit to defend the action at all and that he should have got judgment. I refer to the estimate for repairs dated July 15, 1965, in which the first defendant's witness, who admits he was a partner in the defendant firm, received – and I also refer to exhibit “C” – which his brother, admittedly his agent signed, and I quote from this order:

“Repair my ZANDAPP Motor Cycle TD. 5510 as per your estimate of Repairs under Ref. No. T/2904E of 15/7/65 and I will pay cash before taking delivery.”

On that definite agreement the plaintiff did the work and in fact his bill was for less than the estimate and yet the defendant refused to pay. In my view on the merits in this case, it appears clear that the plaintiff was entitled to judgment, even apart from s. 30 of the Bills of Exchange Act.

On the question of the charges for storage I agree with my Lord President. I agree with the judgment which he proposes.

Spry JA: I also agree with the judgment of my Lord President and with the order which he proposes.

Appeal allowed with costs. Judgment and decree of the resident magistrate and of the High Court set aside. Substituted a judgment and decree granting to the plaintiff the sum of Shs. 716/80 cents with interest thereon at nine per cent. per annum from the date of the suit until October 3, 1966, and thereafter at six per cent. per annum until payment and that the plaintiff be entitled to the costs of that suit. Plaintiff to have costs of the first appeal.

For the appellant:

Vellani & Co., Dar-es-Salaam

N. M. Kassam

For the respondent:

R. C. Kesaria, Dar-es-Salaam

Kothari v Qureshi and another [1967] 1 EA 564 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	22 May 1967
Case Number:	11/1966 (130)
Before:	Rudd and Mosdell, JJ
Sourced by:	LawAfrica
Appeal from:	The Senior Resident Magistrate, Nairobi.

[1] *Probate and Administration – Executor of a will appointed as legal representative of a deceased party to a civil suit before probate of the will granted – Whether appointment valid.*

[2] *Practice – Legal representative – Whether executor of will can be validly appointed legal representative of a deceased party to a civil suit before grant of probate – Civil Procedure (Revised) Rules, 1948, O. 23, r. 4 (K.).*

[3] *Practice – Parties – Dead respondent – Joinder of executor – Executor of a will validly appointed legal representative of a deceased party to a civil suit before grant of probate – Civil Procedure (Revised) Rules, 1948, O. 23, r. 4 (K.).*

Editor's Summary

Before the senior resident magistrate at Nairobi two landlords holding a property as tenants in common raised a rent restriction action against the present appellant. The resident magistrate issued a decision and ruling against which the appellant appealed. The second respondent landlord died. The appellant applied to the High Court to have a legal representative of the deceased second respondent appointed. As a result of advertising it appeared that the deceased second

respondent had died leaving a will which appointed an executor. The will had not been admitted to probate. The High Court ordered that the executor be appointed administrator ad litem of the second respondent. It was further directed that upon grant of probate of the will the executor was to remain on the record as executor. The appeal was set down for hearing but on the hearing date the advocate for the first respondent objected to the order (to which the advocates for the appellant and second respondent had consented).

Held –

- (i) the executor had validly been made a party to the suit under Orders 23 and 24 of the Civil Procedure (Revised) Rules, 1948, and the appeal was to proceed;
- (ii) it was not necessary that probate of the will be granted before the executor could be made a valid party to the suit as representative of the deceased;
- (iii) (per Mosdell, J.), the court had in any case no jurisdiction to upset its own earlier order.

Preliminary objection dismissed with costs.

No cases referred to in judgment.

Judgment

Rudd J: The appellant in this suit is a tenant of a dwelling which is controlled under the Rent Act. The respondents were the landlords of the property in question which they hold as tenants in common.

The second respondent died and, as no grant of probate or letters of administration had been issued, the appellant following the English practice applied to have a legal representative of the deceased second respondent appointed in respect of this appeal.

This application came before Harris, J., who ordered advertisements to be made as a result of which it appeared that the deceased second respondent had died testate and had appointed an executor under his will, which however had not been admitted to probate.

The court is informed that the executor has applied for probate or intends to apply for probate of his will but that the matter is held up and likely to be held up due to difficulties in connection with the estate duty certificate.

In these circumstances the appellant's advocate and the executor's advocate appeared in chambers and an order was made by their consent whereby instead of the appointment of a neutral stranger as the legal representative of the second respondent for purposes of this appeal the executor was appointed to be such legal representative.

The consent order stated this by appointing him administrator ad litem pending grant of probate and directing that upon such grant he should remain on record as executor.

It may be possible to criticize the terms of that order but there is no doubt but that it in effect ordered the executor to be brought on record as the legal representative of the second respondent as far as this appeal is concerned.

An order was drawn up accordingly and the appeal was set down for hearing but on the hearing date

counsel appearing for the first respondent objected that the consent order was invalid and that the appeal could not proceed.

Counsel appeared for the executor as legal representative of the second respondent and was anxious for the appeal to proceed and counsel who appeared for the appellant also argued that the hearing of the appeal should proceed.

So far as the court is aware no one has objected or is likely to object to the will or the grant of probate in due course to the executor. O. 23, r. 4 (1) of the Civil Procedure (Revised) Rules, 1948, requires the court on application made in that behalf to appoint the legal representative of the deceased to be made a party to the suit where the cause of action does not survive or continue against the surviving defendant alone. Counsel for the first respondent relied on this rule in support of his submissions but contended, as I understand it, that the order making the executor a party to the suit was not valid.

Under rr. 5 to 10 of that Order it is provided that where a question arises as to whether any person is or is not the legal representative of a deceased respondent in an appeal, such question shall be decided by the court.

The term legal representative is defined in s. 2 of the Civil Procedure Act as meaning a person who in law represents the estate of a deceased person in suits other than representative's suits. This definition is quite different from the Indian definition of the term or expression.

Where a person dies leaving a will appointing an executor, the person so appointed as executor represents the estate of the deceased testator as from the date of the death of the testator, unless the executor renounces the executorship, and if he had intermeddled in the estate he cannot renounce the executorship.

In this case the executor, by consenting to be put on the file as a party, thereby intermeddled in the estate and, by appearing through an advocate to conduct the appeal, he has further intermeddled in the estate.

It is elementary law that an executor's title dates from the death of the deceased and springs from the will not from the grant of probate.

An executor's actions before probate are valid in themselves without recourse to any doctrine of relation back and they have effect by virtue of the will. Probate is merely the authentication of the will in such cases and if the will is ultimately proved no one can question the validity of such acts.

An executor may commence suit before grant of probate and he can carry on the proceedings without grant as far as is possible until he has to prove his title, when of course he must be able to establish the grant of probate because that is the proof or evidence of his title. His rights exist as from the death of the testator and the grant is only required as evidence of this.

The position of an administrator is different; his rights date from the grant of letters of administration and any prior acts of administration of the estate can only be validated by the doctrine of relation back from the grant.

An executor can before grant of probate commence an action, release a debt and generally act as the representative of the deceased until he is required to prove his title as such.

No one can question his acts as personal representative if he is in fact the executor under the will, but to prove that fact and to establish the validity of his acts before probate the will must eventually be admitted to probate. Even if the executor died before probate his acts as executor are valid if the will is later proved.

An executor can be sued before probate is granted if he does not renounce and if he has intermeddled in the estate he cannot renounce.

Now applying these principles it seems clear to me that when a party to a suit dies and the suit does

not thereby abate as regards that party's estate the other side can apply before probate to have the deceased's executor brought on record as the legal representative of the deceased and the executor can consent to be made a party to the proceedings as the legal representative of the deceased party. This is an instance of intermeddling.

I do not think it matters that the consent order described him as administrator ad litem pending grant of probate. The important matter of substance is that the court accepted him as being the proper legal representative of the deceased for purposes of the appeal and appointed him accordingly. This was done with his consent.

It appears to me that no one else could in the circumstances properly have been made a party as the legal representative of the deceased in the light of the information before the judge who ordered the executor to be put on record as the legal representative of the deceased.

I do not see that the first respondent has any cause of complaint or how the matter concerns him nor do I see how the present court can overrule the order that was made in the matter. As my brother agrees objection is overruled.

I agree with the order for costs proposed by my brother Mosdell, J., and there will be an order accordingly.

Mosdell J: I have had the advantage of reading the ruling of my brother Rudd, J., in draft and I agree with it. I would only add the following remarks.

In my view the preliminary objection is incompetent because we are not a Court of Appeal so far as decisions of the High Court are concerned. The order of this Court dated December 2, 1966 appointing Abdul Manan Qureshi administrator ad litem still stands and we have no jurisdiction to upset it. He is on the record as administrator ad litem and the appeal can proceed. Even were a successful appeal to be made to the Court of Appeal for Eastern Africa, and the order of December 12, 1966, nullified, Abdul Manan Qureshi could wear his other hat, come on the record as executor, even before a grant of probate to him, and the appeal could proceed.

Secondly, under O. 23, rr. 4 (1), 2 and 10, in my view, the appeal survives against the first respondent upon the death of the erstwhile second respondent, quite apart from the fact that Abdul Manan Qureshi, as executor of the erstwhile second respondent, would have the right to continue to oppose the appeal, even before a grant of probate to him. The appeal could have proceeded in the absence of any representative of the erstwhile second respondent. Thirdly I would hold that the first respondent has no locus standi to raise this preliminary objection. In my view it could only be raised by the appellant, an unlikely occurrence, or by Abdul Manan Qureshi himself, as executor of the erstwhile second respondent. Neither of these two parties has seen fit to raise it.

I would reject the preliminary objection and order any costs incurred by the appellant and the executor of the erstwhile second respondent, by reason of it, to be taxed and paid by the first respondent.

Order accordingly.

For the appellant:

J. K. Winayak and Co., Nairobi

J. K. Winayak

For the first respondent:

Khanna and Co., Nairobi

D. N. Khanna

For the second respondent:

Daly and Figgis, Nairobi

A. E. Hunter

Dhupa v Birdi
[1967] 1 EA 568 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	21 June 1967
Case Number:	1327/1966 (132)
Before:	Rudd J
Sourced by:	LawAfrica

[1] Rent Restriction – Statutory tenant – Effect of notice to quit given prior to the premises becoming subject to control under Rent Restriction Acts where tenant holds over and remains in possession – Whether tenant protected.

Editor's Summary

The plaintiff landlord of a residential flat gave notice to quit to a tenant purporting to terminate a tenancy about the end of June, 1966. The tenant remained in possession and refused to vacate. The flat became subject to the Rent Restriction Act by virtue of an amendment enacted on December 19, 1966, the amendment taking effect as from December 20, 1966. This action for ejectment was started by the plaintiff on December 22, 1966. A preliminary objection by the defendant tenant was raised, namely whether the tenant's right of occupancy was protected by s. 25 of the principal Act and the plaintiff's right to eject barred by s. 15 of the principal Act. The plaintiff contended that prior to the date of the amendment the tenant had ceased to be a tenant by virtue of the notice to quit and was not therefore a statutory tenant.

Held –

- (i) the principles and objects of Rent Control legislation apply to premises whether presently let or not so as to make the incidents of any letting of such premises as may occur subject to the effect of the Acts;
- (ii) if a tenant whose tenancy has been determined holds over and remains in possession until such time as the premises become controlled, he becomes entitled to the protection of the Acts (*Remon v. City of London Real Property Co. Ltd.*, [1921] 1 K.B. 49 applied).

Preliminary objection upheld and case dismissed with costs.

Cases referred to in judgment:

(1) *Remon v. City of London Real Property Co. Ltd.*, [1921] 1 K.B. 49.

Judgment

Rudd J: The defendant was the contractual tenant of a dwelling-house which was in fact a residential flat and the plaintiff was his landlord.

This dwelling-house became subject to the Rent Restriction Act as a result of the Rent Restriction (Amendment) Act, 1966 which was enacted on December 19, 1966 and its date of commencement was December 20, 1966.

For the purposes of this ruling it can be taken that the defendant's contractual tenancy was determined by notice to quit expiring about the end of June, 1966 before the Amendment Act of 1966 commenced in effect but the defendant held over continuously without the plaintiff's consent until after December 22, and holds over until now.

The plaintiff commenced action on December 22, 1966 seeking a decree for ejectment against the defendant and is met by the preliminary objection that the defendant's right of occupancy is protected under s. 25 of the Principal Act (Cap. 296) and that the plaintiff's right to a decree of ejectment is barred or limited by s. 15 of the principal Act and that the proceedings for ejectment could only be taken before a rent tribunal.

It was argued by the plaintiff that the defendant had ceased to be a tenant before the Amending Act of 1966 was enacted, that no statutory tenancy could arise before the commencement of that Act and that on the commencement of that Act the defendant was not a tenant of the plaintiff in respect of the premises and was not a statutory tenant.

These arguments are attractive to some extent but it has been held that they conflict with the principles and objects of rent control legislation which applies to premises to some extent whether they are presently let or not so as to make the incidents of any letting of such premises as may occur subject to the effect of the Acts.

Further the decision in *Remon v. City of London Real Property Co. Ltd.* (1) shows that a lessee whose tenancy had been determined but who was overholding and continuously in possession since the termination of the contractual tenancy up to the time the premises became controlled is entitled to the protection of the Acts. As Scrutton, L.J. pointed out in that case the statutory restrictions on the power of ejectment apply in such case in favour of a person who was a tenant in the proper sense of the term who was holding over after the determination of the tenancy before the Act in question came into operation and was still holding over when the Act came into operation. It is true that that case was decided under a different Act, but the essential provisions of that Act and of our Kenya legislation as regards the point in question are sufficiently similar to prevent me from being able to distinguish the present case.

I therefore feel bound to decide that the preliminary objection taken by the defendant in this case must succeed.

Preliminary objection upheld. Suit dismissed with costs.

For the plaintiff:

M. D. Patel, Nairobi

For the defendant:

Akram and Esmail, Nairobi

Esmail

Gohil v Attorney-general

[1967] 1 EA 570 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	5 May 1967
Case Number:	47/1966 (133)
Before:	Chanan Singh J
Sourced by:	LawAfrica
Appeal from:	The Nairobi Resident Magistrate's Court.

[1] *Government – Proceedings against – Action against Attorney-General for tort of policeman – Whether notice required before institution of proceedings – Police Act, s. 31; Government Proceedings Act s. 4 (4) (K).*

[2] *Police – Action against Attorney-General for tort of police officer – Whether notice required to officer prior to the institution of action – Police Act, s. 31; Government Proceedings Act, s. 4 (4) (K).*

Editor’s Summary

The appellant filed a suit in the Resident Magistrate’s Court in Nairobi against the Attorney-General in tort for damages in respect of a motor car accident. The suit was filed within the six months’ period of limitation as required for suits against public officers by the Public Officers Protection Act. The defence of the Attorney-General was, inter alia, that one month’s notice under s. 31 of the Police Act was not given to the police officer concerned prior to the suit being filed. The resident magistrate upheld this defence and dismissed the suit.

Held –

- (i) the action lay against the Attorney-General without any prior notice of institution of proceedings being given under the Police Act;
- (ii) section 4 (4) of the Government Proceedings Act read with s. 31 of the Police Act did not affect the validity of the action by the appellant against the Attorney-General.

Appeal allowed with costs.

Cases referred to in judgment:

- (1) *John Mwangi Laban Kingori v. Attorney-General* (High Court Civil Case No. 368 of 1965, Nairobi (unreported)).
- (2) *Samson Ondego v. Attorney-General* (High Court Civil Case No. 1260 of 1965 (unreported)).

Judgment

Chanan Singh J: The appellant filed a suit against the respondent seeking to recover Shs. 802/15 for damage done to her car by a police vehicle which collided with it. The accident took place on April 11, 1964, and the suit was filed on October 10, 1964, being the last day of the six months’ period during which suits against public officers must be brought under the Public Officers Protection Act (Cap. 186). It appears counsel for the appellant received his instructions too late for any notice to be given because the plaint states that “the plaintiff has not been able to give notice of intention to sue as the time for filing action runs out in a day”.

The Written Statement of Defence filed by the respondent denied the policeman’s negligence but alleged negligence on the part of the appellant’s servant and counterclaimed Shs. 2200/- for damage suffered by the police vehicle.

When the case came up for hearing on July 20, 1966, State Counsel for the respondent raised a point of law on the basis of s. 31 of the Police Act (Cap. 84) which reads as follows:

“No action shall be commenced or prosecution instituted against any police officer in respect of anything done or purporting to have been done by him under the provisions of this act, unless at least one month before the commencement of the action or the institution of the prosecution notice in writing of the action or prosecution, and particulars thereof, have been given to the police officer and to the officer in charge of the force in the place where the act complained of was committed.”

Counsel for the respondent submitted to the learned magistrate that no notice having been given the action did not lie. He quoted Civil Case No. 368 of 1965 (1) of the High Court at Nairobi in his support. The learned magistrate accepted this argument and dismissed the appellant's case with costs. Referring to case No. 368 (1) he stated that he was “bound by that ruling” although “no reasons” were given by the learned judge. He thought “the clear and unambiguous wording of s. 31” tended “to show counsel's objection to be without merit”, but he considered that the object of the section was that no proceedings should be commenced without notice and that if aggrieved parties were permitted to sue the Attorney-General without notice the mandatory provisions of the section would be rendered nugatory.

In case No. 368 (1), the plaintiff claimed damages for unlawful arrest and detention by the police on two occasions. The learned judge held that notice had been only given with regard to the first arrest only and concluded by saying: “I cannot therefore hear any evidence as to the second arrest”.

This brief ruling was delivered on May 18, 1966. On September 22, 1966, the same learned judge (Sherrin, Ag. J.) gave another ruling on the same point but in a different case (No. 1260 of 1965, *Samson Ondego v. Attorney-General* (2)). There the facts were similar to those in the present case in that the plaintiff was suing for damages arising out of a collision between his car and a police vehicle. The learned judge held that s. 31 did not apply because the driving of a motor vehicle on duty is in ordinary circumstances not a “thing done under the provisions of the Police Act” within the meaning of s. 31. He added that the Act envisaged “things such as arrest using arms to prevent the escape of a felon, taking fingerprints, etc., which a policeman is empowered or required to do under the Act”.

If this ruling had been given before the decision from which the appellant now appeals there is little doubt in my mind that the learned magistrate would not have dismissed the case.

The point that counsel for the appellant has been urging, however, has not received consideration. He says that he is complaining of a tort on the part of an employee of the Government and that he is free to sue either the employer or the employee or both. He has elected to sue the employer as represented by the Attorney-General. Section 31, he argues, governs suits against police employees not suits against the Attorney-General as employer.

I think this point deserves consideration. Suits against the Government in respect of torts committed by its servants have been made possible by the Government Proceedings Act (Cap. 40). Prior to this enactment, Government servants had to be sued personally and if the defendant was a policeman, a notice had to be given to him and to his superior in the place where he was posted.

Now, however, the Government of Kenya is in this matter in the same position as a private person. Suits can be brought against the Attorney-General for torts committed by Government employees. The Act does not create a new cause of action. It merely removes a bar against suing the Government as employer. The proviso to s. 4 (1) makes this clear by saying that proceedings shall be only if “the act or omission would” apart from the Act “have given

rise to a cause of action in tort against that servant or agent or his estate". Thus, if the appellant can show that the police officer concerned did the act in the course of his employment as servant or agent of the Government, then she has a cause of action against the Attorney-General.

Counsel for the respondent also argues that an action by the appellant would not lie in any case by virtue of s. 4 (4) of the Government Proceedings Act (Cap. 40) which, with immaterial expressions omitted, reads:

"(4) Any written law which negatives or limits the amount of the liability of any . . . officer in respect of any tort committed by that . . . officer shall, in the case of proceedings against the Government under this section in respect of a tort committed by that . . . officer, apply in relation to the Government as it would have applied in relation to that . . . officer . . . if the proceedings against the Government had been proceedings against that . . . officer."

Section 31 of the Police Act is of course a "written law". Does it negative or limit the amount of the liability of the police officer concerned if a suit is brought against him instead of against the Attorney-General? One thing is certain, no notice having been given, a suit could not be filed against the officer concerned, if it can be said that the action is "in respect of anything done by him under the provisions of" the Police Act. Sherrin, Ag. J., has held that an action arising from the driving of a police vehicle is not such an action. I would not go as far as that.

My own view is that s. 31 does not "negative or limit the amount of the liability" it takes away the right of enforcing it by court action in the absence of a notice.

Again, the plain meaning of s. 31 is that a notice is to be given if an action is instituted "against any police officer". The question of notice is irrelevant if the complainant decides to sue the Attorney-General. Since the Attorney-General is sued under the Government Proceedings Act, if any notice had been necessary it would have been provided for in that Act.

I therefore allow the appeal with costs and set aside the judgment and decree of the lower court.

Appeal allowed.

For the appellant:

H. M. Parekh, Nairobi

For the respondent:

R. S. Sehmi (State Counsel, Kenya)

Musa and others v Republic [1967] 1 EA 573 (HCT)

Division:	High Court of Tanzania at Mwanza
Date of judgment:	31 May 1967
Case Number:	813/1966 (135)
Before:	Platt J

[1] *Criminal Law – Assault – Compared with robbery – May be included in robbery – Penal Code ss. 241 and 286 (T).*

[2] *Criminal Law – Practice – Defence witnesses – Duty of trial court to record whether or not applied for and result of application.*

[3] *Criminal Law – Robbery – Assault may be included in – Penal Code, ss. 241 and 286 (T).*

Editor’s Summary

Three appellants were convicted of robbery with violence under s. 286 of the Penal Code, and in respect of the same transaction of assault causing bodily harm under s. 241 of the Penal Code. At their trial, which had taken place a long time before, the trial magistrate had not recorded whether or not the appellants wished to call witnesses in their defence or had applied to do so.

Held –

- (i) the conviction for assault was redundant and wrong as the ingredients of the offence were included in the offence of robbery with violence;
- (ii) a trial magistrate should record whether an accused wishes to call defence witnesses and in the event of such witnesses being called for he should call them or else record his reasons for refusing the application.

Appeals allowed.

No cases referred to in judgment.

Judgment

Platt J: The appellants Musa Kiumbe, Said Iddi and Sadiki Masudi were convicted on the first count of robbery with violence contrary to s. 286 of the Penal Code and on the second count of assault causing actual bodily harm contrary to s. 241 of the Penal Code. On the first count the appellants were each sentenced to two years’ imprisonment carrying the 24 strokes of corporal punishment and on the second count three months’ imprisonment, these terms of imprisonment being ordered to run concurrently. The appellants’ appeal against conviction and sentence and their appeals are consolidated.

It will be convenient to commence by saying that the count for assault was unnecessary because it was part of the offence of robbery with violence. Section 286 of the Penal Code is as follows:

“Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

If the offender is armed with dangerous or offensive weapon or instrument or is in company with one or more person or persons or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he is liable to imprisonment for life with or without corporal punishment.”

It will be seen, therefore, that the offence of robbery is complete if immediately before or immediately after the time of stealing, the offender uses or threatens violence and for that offence he will be liable for

fourteen years' imprisonment. If on the other hand the offender goes further and assaults the complainants

by wounding, beating or striking or using any other personal violence the offender would be liable to imprisonment for life with or without corporal punishment. On count one the charge was laid under s. 286 of the Penal Code and therefore the use of violence amounting to actual bodily harm brought the case within the second paragraph of s. 286 and rendered the offenders liable to the augmented punishment. It follows that the convictions on count two merely charged the appellants a second time for that with which they had already been charged on the first count. These convictions are therefore quashed and the sentences imposed thereon set aside.

Concerning the convictions of these three appellants on count one, the grounds of appeal raise first of all issues of fact concerning their identifications as the robbers and secondly the issue of procedure in that they each allege that the learned trial magistrate debarred them from calling defence witnesses. It will be convenient to consider the second issue first. Unfortunately, the record does not disclose whether the appellants were given the opportunity of calling defence witnesses or indeed whether the appellants made any such application. They claim that the learned trial magistrate refused their application in order to save time. It is doubtful whether this was really so. In his judgment the learned trial magistrate in referring to the appellants Saidi and Sadiki observed they had not thought fit to support their alibis by calling witnesses in their defence. However, concerning the first appellant Musa there is no reference to any witness for the defence. Therefore, in his case there is no way of saying whether the allegations in his petition of appeal are true or false. In the normal course of events I should have returned the record to learned magistrate for him to certify on affidavit as to what happened at this stage of the trial. But the appellants have now been in custody for a considerable period and I think to delay the appeal further would cause injustice. As the record is not complete the appellants must be given the benefit of doubt that the trial may not have been conducted with complete fairness. I have no doubt that the learned trial magistrate will in future record whether or not an accused person wishes to call defence witnesses, and in the event of witnesses for the defence being applied for, he will no doubt call such witnesses or record his reasons for refusing the application. If this procedure is followed accused persons will not then be able to challenge the fairness of the trial.

Although it follows that the trial was a nullity I should observe that the evidence of identification of the appellants Saidi and Sadiki was very thin. They were recognised by their facial appearance and clothing. But in fact their distinguishing facial characteristics were not described nor were they found to be wearing, or to be in possession of, the type of clothing which the complainant alleged that they had been wearing at the time of the robbery. They were identified some time after the offence. None of these appellants had been known to the complainant before the offence and the attack was carried out suddenly. While it may be that the complainant had some opportunity of recognising these two appellants the evidence remained doubtful. It would not therefore be suitable to order a retrial against them. In the case of the first appellant the evidence was much stronger and his conviction could properly have been confirmed had there been anything on the record at all from which it could be gleaned that he had been given the opportunity to call defence witnesses. I have given some consideration whether there should be a retrial in his case. But on the whole I think this would be unfair. As I have said he has now been in custody for a considerable period and he appears to have taken a less violent part in the robbery than the two other persons with him. Accordingly the appeals of each appellant against conviction and sentence are allowed with the result that their convictions

are quashed, and the sentences imposed thereon set aside. They are ordered to be set at liberty forthwith unless held for any other lawful cause.

Appeals allowed.

The appellants did not appear and were not represented.

For the respondent:

Advocate: Attorney-General, Tanzania

B. A. Samatta (State Attorney, Tanzania)

Mohamed Mitha and others v Ibrahim Mitha and others
[1967] 1 EA 575 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	19 July 1967
Case Number:	13/1966 (137)
Before:	Russell J
Sourced by:	LawAfrica

[1] *Company – Minority rights – Application by oppressed minority group of shareholders for winding up – Whether ‘just and equitable’ – Companies Ordinance, s. 211 (U.).*

[2] *Company – Winding up – “Just and equitable” – Petition by minority group of shareholders alleging oppression by majority – Companies Ordinance, s. 211 (U.).*

Editor’s Summary

Under s. 211, Companies Ordinance a minority group of shareholders in a private limited company petitioned the High Court on the grounds that the majority group of shareholders (the respondents) were conducting the affairs of the company in a manner oppressive to the petitioners and it would be just and equitable for the court to order: (i) that the respondents sell their shares to the petitioners on such terms as the court should think fit, or (ii) that the company be wound up. In 1943 the company was incorporated, the nominal capital comprising 900 ordinary shares of Shs. 500/- each, which shares were issued and were fully paid up (the nominal capital was subsequently increased by the creation of additional shares but these were never issued). Four brothers were the first shareholders and were appointed permanent directors for life; and one of the brothers, Haji, was appointed the permanent managing director with a casting vote. In 1960 differences arose between the four brothers and by agreement Haji and another brother, Alibhai, left the company and transferred their shares, leaving the petitioners (viz.: the remaining brother Mohamed, his wife and son, Sadrudin) with 360 shares and the

respondents (viz.: the other remaining brother, Ibrahim, his wife and two sons, Tajdeen and Sultan) with 540 shares (originally no shares were transferred to Sultan but subsequently on his becoming a director Ibrahim transferred 90 of the 540 shares to Sultan). After 1960 the remaining brothers Mohamed and Ibrahim appointed their respective sons Sadrudin and Tajdeen to be co-directors to fill the vacancies left by the departure of Haji and Alibhai. A deadlock occurred between the two groups and to resolve it on November 27, 1966, at a requisitioned meeting by an ordinary resolution Ibrahim's son Sultan was appointed to replace Sadrudin. At the hearing it was conceded that this appointment was validly made. The petitioners complained that certain resolutions passed at and parts of the record of a meeting on February 28, 1966, were incorrect, but on the evidence the court held these resolutions were accurate. The main complaint of the petitioners was that the principles of fair management were being

deliberately and consistently violated and set aside by the respondents. The judge reviewed the various allegations of the petitioners and found as a fact that no hardship or oppression was proved; and that the majority appeared to be acting in the best interests of the company; and there was no lack of probity by the respondents in the conduct of the company's affairs.

Held – the petitioners had failed to prove that it would be just and equitable to make a winding up order, and it followed that since it was not just and equitable to wind up the company the question whether any other order would be just and equitable did not arise for consideration.

Petition dismissed.

Cases referred to in judgment:

- (1) *Re Yenidje Tobacco Co. Ltd.*, [1916] 2 Ch. 426; [1916-17] All E.R. Rep. 1050.
- (2) *Scottish Co-operative Ltd. v. Meyer*, [1958] 3 All E.R. 66.
- (3) *Modern Retreading Co. Ltd.*, [1962] E.A. 57.
- (4) *Re Expanded Plugs Ltd.*, [1966] 1 All E.R. 877.
- (5) *Re Cuthbert Cooper & Sons Ltd.*, [1937] 2 All E.R. 466.
- (6) *Re Davis & Collett Ltd.*, [1935] Ch. 693.
- (7) *Loch v. Blackwood (John) Ltd.*, [1924] A.C. 783; [1924] All E.R. Rep. 200.

Judgment

Russell J: The three petitioners, Mohamed Mitha, his wife Nurbanu Mitha and his son Sadrudin Mitha filed a petition dated December 7, 1966 in this court citing as respondents Ibrahim Mitha, the elder brother of Mohamed, Ibrahim's wife Mariambai and his two sons, Tajdeen and Sultan, praying for declarations and orders as follows:

1. That the so called resolutions contained in the minutes of February 20, 1966 be declared void.
2. The meeting and the proceedings of the meeting dated November 27, 1966 be declared unlawful.
3. That a declaration be made that the appointment of the said Sultan I. Mitha as a director of the company is invalid and that an order directing him to be removed from the Board of Directors be made.
4. That the members of the majority should sell their respective shares to your petitioners on such terms as the court should think fit.
5. That such other order should be made in the terms as may be just.
6. Alternatively the said Budaka Ginners Ltd., should be wound up by the court.

During the course of the hearing counsel for the petitioners rightly withdrew the third prayer for a declaration invalidating the appointment of Sultan I. Mitha as a director as there appears to have been some confusion in the minds of the advocates who drafted and filed the petition regarding the effect of s. 185 of the Companies Act which enacts that although special notice must be given of any resolution to remove a director under that section or to appoint someone in his stead the actual resolution may be an ordinary resolution passed by a simple majority.

Certain facts are set out in the petition and the affidavits on record and the various annexures thereto which are not in dispute and may be briefly summarised as follows:

1. Budaka Ginnery Ltd. (to which I shall hereafter refer as “the company”) was incorporated on May 28, 1943 under the Companies Ordinance, 1935, as

a private limited liability company with a nominal capital of Shs. 450,000/-divided into 900 ordinary shares of Shs. 500/- each. The nominal capital was increased on October 25, 1952, to Shs. 1,200,000/- by the creation of 1,500 further ordinary shares of Shs. 500/- each but the original 900 shares are the only shares which have been issued and they are fully paid up.

2. The company was formed to acquire and operate the Budaka Ginnery and the first four shareholders were four brothers, namely, Haji Mitha, Alibhai Mitha, Ibrahim Mitha and Mohamed Mitha. The same four brothers were appointed permanent directors and entitled to hold office for life and the said Haji Mitha was appointed the permanent managing director.
3. The company prospered and established certain "sister" concerns but owing to differences arising between the brothers there was a split in 1960 and Haji and Alibhai took over certain "sister" concerns and agreed to transfer their shares in the company to Ibrahim and Mohamed. This result was apparently achieved by negotiation and there was no need to invoke the arbitration clause in the articles nor for the managing director to exercise a casting vote.
4. Leaving aside for the moment any discussions between Ibrahim and Mohamed, the result of the split was that 540 ordinary fully paid shares in the company were to be held by Mohamed and 360 by Ibrahim. On the completion of the transaction the petitioners were registered in the aggregate as the owners of 360 shares and the respondents (excluding Sultan) in the aggregate of 540 shares. Subsequently, for the purpose of qualifying Sultan as a director, Ibrahim transferred to him 90 shares. I shall therefore refer to the petitioners as the "Minority Group" and the respondents as the "Majority Group".
5. The present articles of association of the company appear to have been drafted by an experienced firm of advocates and were adopted in to at an extraordinary meeting of the company by special resolution on March 2, 1948. There has not been the slightest suggestion that they were not drafted in accordance with the instructions and wishes of the members of the company and I must therefore regard them as constituting the contractual relations between the members of the company.
6. Both the original and the present articles of association provide for the appointment of not less than two nor more than six directors unless and until otherwise determined in general meeting, that the said four brothers would be the first and permanent directors and the said Haji the permanent managing director and that each member would be entitled to one vote in respect of each share held by him. There was also a clause whereby any difference arising between the members or the company could be referred to arbitration. There is no evidence before me that this clause has ever been put to effective use.
7. After the split in 1960 between the four brothers, Mohamed Mitha and Ibrahim Mitha remained as permanent directors and Sadrudin, the son of Mohamed, and Tajdeen, the son of Ibrahim, were appointed directors to fill the vacancies caused by the retirement of Haji and Alibhai. After a deadlock had occurred on the board owing to differences of opinion between the two Groups, Sadrudin was removed from office by an ordinary resolution at a requisitioned meeting of the company held on November 27, 1966 and Sultan, the son of Ibrahim, was appointed in his stead.
8. Tajdeen has his own business in Jinja and only worked for the company after 1960 for a total period of about three and a half months. He rarely if ever attended directors' meetings up to the end of 1965 and does not appear to have taken the slightest personal interest in the affairs of the company. Mohamed Mitha was the general manager of the Eastern Province Bus Company Ltd. in 1960 and continued to hold that post up to the beginning of 1965; he

had not worked for or had any direct concern with the normal business management of the company although he paid his salary from the Eastern Province Bus Company Ltd. into the company and in return drew remuneration on the same scale as Ibrahim.

9. According to the evidence of Tajdeen, Mohamed was offered employment by the company after his employment with the Eastern Province Bus Company Ltd. had terminated but he refused to come and work for the company. I accept the evidence of Tajdeen on this point particularly as there is no evidence to the contrary.

The relief claimed by the petitioner is substantially under s. 211 of the Companies Act which provides that if any members complain that the affairs of the company are being conducted in a manner oppressive to them then, if the court is satisfied that the company's affairs are being so conducted, and that the facts would justify the making of a winding up order on the ground that it was just and equitable that the company be wound up, the court may make such other order as is authorised by the section if it is of opinion that to wind up the company would unfairly prejudice the oppressed members. I must therefore decide firstly whether the circumstances are such that a winding up order on those grounds would be justified.

During the course of his very able argument counsel for the petitioners directed my attention to *Re Yenidje Tobacco Co. Ltd.* (1) and has asked me to find that the present company is in effect a partnership existing between the directors and that the same principles should be applied as those which would be applied in the case of a dissolution of partnership; that there exists a deadlock in the management of the company which could not have been contemplated by the parties when the company was formed; that there were specific arrangements as to the maintenance of equality of management and that the court would be justified in holding in these circumstances it was "just and equitable" that the company be wound up as a preliminary step to granting the relief prayed for in the petition under the said s. 211.

In the *Yenidje* (1) case Marcus Weinburg and Louis Rothman decided to amalgamate their tobacco businesses and for that purpose incorporated a private limited liability company under the constitution of which they were the sole shareholders. Although the holdings of the two members in "B" shares and preference shares was unequal – one having a larger holding than the other – the "A" shares, which were the only shares which gave the power of voting carried precisely equal voting rights because each of the two share-holders held an equal number of shares of that class. There was also a provision in the articles of association of the company that there should not be any casting vote. There was an arbitration clause providing that in the event of a dispute between the directors the matters in dispute should be referred to arbitration. A very strong case was made out justifying an order for a dissolution of partnership and I will quote from the judgment of Lord Cozens-Hardy, M.R. ([1916-1917] All E.R. Rep. at p. 1051):

"Here we have this fact. Rothman has commenced an action charging Weinberg with fraud in obtaining the agreement under which he, Rothman, sold his business to the company. I ask myself the question: When one of the two partners has commenced and has not discontinued an action charging his co-partner with fraud in the inception of the partnership, is it likely, is it reasonable, is it commonsense, to suppose those two partners can work together in the manner in which they ought to work in the conduct of the partnership business? Can they do so when things have reached such a pass that after the eighteen days' arbitration which terminated in favour of Weinberg on the only point that was referred, Rothman declines to give

effect to it, in the sense that, although the award decided that Litiger had not been dismissed and ought to be continued as a servant of the firm until removed, Rothman will not allow him to come and do his work, so that he, Litiger, is in the happy position now of receiving his wage of £5 a week without being allowed to do any work for the company in respect of which he is a servant. The matter does not stop there. It is sworn to that these two directors are not on speaking terms, and the so-called meetings of the board of directors have been also a farce. They will not speak to each other on the board. Some third person has to convey communications which ought to go directly from one to the other.”

Counsel for the petitioners also referred me to *Scottish Co-operative Ltd. v. Meyer* (2) but that was a case in which it was common cause that it would be just and equitable that the company be wound up and the only question that remained was whether the appellants had conducted the affairs of the company in a manner oppressive to the respondents. Although there are useful dicta as to the interpretation of the word “oppressive” the facts as to oppression were so glaring as to obviate any real necessity for a legal definition and the only issue of interest was whether the actions of a parent company in its own affairs could be construed as being oppressive in the conduct of the affairs of the subsidiary company. It is however interesting to note that the court ordered the appellants (the oppressors) to purchase the shares of the respondents (the oppressed) at the price of £3 10s. per share which is the reverse of what the alleged oppressed are asking me to do in this case.

In the present case, although the company may be regarded in some respects as being in the nature of a partnership, it is quite clear that from the beginning the affairs of the company were to be run by the board of directors and that the senior brother and permanent managing director, Haji Mitha, would have a casting vote in the event of differences of opinion between the directors which would be bound to arise from time to time in the conduct of the business. It is also clear that any ordinary resolutions of the company could be passed in general meetings of the members by a simple majority. This state of affairs persisted up to the time of the split and there then does not appear to have been any provision for the settlement of disputes except by resort to the arbitration clause in the company’s articles of association or by resolutions passed at general meetings of the members of the company. The fact that the permanent managing director had resigned and there was no longer any casting vote was possibly overlooked at the time of the split but in any event I am not prepared to accept the suggestion that it was anticipated that in the event of a deadlock on the board such deadlock could not be resolved owing to the absence of a chairman with a casting vote and the inability of the majority of shareholders to remove an obstructive director or appoint another director by reason of some nebulous “arrangement” between Ibrahim and Mohamed that the only directors apart from Ibrahim and Mohamed would for all time be one each of their respective sons.

The evidence of Mohamed Mitha as to the arrangements made at the time of the split regarding the shares and the appointment of directors is as follows:

“There were discussions as to how the shares were to be held. The discussions occurred in 1960 in Ibrahim’s house in Mbale. The discussions were between Ibrahim and myself. I proposed we should acquire fifty per cent. each of the issued shares of the company. Ibrahim said he wanted more as he had a big family and asked for sixty per cent. of the shares. I was to receive forty per cent., i.e., 540 for Ibrahim and 360 for me. A discussion arose as to who should be the directors. Haji and Alibhai ceased to be directors as they had disposed of their shares and we decided to

appoint two directors in their place. It was decided that one of my sons and one of Ibrahim's should be directors so that our families were equally represented on the board. My son Sadrudin and Ibrahim's son Tajdeen were appointed. At that time both those sons were working as clerks in Budaka Ginnery and paid salaries. We agreed we would not appoint any further directors. We also agreed that we two brothers would receive the same remuneration as directors and from 1960 to 1964 we received equal remuneration. In June or July the necessary share transfers were made to Ibrahim and myself from Haji and Alibhai. It was also agreed that whatever privilege Ibrahim had I would have the same. Ibrahim worked in the Budaka Ginnery but I was working as manager of the Eastern Province Bus Company Ltd. We four brothers had shares individually in that company. Ibrahim was the managing director of the company and myself and my other brothers were directors. As manager of the bus company I received a salary but I gave that salary to Budaka Ginners Ltd. In 1960 to 1964 we continued on the terms as agreed between Ibrahim and myself and the directors also agreed. Ibrahim and myself received equal remuneration".

According to Mohamed the trouble between him and Ibrahim started when Mohamed received a notice convening the annual general meeting of the company for October 2, 1966. Item 2 in that notice was to confirm the minutes of the last meeting which had been held on February 20, 1966. Mohamed requested and was supplied with a copy of the minutes of the meeting of February 20 and did not agree that they were a true record of the proceedings. It is the resolutions contained in those minutes referred to by the petitioners in their first prayer claiming a declaration that they are void. In his evidence Mohamed testified:

- (a) That item 2 (a) was discussed at the meeting but no resolution was in fact passed.
- (b) That item 2 (b) was correct regarding Basic Remuneration but the item under Working Remuneration was not correctly recorded.
- (c) That the resolution regarding crediting four per cent. on members' credit accounts was not passed nor agreed to by him.
- (d) That although there was some discussion regarding an increase in the paid up capital of the company, no resolution was put forward or passed as alleged in the minutes.

I have heard the evidence of Mohamed Mitha, Tajdeen Mitha and the auditor, B. R. Shah, on these issues and am entirely satisfied that the minutes of the general meeting of the company held on February 20, 1966 as recorded by Shah are substantially a correct record of what occurred at that meeting. I was impressed with the straightforward manner in which Tajdeen and Shah gave their evidence but Mohamed Mitha was evasive and obviously uncertain of what had actually occurred; I prefer the evidence of Tajdeen and Shah on any issues in which there is a conflict between them and Mohamed. In his evidence Mohamed Mitha has agreed that the minutes of the meeting of November 27, 1966 are a true record of the proceedings at the meeting.

The gravamen of the Minority Group's grievance against the Majority Group is set out in para. 16 of the petition which reads:

"Your petitioners humbly believe that the principles of fair management of a company are deliberately and consistently violated and set aside by members of the majority group and wield an overwhelming voting power; your petitioners are afraid that the so-called resolutions which have not

been passed in a meeting dated February 20, 1966 would be confirmed in the ensuing meeting by oppressive majority. In the result the property of the company will be diverted and effected considerably to the disadvantage of any loss to the 'minority group'."

It appears that the objections by Mohamed Mitha to the travelling expenses of Ibrahim Mitha from Uganda to Italy are ill-defined and unreasonable. He is prepared to agree to a paltry sum of Shs. 3,000/- only for the air fare and expenses but does not give any details and has not satisfied me that his objections have any substance. As far as his objections to the increase in the issued share capital of the company are concerned he is obviously on weak ground as although he insists that all members' credit balances be paid out in cash and that this would leave the company short of liquid cash he, Mohamed, has refused to sign the bank guarantee which is an essential adjunct to the company's business. As to the removal of Sadrudin, this appears to have been a reasonable and businesslike course to adopt in order to avoid perpetuating the deadlock and so that the business of the company could be continued. I am by no means satisfied that there was any binding and enforceable agreement between Ibrahim and Mohamed that they would remain the permanent directors and that their two sons would be and remain the only other two directors although there may have been a friendly informal understanding to that effect as between the two brothers. I am also satisfied that Ibrahim did not at any time relinquish any voting rights he or his sons or his wife may have had in respect of their shareholdings in the company.

In conclusion I refer to one further case quoted to me by counsel for the respondents and will disregard the case of *Modern Retreading Co. Ltd.* (3) as it does not appear to me to carry the matter any further. In the case of *Re Expanded Plugs Ltd.* (4) a petition was presented for the winding up of the company on the just and equitable ground and although the petition was dismissed on the grounds that as there was no surplus available for distribution the petitioner had no locus standi the judgment is of interest as it goes on to hold that in any event the analogy with a partnership did not confer on the petitioner the locus standi that he lacked by company law. In his judgment Plowman, J., refers to the decision of Simonds, J., in *Re Cuthbert Cooper & Sons Ltd.* (5) ([1937] 2 All E.R. at p. 468) where he said:

"It has been pressed upon me that I am to be guided by the principles laid down by the Court of Appeal in *Re Yenidje Tobacco Co. Ltd.* (1) and followed recently by Crossman, J., in *Re Davis & Collett Ltd.* (6). But whether it be a matter of articles of association or articles of partnership the rights of the parties are determined by those articles, and the question whether it is right for me to apply the principles of partnership to the question of dissolution, depends upon what are the contractual rights of the parties as determined by the articles of association in this case. Accordingly, when I come to consider the allegations in the petition, I must have regard to the rights of the parties as determined by the bargain into which they have entered."

In his judgment Plowman, J., continued:

"In order to succeed on this petition, the petitioner, in my judgment, has to establish that the matters of which he complains, all of which were carried out within the framework of the articles, were not carried out bona fide in the interests of the company. This, in my judgment, he has failed to establish. All the challenged decisions were decisions which, in my view, were capable of being regarded as being in the best interests of the company

and I see no reason to think that those who took them did so other than in good faith.

The petitioner's basic complaint is really this, that the very fact that Mr. Landau has succeeded in establishing a position where a deadlock can be resolved is, as between the two persons who embarked on this venture on a partnership basis, itself a sufficient ground for a winding-up order. A similar argument was addressed to Crossman, J., in *Re Davis and Collett Ltd.* (6) by the successful petitioner, but the learned judge does not appear to have decided the case on the basis of that particular argument. However that may be, the petitioner was, as I have said, content to leave the formation of the company to Mr. Kaufmann and I have no reason to think that in framing the constitution of the company in the way in which it was in fact framed, a deliberate trap was being laid for the petitioner, or that Mr. Kaufmann was doing anything other than producing a constitution which seemed to him best suited to the facts of the case with which he was dealing.

Once it is accepted as I consider it must be, that the constitution of the company is not one of which the petitioner is entitled to complain, then in the absence of any proof of what Lord Shaw in the well-known case of *Loch v. Blackwood (John) Ltd.* (7) referred to as 'a lack of probity in the conduct of the company's affairs', the petition must, in my judgment, fail."

Although neither Mohamed nor his son, Sadrudin, are employed by the company this is no hardship or oppression as neither of them have expressed any desire to be so employed. There is no evidence on record that the remuneration of either Ibrahim or Tajdeen is excessive but on the contrary Tajdeen has testified he has been offered a better job. Mohamed Mitha is still a permanent director on the board and can protect the interests of himself and family.

I am satisfied that the various decisions arrived at by the company as set out in the said minutes are fully capable of being regarded as being in the best interests of the company and that there has not been any lack of probity by the respondents in the conduct of the company's affairs. The petitioners have failed to satisfy me that there are any facts which would justify the making of a winding-up order on the ground that it would be just and equitable to do so. As this is an essential step preliminary to any order being made under s. 211 of the Companies Act and as I have already come to a decision as to the other prayers I have no alternative but to dismiss the petition with costs.

Petition dismissed.

For the petitioners:

Patel and Shah, Kampala

Y. V. Phadke and M. A. Patel

For the respondents:

P. J. Wilkinson, Q.C. and P. Carrasco, Kampala

Roria v Republic
[1967] 1 EA 583 (CAN)

Division: Court of Appeal at Nairobi

Date of judgment: 29 June 1967

Case Number: 11/1967 (138)
Before: Sir Clement de Lestang VP, Duffus and Law JJA
Sourced by: LawAfrica
Appeal from: The High Court of Kenya – Madan, J.

[1] Criminal Law – Evidence – Identification by a single witness – Whether sufficient for a conviction – Whether in all the circumstances it is safe to rely on the evidence.

Editor’s Summary

Arising out of a dawn armed raid by a band of Masai on September 27, 1966, upon a Masai manyatta four persons were killed including a deceased in respect of whose death the appellant was charged and convicted of murder. On appeal the evidence against the appellant was reviewed. Fourteen days after the raid he was identified at an identification parade by the wife of one of the persons killed in the raid as “either the person who killed her husband or passed close to her when entering the manyatta”. The wife was in the manyatta at the time of the raid. The trial judge assessed the wife as a truthful witness and thought that it strengthened her evidence that the appellant was a stranger to her. The judge said the possibility of mistake was excluded. The assessors had unanimously disagreed with the trial judge expressing their views that the appellant was a stranger to the witness, that the conditions under which she thought she saw the appellant at the raid were unfavourable to accurate identification, and that other witnesses at the manyatta were unreliable over the purported identifications of co-accuseds.

Held – while it is legally possible to convict on the uncorroborated evidence of a single witness identifying an accused and connecting him with the offence, in the circumstances of this case it was not safe to do so.

Appeal allowed. Conviction and sentence quashed.

Case referred to in judgment:

(1) *Abdala bin Wendo and Another v. R.* (1953), 20 E.A.C.A. 166.

Judgment

Sir Clement Delestang VP, delivered the following judgment of the court: Just before dawn on September 27, 1966 there was a raid on a Masai manyatta at Nailombe Mashura in the Kajiado district by a large band of Masai armed with spears, simis, clubs and shields. In the course of the raid four of the occupants of the manyatta including the deceased and one of the raiders were killed and a number of cattle stolen. On the afternoon of the following day a group of thirty-three Matapato morans armed with spears, simis, rungas and shields were arrested in the Mabarasha Hills some distance away. They were eating roast meat at the time. On the morning of September 29, four other Matapato morans also carrying spears, simis and rungas were arrested in the same area. On October 11, 1966 four identification parades were held in the Detention Camp at Kajiado. Each parade consisted of a number of the arrested morans mixed up with eighteen members of the public. Five of them including the appellant were identified by various witnesses as having taken part in the raid. The appellant was among the eleven suspects in the

second parade. He was identified by Samaji, the wife of one of the men killed in the raid, either as the person who killed her husband or passed close to her when entering the manyatta.

It is not very clear which as she did not mention the former at the time of the parade. Apart from the identification of the appellant by Samaji at the identification parade there was absolutely nothing to connect him with the raid. The assessors were of the unanimous opinion that the identification of the appellant as well as that of the other four morans who were jointly tried with him was unreliable. The learned trial judge correctly appreciated that “the evidence must therefore be scrutinised carefully and with extreme caution; more so, in view of the circumstances that prevailed at the manyatta on the morning of the attack as set out in my summing-up” such as general confusion, state of fear, attack at day-break, difficulty of recognising with reasonable certainty in such conditions, etc. Nevertheless he was satisfied with the identification of the appellant and said this:

“Samaji w/o Lekerei impressed me as a witness of truth. I think it strengthens her evidence that she identified the third accused who was a stranger to her. I can see no reason why she should do it falsely. In my view therefore possibility of mistake is excluded. I also think she was speaking the truth when she said the third accused speared her husband. Is it strange then that the third accused made an impression upon her mind?”

A conviction resting entirely on identity invariably causes a degree of uneasiness, and as Lord Gardner, L.C. said recently in the House of Lords in the course of a debate on s. 4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdicts:

“There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cases out of ten – if there are as many as ten – it is in a question of identity.”

That danger is, of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification. In *Abdala bin Wendo and Another v. R.* (1) this court reversed the finding of the trial judge on a question of identification and said this (20 E.A.C.A. at p. 168):

“Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.”

In the present case the learned trial judge thought Samaji an honest witness. We do not quarrel with his assessment of her honesty but a witness may be honest yet mistaken, and in excluding the possibility of a mistake on her part, the learned judge, with respect, erred in our view. The passage which we have quoted from his judgment contained a non sequitur and having regard to all the circumstances of this case and in particular to the unanimous opinion of the assessors, to the fact that the appellant was unknown to the witness, to the existence of conditions unfavourable to a correct identification, to the fact that the purported identification of the appellant’s co-accused by other inmates of the manyatta was found unreliable and to the discrepancies in the evidence of the identifying witness as to the circumstances of the identification we thought it

would not be safe to allow the conviction to stand and for these reasons we quashed the conviction of the appellant and set aside the sentence passed on him.

Appeal allowed. Conviction quashed.

For the appellant:

S. K. Kapila, Nairobi

For the respondent:

Attorney-General, Kenya

J. B. Karugu

Aggarwal v Official Receiver
[1967] 1 EA 585 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	10 February 1967
Case Number:	42/1966 (61)
Before:	Sir Charles Newbold P, Sir Clement de Lestang VP and Duffus JA
Sourced by:	LawAfrica

(Application for leave to appeal from the High Court of Tanzania at Arusha – Bannerman, J.)

[1] Appeal to Court of Appeal – Interlocutory decision below – Application for leave to appeal against exercise of discretion of judge below refusing leave to administer interrogatories – Leave to appeal refused by judge – Observations on difficulties faced by applicant.

[2] Practice – Interrogatories – When leave to administer interrogatories should be granted – General principles – Interrogatories applied for unnecessary – General observations – Civil Procedure Code, 1966, O. 11 (T.).

Editor's Summary

The applicant applied to a judge of the High Court for leave to deliver a large number of interrogatories to the respondent. His application was refused by the judge, who found that, having regard to the nature of the case and to the prolixity of the interrogatories, the application was oppressive and unnecessary. The judge refused leave to appeal against his decision. The applicant now applied to the Court of Appeal for leave to appeal.

Held –

- (i) the general principle followed is to allow such interrogatories as may be necessary either for disposing fairly or more expeditiously of the case or for the purpose of saving costs;
- (ii) although there would appear to have been certain questions which could have been properly the subject of interrogatories, a great number of the interrogatories were not relevant or necessary and the judge had exercised his discretion properly in refusing leave to deliver them; it not being the duty of the judge to redraft interrogatories for the parties.

Per Sir Charles Newbold P: in determining an application for leave to appeal to the Court of Appeal against the exercise of his discretion by a judge on a purely interlocutory matter where the judge has refused leave to appeal, the Court of Appeal cannot but have regard to the fact that leave has already been refused and the applicant faces a very difficult task.

Application refused.

No Case referred to in judgment:

The interrogatories applied for were as follows:

1. Were the bankrupt and the defendant ever co-partners as buyers and sellers of, and dealers in landed property?
2. Were the bankrupt and the defendant ever jointly interested in any other property or properties? If yes, give a list of the property or properties, identifying them.
3. Were any of the aforesaid properties, including the suit property acquired for the purpose of disposing of them and dividing the profit (if any) or losses, or were such properties acquired as and by way of permanent investment to belong to the bankrupt and the defendant, to hold the same as owners, and to enjoy the yield thereof?
4. Also state in what proportion the purchase-money of such properties was found in each instance.
5. Further state in what proportion the equipment and running costs, including the management and all outgoings including ground rent and other taxes were found.
6. State how and in what proportions were the proceeds from the farming yield disposed of between the bankrupt and the defendant.
7. Were the expenses of management and running the farm and the cost of development, improvement and of obtaining the supplies always, or in some years, stating which, overtopping the income from the farm yield? If yes, state how and in what proportions was the deficiency borne or made good?
8. Did the bankrupt and the defendant ever set up a separate shop or other establishment to trade in the farm produce from the suit property, or to obtain supplies from such trading establishment for the use of the said suit farm?
9. State any special fact or facts you the bankrupt or the plaintiff on his behalf rely upon, including any special feature or features, or the manner of keeping accounts, by which you contend the relationship between the bankrupt and the defendant was not that of co-owners of the suit farm and the produce thereof, but was that of partners.
10. Did the bankrupt or you the plaintiff on his behalf and if the answer is yes, on what material allege that you agreed with the defendant to become partners in the purchase and holding of the farm, or in sharing the profits in the yield therefrom? State when and where and between whom such agreement was made, and whether verbally or in writing. If verbally state the substance of it; if in writing, identify the document. When so agreeing did you the bankrupt or you the plaintiff on his behalf appreciate the difference between the relationship of “partners” and “co-owners”?
11. State who you allege was the full time or other farm manager. State by whom, when and where he was employed, what his salary was and other remuneration, and what his hours of work were. State whether such contract of employment was made verbally or in writing. If verbally state the substance of it; if in writing identify the document.
12. Was not the defendant at all material dates to this action carrying on business under the firm name or style of “Building & General Trading Company”, in Market Street at Moshi? Did not the “Arusha Chini Jaggery Estate” enlist the services of the said “Building & General Trading Company” as regards the disposal of its farm produce and for obtaining of supplies for the said farm? Was it not expressly agreed that the said Building & General Trading Company should

charge commission on the disposal of produce, and a fee for his services in addition to the price of the aforesaid supplies? Does not a course of dealing over a number of years since 1952 further show that this commission and fee was payable, and had never been objected to by you the bankrupt or you

the plaintiff on his behalf? Did the principals of Arusha Chini Jaggery Estate ever have a business of the same nature as and competing with that of the Building & General Trading Company? Was the said Building & General Trading Company under any obligation to forego or not to charge its aforesaid fee or commission? If yes, state the nature of such obligation, and the precise circumstances from which it was to be implied.

13. Has not the defendant supplied to you, the plaintiff, all accounts relating to and of Arusha Chini Jaggery Estate? Has not the defendant further sent you balance sheets of the said Estate for 1962, 1963 and 1964? Has your accountant not either many times or at least once, stating which, not examined and checked the books of the said Arusha Chini Jaggery Estate? Have you at any time complied or forwarded to the defendant any list of what you claim to be omissions, or of what you considered wrong debits?
14. Was not the bankrupt adjudged so on the petition of the defendant? Is the defendant not entitled to his costs of such petition in priority to all other debts of the bankrupt? Are you prepared to agree such costs, or to obtain an order therefor and to have them taxed? Do you consider Shs. 10,054/50 as exorbitant for such costs? State what you consider to be a proper and reasonable figure? Are you prepared to allow a reasonable figure to be paid to the defendant, or to allow it to him in ascertaining the indebtedness of one to the other as between the defendant and the bankrupt?
15. Was not Arusha Chini Jaggery Estate indebted to N. Mehta and Company for accountancy fee and writing books? Was not the figure owing for such fees Shs. 17,500/- from 1962 until the sale of the estate and thereafter for completion of the books? Do you not consider such fees to be fair and reasonable? Was not the defendant as the solvent co-owner compellable to pay this? Do you dispute that the defendant so paid the said fees? Have you any valid reason for objecting to affording the defendant a full allowance therefor upon the taking of accounts to ascertain the liability of the one to the other, as between the bankrupt and the defendant?
16. Is it not true that you the Official Receiver had no funds to employ anyone to carry on the day to day running of the said Estate? Is it further not true that the bankrupt did not from October, 1963 until June, 1965 render any services towards the running of the Estate? Do you agree that the defendant was under no obligation to the said bankrupt after the date of the Receiving Order to render any services, or if he did so, to render them free of charge? Are you prepared to make a just allowance to the defendant for rendering or procuring such services? If yes, state what sum or sums monthly or at other stated periods, you would deem proper and reasonable remuneration.
17. Was there not a surplus of Shs. 62,288/65 upon a forced sale by the mortgagee of the land, known as "Arusha Chini Jaggery Estate"? Are you prepared to release this to the defendant, subject to payment of any debts of the said Estate, to be taken into account in order to ascertain, after retention thereof by the defendant, what is the net sum still due by the bankrupt to the defendant or vice versa? If not, specify precisely what claim you have to the whole or part thereof, apart from accounts after paying the same into the assets of the said Estate, and the basis of such claim. Was there not a surplus of Shs. 315/80 on a sale of the movables on the said Estate? Are you prepared to release the said sum to the defendant subject as above? If not, state the basis of your claim to the whole or part thereof.

Mokund Ram.
Defendant/Applicant.

Note: The plaintiff is required to answer interrogatories numbered 1-12 (both inclusive) either himself or by the bankrupt and 13-17 (both inclusive) personally

or by other proper officer after due enquiries from the bankrupt or other proper Officer.

Judgment

Duffus JA: This is an application for leave to appeal against the ruling of a judge of the High Court sitting at Arusha refusing leave for the applicant to deliver interrogatories. The application for interrogatories is now governed by O. 11 of the Civil Procedure Code, 1966 which came into force on January 1, 1967.

It is clear from the ruling that the judge carefully went through and considered all the proposed interrogatories, but this does not appear to have been the case when the application was argued before the court. There it was stated that the simple issues were whether the parties were partners or co-owners and then for the accounts to be gone into. Counsel for the respondent submitted that most of the interrogatories had no bearing in the case which was one for accounts and that they were unnecessary. In reply counsel for the applicant said:

“I do not oppose accounts being taken. Issue of partners or co-owners has to be determined first before accounts are gone into.”

This was in short the argument before the judge. The learned judge, however, gave full reasons for his refusal of the application. In concluding his reasons he said:

“Having regard to the nature of the case and to the prolixity of the interrogatories I find the application is oppressive and quite unnecessary and it is refused.”

The general principle followed is to allow such interrogatories as may be necessary either for disposing fairly or more expeditiously of the case or for the purpose of saving costs and this is a matter in the discretion of the judge.

The pleadings in this case were handed to this court this morning and the issues in the case appear to be very definitely set out. I would refer here to the interrogatories which were very fully gone into by counsel for the applicant before us, and I think that counsel must have gathered from questions from the bench our view that a great number of these interrogatories were not relevant or necessary. Thus it appears that interrogatories Nos. 1-7 are not relevant as they refer to other properties not connected with the property, the subject of the plaint. Then for instance interrogatory No. 8 which is clearly connected with interrogatory No. 12 refers to another business that was apparently set up to deal with the produce of the farm. Then Nos. 17 and 15 are direct issues on the pleadings and will be a matter of evidence to be called by the parties. Then as to No. 9 it appears that the plaintiff was denying the defendant's allegations of co-ownership and it will be a waste of time and unfair for the plaintiff to have now to set out in detail exactly what evidence he proposed to call. Then some of the interrogatories are not even understandable. I refer here in particular to interrogatories Nos. 10 and 12. Then interrogatory No. 14 desires to know whether the bankrupt was so adjudged on the petition of the defendant, a matter clearly to be found on the records and then it also desires to know whether he would be paid his costs in priority to other debtors and then suggests the amount of such costs?

There would appear to have been certain questions which could have been properly the subject of interrogatories, as in question No. 11, but it is not the duty of the judge to redraft or frame interrogatories for the parties. Counsel for both sides appeared before him at the application and both stated what appeared to have been the simple issues on the pleadings and no application was made to amend the

proposed interrogatories. In all the circumstances, I am of the view

that the judge in refusing to allow these interrogatories to issue exercised his discretion properly. This being so I would refuse this application for leave to appeal.

Sir Clement De Lestang VP: The facts leading up to this application have been fully stated by Duffus, J.A. and I will not repeat them. The application for leave to appeal has been fully and exhaustively argued and if I may say so very ably also by counsel for the applicant but nothing that he has said has convinced me that the learned judge wrongly exercised his discretion in refusing leave to the applicant to deliver the interrogatories which he sought to administer to the respondent. I think that there are probably a few matters which could properly have been the subject of interrogatories but they are so mixed up with such a mass of irrelevant and indeed in some instances, objectionable matter as to justify the learned judge's decision that they were oppressive and unnecessary in the circumstances, in a case which raised a relatively simple issue, namely, whether the parties were partners or co-owners in regard to the farm. I can see no reason to grant leave to appeal and would refuse it.

Sir Charles Newbold P: I agree with what my brethren have said and I find it unnecessary to deal with the particular facts of this case; but I think it would be of assistance if I said a few words on the general position.

This is an application for leave to appeal against the exercise of the discretion of a judge of the High Court on an interlocutory application. The judge exercised his discretion in a particular way; and when leave to appeal against the exercise of that discretion on a purely interlocutory proceeding was asked for it was refused. The application for leave to appeal has now come afresh to this court. This application, it is true, is not an appeal from the decision of the judge of the High Court refusing leave to appeal. It is a fresh application. Nevertheless in determining this application, this court cannot but have regard to the fact that leave has already been refused and that what is sought to be the subject of the appeal is the exercise of the discretion of a judge in purely interlocutory proceedings which will not in any way whatsoever determine any matter between the parties. In the circumstances it seems to me that the applicant faces a very difficult task.

Turning now to the proceedings themselves I should like to make it quite clear that a party is not entitled to administer interrogatories. The Civil Procedure Code of Tanzania provides that a party to a suit may only administer interrogatories with the leave of the court; and then in his application he has to submit the precise interrogatories in respect of which leave is sought. There is therefore no right to administer interrogatories. Furthermore the terms of O. 11 of the Civil Procedure Code make it quite clear that in certain cases the application for leave to administer interrogatories should be refused. These cases include, but are not restricted to, cases where the interrogatories are sought to be administered to persons who are not parties to the proceedings and where they are sought to be administered in respect of matters irrelevant to the issues in the suit. Further, in exercising his discretion a judge, and it is so specifically stated in the rules, may refuse to grant leave to administer the particular interrogatories if they are prolix, oppressive or unnecessary. By unnecessary the rule means that the interrogatories will serve no useful purpose.

The judge in exercising his discretion to refuse leave in respect of these interrogatories has described them as unnecessary and has ended his judgment in the following words:

“Having regard to the nature of the case and to the prolixity of the interrogatories I find the application is oppressive and quite unnecessary

and it is refused. I order the costs of this hearing to be for the plaintiff in any event.”

I may say here that certainly the main reason for granting leave to issue any particular interrogatory in respect of which leave is sought is if the judge is satisfied that the answer to this interrogatory would bring the suit to an earlier close and result in a saving of costs. Interrogatories are not intended to provide a substitute for evidence in a suit. As both of my brethren have said, it is possible that there is hidden within the cumbrous oyster of these interrogatories a pearl. But it is not part of the functions of the judge from whom leave is sought to go through the interrogatories himself, separate the good from the bad and give leave in respect of the good parts only. This is something which he cannot properly do and which he should not be called upon to do. I suppose that there may well be some parts of these interrogatories which are good and which, if they had stood alone either originally or as a result of amendment made by the applicant, the judge might have allowed. But taken as a whole I agree entirely with my brethren and with the opinion of the judge that these are improper interrogatories and I would refuse this application for leave to appeal. Accordingly the order of the court is that the application is refused.

Application refused with costs.

For the applicant:

Khanna & Co., Nairobi

D. N. Khanna

For the respondent:

Reid & Edmonds, Arusha

A. Reid

Uganda v Kiwala
[1967] 1 EA 590 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	2 May 1967
Case Number:	209/1967 (121)
Before:	Sir Udo Udoma CJ
Sourced by:	LawAfrica

[1] *Sentence – Stealing by servant – Accused offering to repay money stolen – Whether offer should be taken into account when sentencing – Whether fine of Shs. 5,000/- or six months’ imprisonment an adequate sentence.*

[2] *Sentence – Alteration in, by judge suo motu in course of application for bail pending appeal – Whether competent.*

Editor's Summary

The respondent a public servant was convicted of stealing some Shs. 10,000/- by a servant contrary to s. 252, Penal Code by a Chief Magistrate, and was sentenced to a fine of Shs. 5,000/- or eighteen months' imprisonment in default. Before this sentence was imposed the respondent by his counsel indicated that he would pay back the money which he had stolen within seven days, and this influenced the Chief Magistrate in imposing the sentence which he did. The money was never, in fact, paid back. In the course of a subsequent application for bail pending appeal to the High Court the judge of his own motion reduced the sentence to six months, on the ground that eighteen months was illegal as an alternative to a Shs. 5,000/- fine (Criminal Procedure Code, s. 302 (iv)). The Director of Public Prosecutions then made this application for a revisional order to enhance the sentence, and it was urged that a fine of Shs. 5,000/- or

six months' imprisonment in default was so inadequate as to involve a miscarriage of justice.

Held –

- (i) the magistrate was wrong in allowing himself to be influenced into imposing a lenient sentence by the offer of repayment; and failed to act judicially;
- (ii) it was competent for the judge to correct the sentence suo motu on the bail application.

Application allowed. Original sentence set aside. Sentence of six years' imprisonment substituted.

[**Editorial Note:** an appeal against this order succeeded, and the appeal will be reported.]

No cases referred to in judgment.

Judgment

Sir Udo Udoma CJ: This is an application for an order in revision to enhance the sentence, which was imposed by the Chief Magistrate, Masaka, on the accused, who will hereafter be referred to in this order as the respondent. The applicant is the Director of Public Prosecutions. He is represented by Mr. Khan, State Attorney, while the respondent is represented by Mr. Kiwanuka, an advocate of this court.

The respondent was charged with stealing by servant contrary to s. 252 and punishable under s. 258 of the Penal Code. The particulars of the charge were as hereunder set forth:

“Particulars

Edward Kiwala on the 1st day of June, 1966 at Kibanda Village, in the Masaka District, being a servant to Buganda Government, stole cash Shs. 10,744/–, the property of the said Buganda Government, which came into your possession on account of your employer the said Buganda Government.”

After due trial, the learned trial magistrate found the respondent guilty, convicted and sentenced him to a fine of Shs. 5,000/– or eighteen months' imprisonment in default. That was on December 16, 1966. At the trial the respondent was represented by counsel.

On December 30, 1966, counsel, apparently acting for the respondent, filed a Notice of Appeal in the usual form and applied for a certified copy of the judgment to enable him to formulate the grounds of appeal and to file the same thereafter. He was promptly supplied with a copy of the judgment.

In terms of the provisions of s. 327 of the Criminal Procedure Code, the petition containing the grounds of appeal should have been filed within fourteen days after the receipt of the copy of judgment by the respondent or his counsel. Up till this moment no petition of the grounds of appeal has been filed.

Then on January 7, 1967, counsel for the respondent filed an application for bail to be granted the respondent. That application was supported by an affidavit sworn to by counsel. I do not propose to deal in detail with that affidavit. Suffice it to observe that in paras. 2, 5 and 6 of the affidavit counsel had sworn:

“2. That I am duly instructed to act for the appellant in this appeal.

. . .

5. That I have been informed by Mr. C. R. Patel, Advocate, Masaka, who defended the appellant at his trial that the appellant has a good chance of winning on appeal.

6. That it has so far been impossible for me to peruse the judgment although I have tried several times at Masaka to secure a copy, the reason being that it is so lengthy that it has taken a very long time to get typed out."

The application for bail was heard by Jeffreys Jones, J., who dismissed it, quite rightly I think, in these words:

"There are no special reasons. The application is dismissed."

That was on February 8, 1967.

In the course of dismissing the application for bail, the learned judge observed that the sentence of eighteen months was illegal as an alternative to a fine of Shs. 5,000/-, having regard to the provisions of s. 302 (iv) of the Criminal Procedure Code. He held that the sentence should have been six months. Of his own motion, he reduced the sentence from eighteen months to six months. Thereupon the State Attorney, who appeared and successfully opposed the application for bail, indicated to the court that, since the respondent was proceeding on appeal, it was the intention of the Director of Public Prosecutions to apply for the enhancement of the sentence during the hearing of the said appeal. To put it in his own words, he said:

"On appeal we are going to ask for an enhancement of the sentence."

As no further steps were taken either by the respondent himself or by his counsel to proceed with and prosecute the appeal, the Assistant Chief Registrar addressed a letter dated March 22, 1967, to counsel for the respondent. The letter reads as follows:

"Please refer to the above case in which you filed a notice of appeal on behalf of your client on December 13, 1966. You took a copy of judgment on the very day you brought the proceedings of the lower court. A form of affidavit of service was also given to you on that day but so far, you have not returned it duly sworn acknowledging receipt of the judgment.

Will you please let me know urgently whether you are still pursuing the appeal on behalf of the above accused."

It should be noted that the date December 13, 1966, mentioned in the letter is certainly an error. The notice of appeal was filed on December 30, 1966 and not on December 13, 1966.

It appears also that the date when the record of proceedings and the judgment were issued and delivered to counsel was January 28, 1967, as that is the date of the certificate given by the Chief Magistrate, Masaka.

It is needless to mention that the letter of the assistant chief registrar addressed to the counsel was never replied to with particular reference to para. 2 of the said letter. Since then no further steps have been taken with a view to prosecuting the appeal, either by counsel or by the respondent himself. Assuming that a copy of the judgment was obtained on January 28, 1967, the time for filing the memorandum of grounds of appeal expired on or about February 11, 1967.

On seeing that the time for appealing against the judgment and conviction of the respondent has already expired, and that, despite the letter of March 22, 1967, neither the respondent nor his counsel took any further step with a view to prosecuting the appeal, the Director of Public Prosecutions acting under s. 341 (1) (a) of the Criminal Procedure Code filed this application for a revisional order. The application was filed on April 5, 1967. Still, neither the counsel nor the respondent himself has taken any step even to apply for extension of time within which to file the grounds of appeal.

The application for the revisional order duly came up for hearing before this court on April 17, 1967. On the application of counsel for the respondent the hearing was adjourned and fixed for April 21, 1967.

On April 21, 1967 the application was argued. Counsel for the applicant submitted that the sentence of a fine of Shs. 5,000/- or six months' imprisonment in default on a conviction for the theft of the large sum of Shs. 10,744/- was so inadequate as to involve a miscarriage of justice. Counsel pointed out that under s. 258 under which the charge against the respondent was laid the punishment on conviction is seven years' imprisonment.

It was then submitted by counsel that the learned trial magistrate was unduly influenced by the respondent through his counsel, who had appeared at the trial, by the spontaneous offer of the respondent to make restitution of the amount stolen within seven days after his conviction. That promise has not been fulfilled. No restitution has been made by the respondent. Indeed, the respondent was re-arrested and sent to prison because he defaulted not only in the payment of the fine imposed upon him, but also in making restitution which he had undertaken to make before the magistrate.

In the course of the hearing of this application, counsel for the applicant referred the court to the allocutus wherein is to be found the following remark made by counsel who then had appeared for the respondent. In pleading for leniency counsel for the respondent said:

"The accused informs me that he is prepared to pay the money back in seven days."

That remark had prompted the learned trial magistrate to make the following observation:

"To my mind this is a peculiar case because immediately after conviction the accused volunteered to refund the money. The amount involved is Shs. 10,744/- . . . Let it go on record that I have imposed this lenient sentence because the accused has volunteered to refund the money."

I have examined the circumstances which had led the magistrate to impose the sentence which he did. I am satisfied that he was unduly influenced by the unsolicited offer to refund the stolen money within seven days by the respondent. To have imposed a lenient sentence because the respondent was repentant as said by the learned trial magistrate and had also offered to make restitution of the stolen money, was, in my view, a wrong attitude to be adopted by the magistrate. That should not have been a ground for a lenient sentence. For, after conviction and sentence, it was, in any case, still open to the Government of Buganda and the administration there to institute a civil claim for the recovery of the amount stolen by the respondent. It was a misconception of his duty as administrator of justice to have allowed himself to be so influenced.

Counsel for the respondent has opposed this application. He has submitted that under s. 341 (5) of the Criminal Procedure Code, the application was misconceived; and that it should be dismissed on the ground that the proper course open to the Director of Public Prosecutions was to appeal against sentence and not to apply for a revisional order. The ground for this proposition was said to be the provisions of s. 341 (5), which states:

"341 (5). Where an appeal lies from any fine, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed."

In my view, this submission is not well founded. The provisions of s. 341 (5) would not apply to the Director of Public Prosecutions where, as in this case,

the Director of Public Prosecutions is seeking that the sentence imposed upon the accused person by the magistrate be enhanced.

The Director of Public Prosecutions has no right of appeal against sentence, and can only come to this court by way of a petition for a revisional order.

I agree with counsel for the applicant that the only power of appeal conferred on the Director of Public Prosecutions is to be found in s. 325 of the Criminal Procedure Code, the provisions of which are in the following terms:

“325. When an accused person has been acquitted by a magistrate the Director of Public Prosecutions may appeal to the High Court from such an acquittal on the ground that it is erroneous in law.”

Counsel for the respondent has not suggested that the respondent was acquitted. On the contrary, he was convicted and fined and sentenced to imprisonment in default of payment of the fine.

There is no provision in the Criminal Procedure Code which empowers the Director of Public Prosecutions to appeal against sentence only; nor do I think there is any substance in counsel for the respondent's submission that, since in the course of the hearing of the application for bail Jeffreys Jones, J., had of his own motion corrected an illegality apparent on the face of the record as to the sentence imposed by the magistrate, the revisional power of this court has been exhausted.

What was done by Jeffreys Jones, J., is quite different from what this court is called upon to do now which, of course, is to enhance the sentence imposed on the respondent. It seems to me that the magistrate must have intended to sentence the respondent to eighteen months' imprisonment having regard to the order which he made to the effect that the respondent should pay a fine of Shs. 5,000/- or go to prison for eighteen months.

I think it is correct to say that the attention of Jeffreys Jones, J., was attracted not on the application of anyone to the apparent error committed by the magistrate on the face of the record in sentencing the respondent to a term of imprisonment in excess of the period prescribed by law corresponding to the amount of fine imposed upon him. The judge being well aware that the fine of Shs. 5,000/- could not carry a sentence of eighteen months' imprisonment but only six months, having regard to the provisions of s. 302 (iv) of the Criminal Procedure Code, he had to correct that error.

The matter did not go to him by way of appeal, nor on the application of the Director of Public Prosecutions as regards sentence. What the judge did was done because of an application by the respondent for bail. I am quite satisfied that it was competent for the judge to have corrected the error at the time in regard to sentence.

It is worthy of note that at the time when the sentence was corrected by the learned judge, counsel, who appeared for the Director of Public Prosecutions, had indicated to the learned judge that, since the respondent was proceeding on appeal, the Director of Public Prosecutions would apply for enhancement of the sentence when the appeal came up for hearing.

Due notice was therefore given that, during the prosecution of the respondent's appeal, the Director of Public Prosecutions intended to apply for enhancement of sentence; and it cannot be said that either the respondent or his counsel has been taken by surprise by this application.

It was also argued by counsel for the respondent that the question of sentence is a matter entirely within the discretion of the trial magistrate, and that this court cannot substitute its own discretion for

that of the trial magistrate. While agreeing with this proposition, I think it is also right to point out that

it is the duty of this court to see that the discretion exercisable by a magistrate is not capricious. Such discretion must be judicially exercised.

I am satisfied on the facts and circumstances of this case, that the learned trial magistrate did not exercise his discretion judicially. The sentence of Shs. 5,000/- or six months' imprisonment in default for the theft of Shs. 10,744/- is, in my view, so inadequate as to involve a miscarriage of justice. The respondent actually abused a high privileged position of responsibility entrusted to him as a chief. He took advantage of the disturbed state of Buganda at the material time to steal the sum of Shs. 10,744/-, the property of the Buganda Government. A case of this kind cries aloud to high heavens for justice to be done.

I would like to point out that even though the respondent through his counsel had voluntarily offered to refund the amount stolen by him within seven days, up to the present time he has made no effort to make that restitution. By voluntarily offering to refund the money and failing to do so, it seems a fair inference to be drawn from the respondent's conduct that he had offered restitution as a means of inducing the trial magistrate to treat him leniently, and he succeeded. He got off with a light sentence under false pretences.

I would set aside the sentence of Shs. 5,000/- or six months' imprisonment in default and substitute therefore a sentence of six years' imprisonment without any option of a fine. The sentence of six years to date from the date when the respondent was arrested and began serving his sentence.

I would end this order by dismissing the appeal of the appellant for want of prosecution since up to the present moment there has been no application for leave to appeal out of time brought by the appellant or his counsel. This court is entitled to conclude that the respondent does not intend to pursue his appeal.

Furthermore on counsel for the respondent's attention being drawn to this state of affairs as regards the appeal of the respondent, he had told the court from the Bar, that he has not been duly instructed to proceed with the appeal by the respondent for which he had filed notice since December 30, 1966. Although I believe what he has told me from the Bar, it is also necessary to observe that in para. 2 of his affidavit when applying for bail he had sworn that he had been duly instructed to act for the appellant in this matter.

In the circumstances I was compelled to discharge counsel for the respondent from the appeal and to dismiss the appeal for want of prosecution. Finally I must repeat that the order of this court is that the appellant do go to prison for six years commencing from the date on which he was arrested and sent to prison in default of payment of the fine imposed upon him.

Order accordingly.

For the applicant:

Attorney-General, Uganda

A. M. Khan (State Attorney, Uganda)

For the respondent:

Kiwanuka & Co., Kampala

B. M. K. Kiwanuka

Alai v Uganda
[1967] 1 EA 596 (HCU)

Division: High Court of Uganda at Kampala
Date of judgment: 28 June 1967
Case Number: 310/1967 (123)
Before: Sir Udo Udoma CJ
Sourced by: LawAfrica

(Case Stated by Chief Magistrate, Soroti.)

[1] Criminal Law – Adultery – Meaning of “any married woman” – Whether wife must be married monogamously – Penal Code, s. 150A (1) (U.).

Editor’s Summary

In an appeal to him from a conviction of adultery by a magistrate grade II, a chief magistrate stated a case for the opinion of the High Court on a point of law. The adulterer and adulteress and her husband (the complainant) were all Muslims and the marriage between the adulteress and her husband was by Muslim rites. The short point of law was whether the offence of adultery (s. 150A Penal Code) applies to all types of marriage or whether it is restricted to monogamous marriages only and does not apply to potentially polygamous marriages (including Muslim marriages) because of the definition of “husband” and “wife” in s. 4, Penal Code.

Held –

- (i) “any married woman” in s. 150A Penal Code means any woman who is married to any man irrespective of the form of such marriage; provided that such marriage has been conducted in one of the forms recognised by the people of Uganda, including marriages according to the custom of the people;
- (ii) section 150A Penal Code uses the words “any married woman” so that the definition of “wife” in s. 4 is not relevant.

Appeal remitted for disposal on its merits.

Cases referred to in judgment:

- (1) *Laila Jhina Mawji v. R.* (1956), 23 E.A.C.A. 609.
- (2) *Baindail v. Baindail*, [1946] 1 All E.R. 342.
- (3) *Srini Vasan orse Clayton v. Srini Vasan* (1945), 61 T.L.R. 415.

Judgment

Sir Udo Udoma CJ: This is a case stated pursuant to s. 29 of the Magistrates' Courts Act, Cap. 36, the provisions of which are in the following words:

“29. A magistrate may reserve for consideration by the High Court on a case stated by him, any question of law which may arise in any cause or matter before him or in any appeal before him and may give any judgment or decision subject to the opinion of the High Court.”

This is the first case to be stated by a magistrate for the opinion of this court since the enactment of the Act. The case is stated by the chief magistrate of the Soroti magisterial area before whom the matter had come by way of an appeal from the decision of a magistrate grade II, sitting at Serere, in the Teso-Lango-Karamoja Magistrate's Court.

The appellant was charged with having committed adultery contrary to s. 150A (1) of the Penal Code. The particulars of the charge with which this court is concerned were in this form:

“PARTICULARS OF OFFENCE

Alai Bin Sururu on April 8, 1966 at Kakusi village, Etem Olio, Serere County, Teso District you were caught having sexual intercourse with Adija not being your wife, contrary to s. 150A (1) of the Penal Code.”

At the trial before the magistrate grade II, the appellant pleaded not guilty; and so too did the woman named in the charge in respect of the count against her. The charge itself comprised two counts, the first of which with which this court is concerned was against the appellant, while the second count similarly framed was against the woman named in the first count. It was therein stated that she had committed adultery with the appellant not her husband.

In parenthesis it may be observed that the charge against the appellant as framed was bad in law. It did not disclose any offence. There was no allegation in the count that the woman named therein was a married woman, and that she was married to any particular person, and, in particular, to Mohamed Umari, the complainant in the case. The ingredients necessary to constitute the offence of adultery were not set out in the particulars of the charge.

The essence of the offence created by s. 150A (1) of the Penal Code is that the man charged must have had *sexual intercourse with a married woman not being his wife*; that is to say, a woman married to another man. Merely having sexual intercourse with a woman not married to anyone is not an offence within the provisions of s. 150A (1) of the Penal Code, the relevant part of which is set out hereunder:

“150A (1) Any man who has sexual intercourse with any married woman not being his wife commits adultery and is liable to imprisonment for a term not exceeding twelve months or to a fine not exceeding Shs. 200/-; and in addition the court shall order any such man on first conviction to pay the aggrieved party compensation of Shs. 600/-, and on subsequent conviction compensation not exceeding Shs. 1,200/- as may be so ordered.”

It should be noted that the operative words in the section which must be emphasised and underlined are: *has sexual intercourse with any married woman not being his wife*. The import of these words will be examined more fully later in this judgment.

The case as stated by the learned chief magistrate is in the following terms:

“The alleged husband Mohamed Umari and the female co-accused Adija Bint Ibrahima, are both of Muslim faith. According to the Muslim faith a man is allowed to marry up to four women (I use the words man and women on purpose to avoid the difficulty we now call upon the High Court to determine here). It follows therefore the marriage of any believer in the Muslim faith cannot be ‘a monogamous marriage’ as the man remains potentially able to add on another woman up to the fourth one.

Section 150A of the Penal Code has no special definition to include a man, or woman married in this way into the general definitions of ‘husband’ and ‘wife’ which appear in s. 4 of the Penal Code Act. Therefore the ‘wife’ and ‘husband’ referred to in s. 150A is only the husband and wife known to s. 4 of the Penal Code Act. Therefore a man or a woman confessing the Muslim faith is not a husband or wife who was intended to be liable under s. 150A of the Penal Code which was added a few years back. Only the other categories mentioned in the definition are the ones. If then this is all correct appellant committed no offence.

Since the complainant and accused No. 2 Adija Bint Ibrahima are not husband and wife within the meaning of the law under which appellant

and accused No. 2 were prosecuted, whether in a case like this it is necessary for the prosecution to prove de facto that complainant has in fact one woman and it is the accused No. 2 before any conviction of appellant and accused No. 2 can be secured, for if accused No. 2 is a second, third or fourth woman of the complainant the marriage is not monogamous.”

The question of the issues raised in this reference are quite interesting, although by no means easy, having regard to the definitions of “husband” and “wife” contained in s. 4 of the Penal Code wherein “husband” is defined as meaning “husband of a monogamous marriage”; and “wife” similarly as meaning “wife of a monogamous marriage.”

The matter was argued before this court by counsel for the appellant and by counsel for the respondent.

In his submissions counsel for the appellant contended that since “adultery”, that is, the offence of which the appellant was convicted, is a creature of the Penal Code, the court was bound by the definitions of “husband” and “wife” contained in s. 4 of the Penal Code; that the court was not entitled to import a new concept or definition into the offence created by the statute; that the only adultery cognisable by the court must be adultery committed by a man against a wife of a monogamous marriage; that Mohammedan marriages being potentially polygamous, the offence of adultery, created under s. 150A, would not apply to such marriages.

It was further contended that any marriage not conducted in due compliance with the Marriage Act, Cap. 211 and the Marriage of Africans Act, Cap. 212, could not be regarded as legal within the provisions of the Penal Code. Consequently, counsel submitted that any marriage conducted under the Marriage and Divorce of Mohammedans Act, Cap. 213, although valid was not legal; and the words “husband” and “wife” would not apply to any form of marriage other than the marriage conducted in accordance with the Marriage Act, Cap. 211 and the Marriage of Africans Act, Cap. 212. The authority for this proposition was stated to be the decision of the Privy Council in *Laila Jhina Mawji v. R.* (1) which will be properly and carefully examined later in this judgment.

In his contention in answer to the submissions made by counsel for the appellant, counsel for the respondent submitted that the issue referred to the court did not really arise from the facts of the case. Counsel contended that there are at least three forms of marriages recognised under the law of Uganda, namely, marriage under the Marriage Act, Cap. 211, Marriage of Africans Act, Cap. 212 and Marriage & Divorce of Mohammedans Act, Cap. 213.

The court was then referred to s. 37 of the Marriage Act, Cap. 211 which provides that:

“Any person who is married under this Act, or whose marriage is declared by this Act to be valid, shall be incapable during the continuance of such marriage, of contracting a valid marriage under any customary law, but, save as aforesaid, nothing in this Act contained shall affect the validity of any marriage contracted under or in accordance with any customary law, or in any manner applied to marriage so contracted.”

Counsel then submitted that the word “marriage” has not been defined in the Penal Code. It could not therefore be restricted to any particular form of marriage; and that for the purpose of the offence under s. 150A (1) of the Penal Code the form of marriage was immaterial. Furthermore, contended counsel, the provisions of s. 37 of the Marriage Act clearly recognise even marriage under customary law.

The evidence in the case which has given rise to this reference is very brief. The case of the prosecution was that on April 8, 1966, Mohamed Umari “caught” the appellant having sexual intercourse with the woman Adija Bint Ibrahima, who, he said, was his wife. He took both the appellant and Adija Bint Ibrahima to the Etem Chief of Olio.

Mohamed Umari claimed that he had married Adija Bint Ibrahima according to the Muslim religion.

In support of his case, that Adija Bint Ibrahima was his wife, Mohamed Umari called two witnesses, Ramadan Lezi and Ali Masitafa both of whom testified that they were present when the marriage between Mohamed Umari and Adija Bint Ibrahima was solemnised; and that Mohamed Umari married Adija Bint Ibrahima from a place known as Kakus Olio. It was, however, not stated in the record of proceedings when the marriage took place.

In his defence, the appellant swore that Adija Bint Ibrahima was his wife according to the Muslim religion; that he married her in 1960 when she was living with an old woman by name Kadara. The appellant then called three witnesses in support of his claim to having properly been married to Adija Bint Ibrahima. The witnesses, Alijabu Laku, Edward Sajabi and Haruna Ibrahima, swore that they were present when the appellant married Adija Bint Ibrahima in the house of Kadara. That was in 1960. Since then they had always known and treated Adija Bint Ibrahima to be the wife of the appellant since they had not been divorced.

In particular, Edward Sajabi, who described Adija Bint Ibrahima as his sister, testified that at the marriage ceremony of his sister he as her brother, together with both their parents were present.

In her evidence, Adija Bint Ibrahima stated on oath that the appellant was her husband to whom her parents had given her in marriage; that there had been two issue of the marriage; and that the two issue were the children of the appellant. She said that Mohamed Umari was never her husband. Her testimony was corroborated by Kampi d/o Zirimenya, whom she had called as her witness.

On that evidence, the magistrate grade II held that Adija Bint Ibrahima was the lawful wife of Mohamed Umari, because the latter was able to produce a marriage certificate No. 375 of December 12, 1963, whereas the appellant had failed to produce such a certificate.

In the result he found the appellant guilty and convicted him of adultery “as charged”. He ordered that the appellant should pay the fine of Shs. 200/- or serve four months’ imprisonment in default. He also awarded Mohamed Umari Shs. 600/- as compensation against the appellant. Thereupon the appellant appealed to the chief magistrate against his conviction, sentence and the compensation of Shs. 600/- awarded against him.

It is common ground that both Mohamed Umari and the appellant are Muslims. So too is Adija Bint Ibrahima. The marriages were celebrated according to Muslim rites.

I do not propose to deal with the evidence and the decision given by the magistrate grade II since the appeal has not been heard on its merits. I am here concerned with the question of law for which the opinion of this court is sought by the chief magistrate.

In the case stated for the opinion of this court, the learned chief magistrate took the view that since “husband” and “wife” as defined in s. 4 of the Penal Code mean “husband” and “wife” of a monogamous marriage, it would follow that the marriage of “any believer in the Muslim faith”, being potentially polygamous, is excluded from the definition of “husband” and “wife” in s. 4 of the Penal Code.

On that reasoning, the learned chief magistrate held that husband and wife and the form of marriage envisaged in s. 150A of the Penal Code could only mean husband and wife as defined in s. 4 of the Code, and the result of the union between one woman and one man as stipulated both in the Marriage Act, Cap. 211 and the Marriage of Africans Act, Cap. 212.

The learned chief magistrate, therefore, concluded that a man and a woman, who profess the Muslim faith, even though married in accordance with the procedure prescribed in the Marriage and Divorce of Mohammedans Act, Cap. 213 could not be properly described as husband and wife since such a marriage is potentially polygamous. In which case, any man having illicit sexual intercourse with such a woman would not be regarded as having committed adultery under s. 150A of the Penal Code.

The views expressed by the learned chief magistrate were re-echoed with emphasis by counsel for the appellant, who even went to the length of describing marriages of Muslims as merely valid but not legal – a distinction which was difficult to comprehend.

In my opinion the views expressed by the learned chief magistrate are not only unsound in law, they are both extraordinary and dangerous, having regard to the situation and the social structure of Uganda and the different and complex forms of marriages recognised by the law of Uganda.

In my opinion, it is primarily the duty of the court to interpret an Act of Parliament in such a reasonable manner so as not to defeat the intention of Parliament and the purpose for which the Act was enacted. It would be absurd to presume that, when s. 150A of the Penal Code was enacted by Parliament, the provisions thereof were intended to apply only to a husband and wife of a monogamous marriage, having regard to the fact that to the knowledge of members of Parliament there are several other forms of marriage in Uganda. This knowledge must be presumed. In any case, were it the intention of Parliament to limit the offence to monogamous forms of marriage it should have said so. The intention of Parliament can only be gathered from the Act itself.

The learned chief magistrate would appear to have overlooked the fact that in framing the provisions of s. 150A emphasis was laid not on the meaning of a “husband” and “wife” but on the phrase *any married woman not being his wife*. In its true sense, and this must be presumed to have been the intention of Parliament, the expression “*any married woman*” must mean what it says. Its true meaning therefore may be gathered from the provisions of the section. “Any married woman” must mean any woman who is married to any man irrespective of the form of such marriage. The important point to note is that such a marriage must have been conducted in one of the forms of marriage recognised by the people of Uganda, including marriages according to the custom of the people. The phrase “married woman” is a term of art which confers on any woman a special status in society as distinct from an unmarried woman.

It is an accepted principle of law that substantive law must be distinguished from “interpretation” and “meaning”, although sometimes the most obvious form of interpretation might extend or restrict the application of words and thereby affect the substantive law.

In s. 3 of the Penal Code there is to be found the following provision:

- “3. This Code shall be interpreted in accordance with the principles of legal interpretation obtaining in England, and the expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning to them in English Criminal Law and shall be construed in accordance therewith.”

Having regard to the provision of s. 3 of the Penal Code reproduced above, there is an authority in English Law in support of the proposition that the term “married man” or “married woman” confers on the individual concerned a special status in society irrespective of the form of marriage.

Baindail v. Baindail (2) was an appeal by Mr. Nawal Kismore Baindail, a Hindu, from the decision of Barnard, J., which had granted a decree of nullity of marriage to the petitioner, Mrs. Kathleen Joyce Baindail (nee Lawson), on the ground that when she went through a form of marriage with the appellant at Holborn Register Office on May 5, 1939 he was already married according to Hindu rites at Muthra, United Provinces, India, to a Hindu, the daughter of one Ramchandra.

In holding that he had jurisdiction to pronounce such a decree and that in law the petitioner was entitled to it, the learned judge had followed a previous decision of his in *Srini Vasan orse Clayton v. Srini Vasan* (3).

The appellant, a Hindu, while domiciled in India married a Hindu woman according to Hindu rites. That marriage was still subsisting when he went through a ceremony of marriage with an English woman in England. The English woman, after she had become aware of the Hindu marriage, petitioned the court for a decree of nullity of her marriage to the appellant on the ground that the appellant’s wife in India was still alive.

At the trial, the appellant had pleaded that the marriage in India, being potentially polygamous, was invalid by English law.

It was held by the Court of Appeal affirming the decision of Barnard, J., that notwithstanding its polygamous nature, the Hindu marriage gave the appellant the status of a married man by the law of his domicile; that he retained that status at the time of the ceremony of marriage in England; that the courts of England recognised as valid the marriage in India, which was accordingly an effective bar to any subsequent marriage in England; and that the petitioner was therefore entitled to a decree of nullity as the pretended marriage with the appellant was null and void.

In his judgment in the case the Master of the Rolls in a passage, which I consider pertinent to the issue under enquiry in the instant case said ([1964] 1 All E.R. at p. 264):

“The question as it presents itself to my mind is simply this: On May 5, 1939 when the appellant took the petitioner to the Registry, was he, or was he not, a married man so as to be incapable of entering into another legitimate union?

The general proposition would not, I think, be disputed that, in general, the status of a person depends on his personal law, which is the law of his domicile. By the law of the appellant’s domicile at the time of his Hindu marriage he unquestionably acquired the status of a married man according to Hindu law. He was married for all the purpose of Hindu law; and he had imposed upon him the rights and obligations which that status confers under that law. That status he never lost. Nothing that happened afterwards, save the dissolution of the marriage if it be possible according to Hindu law, could deprive him of the status of a married man which he acquired under Hindu law at the time of his Hindu marriage; he was, therefore, a married man on May 5, 1939 according to Hindu law. Did that circumstance prevent him from entering into a valid marriage in this country? It is argued that it did not because, whatever Hindu law may say, and whatever his position may be in India, this country will not recognise the validity of the Hindu marriage.

We are not considering in this case the question of construction of any words such as marriage, husband, wife and so forth in the Divorce Acts. We are considering whether, according to what would have been the old Ecclesiastical law, the existence of the Hindu marriage formed a bar. For the purpose of that consideration, what was the appellant's status on May 5, 1939? Unquestionably, it was that of a married man."

The decision of the Court of Appeal in England in *Baindail v. Baindail* (2) was cited with approval by the Privy Council in *Laila Jhina Mawji and Another v. R.* (1) – a Tanganyika case – to which this court was referred by counsel for the appellant – the decision in which is dead against the appellant.

There the appellants were husband and wife, both Ismaili Khojas, who had been convicted, inter alia, of conspiracy to defeat the course of justice. The Court of Appeal for Eastern Africa had held that the English rule of law that there can be no conspiracy between husband and wife applied generally in Tanganyika, but that it did not apply in that case as the marriage was potentially bigamous.

Special leave was given to the appellants to appeal to the Privy Council limited to the count of conspiracy.

It was held by the Privy Council that:

- (1) the English rule that a husband and wife cannot be convicted of conspiracy was incorporated into s. 110 (a) of the Tanganyika Penal Code [which corresponds to s. 97 (a) of the Uganda Penal Code] by virtue of s. 4 of the said Code [which also corresponds to s. 3 of the Uganda Penal Code already cited above]; and
- (2) while the marriages primarily contemplated by the rule were monogamous marriages, the rule now being part of the Criminal Law of Tanganyika, it applied to any husband and wife of a marriage valid under Tanganyika law, even though the marriage was potentially bigamous.

In the concluding passage of the judgment of the court, Lord Somervell of Harrow said ((1956), 23 E.A.C.A. at p. 611):

"It was submitted for the respondent that the rule could not apply to the appellants unless it would apply to them if the alleged conspiracy had taken place in this country. Their Lordships do not accept this submission. Potentially polygamous marriages have been recognised for various purposes in this country. It may be that such a marriage would be recognised for the purpose of this rule. Their Lordships express no opinion on that point. The rule plainly applies here at least to marriages recognised as fully valid and it should therefore apply in Tanganyika to marriages recognised as fully valid there."

Applying the principles enunciated in the two cases referred to above to the instant case, this court is of opinion that the offence created in s. 150A of the Penal Code is of general application irrespective of the form of marriage concerned. Anyone therefore who has sexual intercourse *with any married woman not being his wife* would be guilty of the offence, irrespective of the form of marriage, so long as the marriage is recognised by the law of Uganda. The definition of "husband" and "wife" under s. 4 of the Penal Code as meaning husband and wife of a monogamous marriage does not in any way affect the offence created under s. 150A of the Penal Code. The definition does not apply to the offence of adultery, which may be committed by any man, who has sexual intercourse with any married woman not being his wife. The essential

ingredient here is that the woman concerned must acquire the status of a married woman.

I therefore accept the submission made by counsel for the respondent, that having regard to the many forms of marriage recognised by the Law of Uganda the offence may be committed by any man who has sexual intercourse with any woman married in accordance with any of the forms of marriage recognised by the Law of Uganda. I do not, however, share his nonchalant and facile optimism that the issue referred to this court did not really arise from the facts of this case.

In my view the forms of marriage recognised in Uganda would include marriages conducted in accordance with the Marriage Act, Cap. 211, Marriage of Africans Act, Cap. 212, the Marriage & Divorce of Mohammedans Act, Cap. 213, the Hindu Marriage & Divorce Act, Cap. 214 and marriages contracted under or in accordance with any customary law recognised by the law of Uganda.

The learned chief magistrate was wrong in law in holding that the “wife” and “husband” referred to in s. 150A of the Penal Code are only the “husband” and “wife” known to s. 4 of the Penal Code. That certainly is not the law. The other point raised by the learned chief magistrate as to the necessity for the prosecution to prove on a charge of adultery that the complainant in the case has in fact one woman before any conviction can be secured, does not therefore arise.

Although, it is not necessary for me to express any view on the evidence which was before the trial magistrate, since this appeal must go back to the chief magistrate with appropriate order, I think that it is only right to observe that the so-called certificate of marriage No. 375 of December 12, 1963, relied upon heavily by the trial magistrate in his finding for the complainant, Mohamed Umari was never tendered in evidence nor was it marked as an exhibit in the case. It suddenly appeared for the first time in the judgment of the trial magistrate. If the certificate was not tendered and exhibited the trial magistrate was wrong in law to have relied upon it in his judgment.

Furthermore, the trial magistrate did not seem to have directed his mind to the provisions of s. 17 of the Marriage and Divorce of Mohammedans Act, Cap. 213, which read as follows:

“17. Nothing in this Act shall be construed to:

- (a) render invalid merely by reason of its not having been registered, any mohammedan marriage or divorce which would otherwise be valid;
- (b) render valid, by reason of its having been registered, any such marriage or divorce which would otherwise be invalid.”

From the above provisions, it would seem that registration is not an essential requisite for the validity of a properly celebrated Muslim marriage. It appears to be a matter of indifference. Registration is not made compulsory; and it would appear not to confer any special rights or privileges.

This particular aspect of the case should be given consideration by the learned chief magistrate when hearing the appeal on its merits, having regard to the evidence to the effect that the appellant was married to Adija Bint Ibrahim since 1960 and has since had two children for him.

In view of the conclusion I have reached regarding the true meaning and proper construction of the provisions of s. 150A of the Penal Code, in my judgment the proper order to make is that the appeal be sent back to the chief

magistrate with a direction that the same be disposed of on its merits subject to the observations of this court on the legal aspect of the matter.

Order accordingly.

For the appellant:

B. Kapoor, Kampala

For the respondent:

Attorney-General, Uganda

M. Opu (State Counsel, Uganda)

Pioneer Investment Trust v Amarchand and others
[1967] 1 EA 604 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	10 June 1967
Case Number:	26/1966 (on taxation). (124)
Before:	Gaffa Registrar
Sourced by:	LawAfrica

[1] *Costs – Brief fee in Court of Appeal – Whether may include travelling expenses – Whether should be apportioned between appeal and cross-appeal – East African Court of Appeal Rules, 1954, Third Schedule, para. 15.*

[2] *Costs – Instructions fee – Applicability of “two-thirds” rule to, in Court of Appeal.*

[3] *Costs – Taxation – Appeal – Counsel’s fees – Quantum – Whether should be apportioned between appeal and cross-appeal – Whether may include travelling expenses – East African Court of Appeal Rules, 1954, Third Schedule, para. 15.*

[4] *Costs – Taxation – Appeal – Instructions fee – Whether “two-thirds” rule applies.*

Editor’s Summary

A bill of costs filed for taxation by the successful second respondents in an appeal included an item (No. 11) for the instructions fee to junior counsel to oppose the appeal of Shs. 15,000/-; and also an item (No. 46) under disbursements for Shs. 10,000/- “brief fee” paid to Queen’s Counsel who led for the second respondents at the hearing. There had also been a cross-appeal by the second respondents, which was dismissed with costs. At taxation on these two items, on the brief fee it was argued for the appellant that this included travelling expenses which should be disallowed; and that the fee should be apportioned

between the appeal and the cross-appeal. On the instructions fee it was argued for the second respondents that Queen's Counsel had merely been a "spokesman" and that the junior had done most of the work and should be allowed a fee higher than two-thirds of Queen's Counsel's fee.

Held –

- (a) on the instructions fee there was no reason to depart from the normal practice that where a certificate for two counsel is given the junior should receive two-thirds of the leader's fee (to include two-thirds of the hearing fees) plus something for the solicitor's work;
- (b) on the brief fee:
 - (i) the element in the brief fee for travelling expenses should be disallowed;
 - (ii) it is proper to apportion the brief fee where the appeal and cross-appeal have been dismissed with costs unless the cross-appeal was such that it could not be said to have occasioned higher costs;
 - (iii) in this case an appropriate amount ought to be taxed off from the brief fee, by reference to the actual course taken and the time properly occupied on "the hearing of the appeals".

Brief fee reduced to Shs. 5,000/-. Instructions fee also reduced to Shs. 5,000/-.

Cases referred to in judgment:

- (1) *Coast Brick and Tile Works v. Premchand Raichand Ltd. and Another* (No. 2), [1964] E.A. 517.
- (2) *Wooding v. Monmouthshire and South Wales Mutual Indemnity Society Ltd.*, [1938] 3 All E.R. 625.
- (3) *Edward Sargant v. Tisdale-Jones*, [1957] E.A. 226 and 613.
- (4) *Virbhai widow of Shamji etc. v. Shankerprasad Manganlal Bhatt and 3 Others* (Civil Appeal No. 25 of 1964, unreported).
- (5) *Jones v. Stott*, [1910] 1 K.B. 893.
- (6) *Greaves v. Nabarro* (1940), 62 L.T. 178.
- (7) *Dwarka Nath Khanna v. Hirji Jivraj Shan and another* (Civil Appeal No. 95 of 1962, unreported).

Judgment

F R Gaffa, Registrar (having dealt with other items), continued: Re items 46 and 11; These concerned the brief fee paid to the Queen's Counsel and instructions fee for the junior counsel respectively. With regard to item 46, counsel for the appellant made a number of submissions. First, he submitted that in accordance with para. 15 of the IIIrd Sched. E.A.C.A. Rules, which rule was mandatory, he was entitled to ask for and see the brief and correspondence to Mr. Gratiaen together with the relevant receipts. He cited *Coast Brick Tile Works v. Premchand Raichand Ltd. and Another* (1) in which the learned counsel for the respondents made a similar submission. It was necessary to ascertain whether it was wholly a brief fee or whether it also included travelling expenses. Secondly, he submitted that para. 4 of Practice Note 7 of 1956 implicitly allows the taxing officer to allow only the actual fee paid but not including travelling expenses. Thirdly, that the two-thirds rule, which he considered applied to this item, does not include travelling allowance and he referred me to para. 9 of Practice Note 7 of 1956 and also to the *Coast Brick* case (1) (*supra*), and drew my attention to item 31 of the bill in that appeal which dealt with travelling allowance and was disallowed. Subsequently, after counsel for the second respondents had shown him the receipt for £500 which it appears was dated July 14, 1966, and bearing the following words: "Paid for brief fee and return air-passage . . . £500", counsel for the appellant submitted that the cost of the return economy class air-passage from London to Nairobi and back, which he estimated to be about £200, should be disallowed. Meanwhile, later on when he was dealing with item 11 (instructions fee), counsel for the appellant made a further submission, which for the sake of relevancy, I will record here. He submitted that the respondents were not allowed the costs of the cross-appeal and that this meant in effect that the fee payable to leading counsel must be correspondingly reduced. He made the following observations:

- (i) that the brief fee paid to Mr. Gratiaen was for the whole of the appeal and the cross-appeal and the crucial time to be considered while assessing the brief fee is the time when the brief is handed over.
- (ii) Alternatively he submitted that there were two points argued on the main appeal and one point was argued on the cross-appeal. The fee therefore could be apportioned as two-thirds representing the costs on the appeal and one-third as representing those on the cross-appeal.
- (iii) He submitted that if the cross-appeal is regarded as of equal weight, then Mr. Gratiaen should be

allowed one-half of the brief fee as the appellant got the

costs of the cross-appeal and Mr. Gratiaen's brief included the costs of the cross-appeal.

Counsel for the second respondents on the other hand submitted that no element of travelling can be taken either to increase or decrease this fee, that Mr. Gratiaen came here not only for this appeal but also for other business and because of this he did not ask for expenses for travelling, hotel expenses etc. He said the court was only concerned with the substantive fee and that in this particular case there was no evidence that £500 did include other expenses. He submitted that the rule regarding witnesses' expenses also applies to counsel in this case. According to him, the fee could not notionally be split up and that the fee was reasonable having regard to the amount involved which was about Shs. 336,000/-. The appeal was a heavy one, bristling with difficult points and that it was indeed the most heavy and difficult matter which has ever been discussed in East Africa. He said he could not subscribe to the "local advocate standard" as it required a hypothetical inquiry and that in his opinion all that the taxing officer ought to have regard to is whether the fee is reasonable and proper having regard to the circumstances and complexity of the case and except in cases where there is definite evidence of specific expenses such as hotel expenses in which case such a specific charge would be disallowed, the fee in this case was commensurate with the matters at issue. Lastly on this point, counsel for the second respondents submitted that the *Coast Brick* case (1) requires me to estimate any other refreshers or as he put it, extraneous circumstances. I then asked counsel what interpretation he gave to the words "paid brief fee and return air-passage" on the receipt which appeared to me to be ambiguous. He agreed that it was ambiguous and conceded the right interpretation to be that the £500 is made up of the brief fee plus the cost of the return air passage. He also stated that Mr. Gratiaen travelled by economy class.

On the point taken by counsel for the appellant about the cross-appeal, counsel for the second respondents said it was absurd to suggest that the cross-appeal was equal to or heavier than the appeal itself, and that the rule to the cross-appeal was the same as in a counterclaim, namely that you get no costs at all for a cross-appeal unless there are points which are not common to the main point of the main appeal. He referred me to the case of *Wooding v. Monmouthshire and South Wales Mutual Indemnity Society Ltd.* (2) ([1957] E.A. at p. 646):

"With regard to the cross-appeal, the rule which has been established is the same as it is with regard to a counterclaim, and the costs would only include the costs whereby the hearing of the appeal had been increased by reason of the cross-appeal".

On item 11, the instructions fee, counsel for the appellant submitted that Practice Note No. 7 of 1956 was binding on me when deciding the instructions fee payable to junior counsel and that there were many decisions of the court to the effect that junior counsel is entitled only to two-thirds of the leader's fee. Counsel for the second respondents in reply submitted that the first consideration in this case is to arrive at a fair fee having regard to the amount of work involved and that Mr. Gratiaen was engaged merely as a spokesman. He then referred me to item 49 which demonstrated that a Queen's Counsel in the Chancery Division was engaged and paid a heavy fee for writing an opinion and that Mr. Gratiaen had been presented with the written arguments and therefore had only to present what was given to him. He accordingly submitted that Practice Note 7 of 1956 was not part of the law or the Rules and as such is not exhaustive and does not cover this type of case where the leader was merely a spokesman. He then referred me to the case of *Edward Sargant v. Tisdale-Jones* (3) – the reference of which he was unable to give me – in which junior counsel got more than senior counsel.

Counsel for the appellant replied that he thought it misleading to say that Mr. Gratiaen was a mere spokesman in court. A junior counsel is supposed to brief senior counsel and that is exactly what happened in this case. He submitted that counsel for the second respondents must produce the relevant correspondence to show that the brief to Mr. Gratiaen was a limited one and challenged the view expressed by counsel for the second respondents that the Practice Note was not the law by referring to the argument of counsel for the second respondents in the *Coast Brick* case (1) where he had argued that it was binding. On the point made by counsel for the second respondents that he had sought opinions of two Queen's counsel, counsel for the appellant submitted that this was simply a luxury for which his clients could not be penalised.

It appears to me that the main issues to be decided as regards the brief fee (item 46) are whether or not the travelling expense element should be disallowed and secondly whether it is just and proper in this case to apportion the brief fee between the appeal and cross-appeal. I am afraid I cannot agree with counsel for the second respondent's submission that the brief fee should not be apportioned at all. The taxing officers of this court have often held that expenses like travelling expenses or hotel expenses are not proper party and party items and are considered as "luxuries". Here the fee paid to Mr. Gratiaen, as counsel for the second respondents himself conceded, includes travelling expenses. I agree with counsel for the appellant's submission that the travelling expense should be disallowed. I am fortified in this view by the Ruling in *Virbhai widow of Shamji etc. v. Shankerprasad Maganlal Bhatt and 3 others* (4) where the taxing officer taxed off the cost of the economy class return air fare. Counsel for the second respondents informed me that Mr. Gratiaen's air passage was a return air passage economy class which I am informed by the East African Airways is about Shs. 3,920/-. I therefore tax off that amount from item 46.

The point that I find difficult to decide is whether or not I can further apportion the brief fee between the appeal and cross-appeal. Quite rightly counsel for the appellant submitted that Mr. Gratiaen's fee included both the appeal and cross-appeal and since the respondents were not granted the costs of the cross-appeal, subject to my discretion, I should tax off that part of the fee which belongs to the cross-appeal. In other words I must apportion the fee between the appeal and cross-appeal. Counsel for the second respondents submitted on this point that the fee could not be notionally split up. I reject this point that the fee in this case should not be apportioned for I think, unless the court directs otherwise, it seems to me to be proper to apportion the brief fee where the appeal and cross-appeal have been dismissed with costs, unless the cross-appeal was such that it could not be said to have occasioned higher costs. A similar point was argued in *Jones v. Stott* (5) in which the question for determination was counsel's fees, which necessarily was common both to the appeal and cross-appeal, because if there is an appeal and also a cross-appeal the fees of counsel appearing in the joint proceeding are necessarily higher than if there had been either an appeal by the appellant or a cross-appeal by the respondent. Hamilton, J., whose decision was later affirmed by the Court of Appeal, thought he should review the taxation by apportioning the costs of counsel's briefs between the appeal and the cross-appeal. The position is perhaps clarified by the judgment of Goddard, L.J. in *Greaves v. Nabarro* (6). He said ((1940), 62 L.T. at p. 180):

"I express no opinion whether or not counsel is entitled to two briefs in an appeal and cross-appeal, where, as in my experience often happens, only one brief is delivered. Whether one brief is delivered at an increased fee or two briefs at marked fees, the question the Taxing Master has to ask himself is, what is the proper remuneration to be allowed to counsel? He can put it on two briefs if he likes or put it on one brief and divide it up. . . ."

The question whether or not the brief fee is apportionable has in fact also been decided by the taxing officer of this court in *Dwarka Nath Khanna v. Hirji Jivraj Shah and Another* (7) in which the appeal and cross-appeal were dismissed with costs. A similar submission was made that the brief fee of Shs. 3,500/- claimed in item 19 of the bill covered the conduct of both the appeal and the cross-appeal. The taxing officer held that the brief fee did include an amount for arguing the appeal and he taxed off more than one-third of the fee claimed.

Having carefully considered the submissions of both learned counsel on this point I am of the view that in this case an appropriate amount ought to be taxed off from the brief fee which I consider must have covered both the appeal and cross-appeal. Counsel for the appellant invited me to hold that the cross-appeal was as heavy as the appeal itself or alternatively, according to the grounds or issues argued, the cross-appeal represented at least one-third of the work done on the appeal. While noting that the above methods can, in certain circumstances and in an appropriate case, be used to determine the apportionments between the appeal and the cross-appeal parts of the brief fee, I am, however, not prepared to do so in this case. I think the costs of counsel's brief fees between the appeal and the cross-appeal should be decided with reference to the actual course taken and time properly occupied on "the hearing of the appeals." The court diary and the notes taken by the judges show that the appeal was argued for a much longer period and certainly for the first two days and the cross-appeal only on the third day and even then not for the whole day. I would estimate the time taken to argue the cross-appeal as being less than one-third of that taken to argue the appeal. Bearing this in mind and all that I am required to under item 6 of Scale A of the Third Schedule to the Rules of the Court I am of the opinion that the respondents' leader's fees (including hearing fees) on the appeal should be Shs. 5,000/-. Having taxed off the cost of the return air-passage of Shs. 3,920/- this leaves Shs. 6,080/-. I therefore tax further off Shs. 1,080/-.

This leaves the instructions fee (item 11). Counsel for the second respondents if I understood him correctly, invited me to hold that Mr. Gratiaen was a mere spokesman and that he had done most of the work himself. In effect, he submitted that the two-thirds rule should not be applied to this case. With respect, I am afraid I am not convinced and I do not accept that Mr. Gratiaen was merely a spokesman and did not do much work both on the appeal and cross-appeal. If counsel for the second respondents had seriously sought to argue this point I consider that he would properly have informed me of the work that had to be done by leading counsel in accordance with Practice Note 2 of 1958 which note, as Duffus, J.A. said in *Dwarka Nath Khanna v. Hirji Shah and Another* (7) is not "binding in law but (it) should be strictly followed and observed by solicitors and counsel as a matter of practice and of etiquette". Practice Note 2 of 1958 says and I quote in extenso:

"Fees to Counsel: Where it is desired to tax in this court any sum as disbursement for fees paid to counsel and the instructions to counsel in respect thereof are given at any time after June 1, 1958, the taxing officer will require that, in addition to counsel's receipt the brief with a dated backsheets, or, at least, a dated backsheets, showing the work to be done by counsel, and endorsed with the fee agreed to be paid therefor, should be produced. It is requested that counsel, whatever other papers (if any) are delivered with his instructions, will treat the delivery of such a backsheets as being essential as a matter of etiquette in every case, unless emergency renders this impossible, in which case the backsheets should be delivered within 48 hours".

It is clear in this case that the requirements of Practice Note 2 of 1958 were not carried out nor was the brief or dated backsheets produced before me. I therefore

see no reason to depart from the normal practice laid down by Briggs, V.-P. that where a certificate for two counsel is given the junior should receive, as an instructions fee, two-thirds of his leader's fee (to include two-thirds of the hearing fees) plus something for the solicitor's work. Accordingly in respect of item 11 I allow Shs. 3,330/- being two-thirds of the leader's fee (including hearing fees) and assess the "solicitor's work" which is usually not heavy in the case of a respondent at Shs. 1,670/- making a total of Shs. 5,000/-.

As more than one quarter of the profit costs has been taxed off this calls for the automatic disallowance of items 39 and 40 and item 42 and Shs. 9/- is taxed off item 53. Nil is allowed for item 54.

The bill is therefore taxed at Shs. 14,119/75 plus a taxing fee of Shs. 142/- making a total of Shs. 14,261/75 (Shillings fourteen thousand two hundred and sixty-one and cents seventy-five only.)

Brief fee reduced to Shs. 5,000/-. Instructions fee also reduced to Shs. 5,000/-.

For the second respondents:

Khanna and Co., Nairobi

D. N. Khanna

For the appellant:

J. K. Winayak and Co., Nairobi

J. K. Winayak

Potgieter v Stumberg and another [1967] 1 EA 609 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	14 April 1967
Case Number:	49/1967 (127)
Before:	Sir Charles Newbold P, Duffus and Spry JJA
Sourced by:	LawAfrica
Appeal From:	The High Court of Kenya – Chanan Singh, J.

[1] *Costs – Successful party deprived partially of costs – Prolix application – Certificate for two advocates refused – Principles to be applied on appeal against such order.*

[2] *Execution – Arrest before judgment – What evidence required to support application for – Whether evidence becoming available after order made is relevant to application to set order aside – Civil Procedure (Revised) Rules, 1948, O. 38, r. 1 (b) (K.).*

[3] *Practice – Arrest before judgment – What evidence required on – Civil Procedure (Revised) Rules,*

1948, O. 38 r. 1 (b) (K.).

[4] Practice – Setting aside ex parte order – Whether evidence not before judge making original order but subsequently available is relevant to.

Editor's Summary

The respondents, having sued the appellant claiming dissolution of an alleged partnership in a farm between themselves and him, an account and judgment for the sums found due, applied ex parte for orders including inter alia an order for the arrest of the appellant. Affidavits filed in support alleged broadly that the appellant had sold the immovable property of the farm and the main part of the livestock, and alleged that “the only hope” the appellant could have of evading the respondents’ just claims was “in leaving the country as soon as possible”. An order, inter alia, for the arrest of or for provision of security for appearance

by the appellant was made, which the appellant applied by motion to have set aside. The judge before whom this motion came declined to set aside the order for arrest or provision of security, and ordered as to the costs of the motion that the appellant should only have a proportion of such costs on the basis of one half the number of pages actually filed in the application and also refused a certificate for two advocates. Subsequent to the order for arrest there was some material on record from which a judge could infer that the defendant would shortly be leaving Kenya and also possibly could infer that he was doing so to defeat the respondents' claims.

Held –

- (i) the court on this particular order could only take into account the evidence before the judge at the time of making it, excluding the subsequent material;
- (ii) there was no evidence before the judge who made the order to enable him to say that the defendant was about to leave Kenya at all, let alone in the circumstances set out in O. 38, r. 1 (b) of the Civil Procedure (Revised) Rules, 1948;
- (iii) the order should not therefore have been made, and should have been set aside;
- (iv) the judge's decision on costs was one in his discretion and the appellant had failed to show that the judge had acted on some wrong principle of law or that the way in which he exercised his discretion was erroneous.

Appeal allowed in part (with consequential orders as to costs below). Appellant to have half the costs of the appeal.

Case referred to in judgment:

- (1) *Re de Cespedes*, [1937] 2 All E.R. 572.

Judgment

Sir Charles Newbold P: This is an appeal with leave against an order made by a judge of the High Court on a motion to set aside an order made previously by a judge of the High Court on an ex parte application. The relevant facts may be briefly stated as follows.

The appellant, to whom I shall refer as the defendant, owned a farm in Kenya and certain discussions took place between him and the two respondents, to whom I shall refer as the plaintiffs, in relation to that farm. What those discussions were precisely I do not know, but apparently the parties fell out. The plaintiffs filed a plaint claiming that a partnership existed between the plaintiffs and the defendant and praying for an order dissolving the partnership, and that the defendant account to the plaintiffs in respect of the partnership moneys, and that judgment be entered for the sums found due on that account. Subsequently the claims and the plaint were amended but it is unnecessary to refer to them as this appeal relates to proceedings before the subsequent amendment and, indeed, before any subsequent pleadings were filed. At about the time, or very shortly thereafter, of the filing of this plaint the plaintiffs applied ex parte for various orders, one of which was an order for the arrest of the defendant. I may here say that the orders which were applied for were wide in the extreme and appeared to relate to persons who were not the subject of the proceedings. That is merely a comment and this fact plays no part in this appeal. That application for ex parte orders was supported by affidavits made by an advocate and by an inquiry agent.

Those affidavits, which in some respects were irregular – and I would again draw to the attention of the advocates the provisions of O. 18 in relation to affidavits and the decision of this court as to the duty of advocates when preparing affidavits – those affidavits broadly alleged that the

defendant had sold both the immovable property of the farm and also the main part of the livestock. In relation to this broad allegation the advocate's affidavit contained this paragraph:

"The only hope that he can have of evading the plaintiffs' just claims in the moneys received by him is in leaving the country as soon as possible."

On the matter coming before a judge of the High Court that judge made the various orders prayed for in the application and one of these orders was an order for the arrest of the defendant. This order could only, as far as I am aware, be made under O. 38, r. 1 (b) of the Civil Procedure (Revised) Rules, 1948, and it is not submitted that it was made under any other Order. That rule enables the court in certain suits, when satisfied by affidavit or otherwise "that the defendant is about to leave Kenya under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit", to issue a warrant to arrest the defendant and bring him before the court to show cause why he should not furnish security for his appearance. The court is also empowered to include in the warrant of arrest a specified sum which, if tendered, would obviate the necessity for the execution of the warrant. The defendant was in due course arrested and brought before the court. There were two appearances I think, on the same day, and then the following day the defendant appeared by advocate who stated that it was proposed to move the court to set aside the ex parte orders made. This was duly done and that motion came before the judge of the High Court and it is the order made on that motion which is the subject of this appeal. Briefly the judge of the High Court on that motion set aside all the various orders made ex parte except the order for the arrest and the provision of security for the appearance of the defendant. The judge on that motion also made orders in relation to the costs of the motion and one of those orders was to the effect that the defendant was only entitled to a proportion of the costs of the motion on the basis of one half of the number of pages actually filed in the application. The judge also rejected the application for a certificate for two advocates.

The defendant appealed against those parts of that order on two main grounds. First, that the judge was incorrect in refusing to set aside the ex parte order for the arrest or the provision of security for the appearance of the defendant; secondly, that the judge was also incorrect in his orders relating to costs.

Dealing with the first main ground of this appeal it is quite clear that the judge would not have the power to make this order for arrest unless he had before him evidence which satisfied him that the defendant was about to leave Kenya in the circumstances I have set out. Now subsequent to the making of the order there was some material from which a judge could infer that the defendant would shortly be leaving Kenya and also possibly could infer that he was doing so in the circumstances I have set out. But counsel for the defendant has submitted that the only evidence which could be considered in determining the question whether the order was properly made was the evidence before the judge at the time of making the order. He makes that submission not only upon general grounds but he cited in favour of it the case of *Re de Cespedes* (1) and he referred in particular to a passage in the judgment of Lord Wright, M.R. where, in relation to a somewhat different application but the principles of which I think must be similar, appear these words ([1937] 2 All E.R. at p. 575):

"I protest against any attempt to justify the inadequacy or the impropriety of the affidavit by making allegations as to what happened afterwards."

I do not really understand counsel for the plaintiffs to dispute that if the evidence before the judge at the time of making the order was then insufficient the order cannot be justified upon any evidence which is placed before the court subsequently. With this view of the law I entirely agree in the circumstances of this particular order. Now was there any evidence before the court in the two affidavits to which I have referred which would enable the judge to say that the defendant was about to leave Kenya in the circumstances I have referred to? I think the answer to that must clearly be no. In fact I can see no real evidence from the affidavit that the defendant was about to leave Kenya. The only thing which could be urged in that direction was the paragraph in the affidavit of the advocate to which I have already referred. That paragraph merely set out the opinion of the deponent that the only hope the defendant had of evading the plaintiff's just claim was in leaving the country. I think, therefore, that the judge was clearly wrong in making this ex parte order for the arrest of the defendant on the material he then had before him; and I think that the judge of the High Court was equally wrong when, in deciding the motion to set aside the ex parte order, he did not also set aside this part of the order made ex parte. Accordingly on this aspect of the matter I would allow the appeal.

The next main ground which was urged related to costs; and this may be broken up into three separate matters. The first of these matters with which I will deal was the refusal of the judge to give a certificate for two advocates. This decision was one arrived at by the judge in the exercise of his discretion and it is well-known that an appellant on an appeal on costs which challenges the exercise of a discretion faces a very heavy burden indeed. In my view the appellant has in no way satisfied me that the judge acted upon some wrong principles of law or that the way in which he exercised his discretion was clearly erroneous. In no way whatsoever has the appellant satisfied me that we should interfere with this exercise of the discretion of the judge of the court below and I reject, therefore, the appeal on this aspect.

The next matter is the order of the judge to the effect that the defendant should have only two-thirds of his costs. Inasmuch as the defendant has succeeded on this appeal in having the order for arrest set aside, the defendant would be entitled to his entire costs on the motion to set aside the ex parte order.

The next matter relating to costs is the submission that the judge was wrong in ordering that the costs on the motion to set aside the ex parte order should be on the basis of one half of the number of pages filed on the defendant's application. This again was a decision in exercise of the judge's discretion and I see no reason whatsoever to interfere with it. I may say that I agree entirely with the judge's comments that this affidavit, running to something over fifty-five pages of the record, was unnecessarily prolix.

The final matter in relation to costs relates to something which does not form part of the order the subject of appeal, but I think it should properly have formed part of it and counsel for the plaintiffs very properly concedes that it would lie within the power of this court to make the necessary order. The point is this. On the ex parte order the judge made an order that the costs of the ex parte proceedings should be costs in the cause. If that order remains the result will be that should the plaintiff succeed ultimately in the action he would then obtain costs of proceedings which have been wholly set aside. This obviously would be wrong. I consider that the proper order for this court to make would be merely to set aside the order for costs on the ex parte order for reasons which I shall shortly set out. I would therefore amend the order under appeal by inserting a provision to the effect that para. 6 of the ex parte order, which paragraph orders costs to be costs in the cause, be deleted. The result of this would be that

no order for costs would be made on the ex parte application. I do this for this reason. On the ex parte application there was no appearance by or on behalf of the defendant until the defendant appeared on May 19, in person under arrest and stated that he wished to show cause. Later that same day the defendant again appeared in person when an order was made adjourning the matter to the following day. On the following day, that is, on May 20, the defendant appeared on two occasions, once in the morning and then later in the afternoon, and on each of these occasions the defendant appeared by an advocate. I think that the costs of these appearances are more properly attributable to the motion to set aside the ex parte order and I would therefore give the direction that the appearances on these two occasions, that is, on the morning and in the evening of May 20, should be taxed as part of the defendant's costs on the motion to set aside the ex parte order. To this extent therefore I would allow or reject, as the case may be, the appeal on the second main ground.

That leaves for consideration the costs of this appeal. The defendant has succeeded on one of the main grounds, the substantive one, but he has virtually lost on all the matters relating to costs, as while he has succeeded in obtaining on the motion to set aside full costs as opposed to two-thirds of the costs, that order would have followed automatically without any specific appeal on the point. I would therefore make an order that the appellant is entitled to one half of the costs of this appeal and I would not give any certificate for two advocates.

Duffus JA: I agree with my Lord the President. This appeal is divided into two parts. The first part is the appeal against the order of the High Court confirming the ex parte order made for the arrest of the defendant/appellant under O. 38 of the Civil Procedure (Revised) Rules, 1948. In so far as this is concerned, counsel for the respondent quite rightly conceded that the High Court had an inherent jurisdiction to set aside any ex parte order improperly made. He has also in my view quite rightly conceded the fact that in the application to set aside the ex parte order the High Court should only consider the evidence which was before the judge of the High Court at the time that the order was made and not consider any subsequent evidence which arose. On this question therefore the matter is simple. The plaintiffs/respondents founded their application for the ex parte order on the two affidavits filed. It is clear in my view that the provisions of O. 38 only apply to a defendant who is about to leave Kenya or is about to remove any of his property out of jurisdiction of the court, that is, out of Kenya, and in neither of the affidavits filed in support of the application for the ex parte order are there any facts to show that the defendant was about to leave Kenya or for that matter to take any of his property outside Kenya. I therefore agree with my Lord the President that the learned judge should have granted the application to set aside the ex parte order. To that extent the appellant succeeds and I agree that this court should now direct that the ex parte order for the appellant's arrest to show cause why he should not furnish security be set aside. It follows also that I agree that the appellant should have the full costs and not two-thirds of the cost of the motion before the High Court.

The second part of the appeal is on the question of costs; here I entirely agree with my Lord the President. Two main matters arose, that is the disallowance of a half of the total length of the various documents and affidavits on which the application was made, and not allowing costs for two counsel. These were matters in the discretion of the trial judge. It has not been shown that the judge exercised his discretion wrongly, indeed it appears to me that he was correct on both questions. I agree therefore with the order in accordance with the terms set out by the President.

Spry JA: I also agree with the judgment of my Lord the President and the order which he has proposed.

Order accordingly.

For the appellant:

Johar & Co., Nairobi

D. N. Khanna and Johar

For the respondents:

Archer & Wilcock, Nairobi

P. le Pelley

Life Insurance Corporation of India v Panesar
[1967] 1 EA 614 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	9 June 1967
Case Number:	1/1967 (128)
Before:	Sir Charles Newbold P, Sir Clement de Lestang VP and Spry JA
Sourced by:	LawAfrica
Appeal from:	The High Court of Kenya – Dalton, J.

[1] *Evidence – Admissibility – Affidavit stating effect of document without exhibiting it – Whether “best evidence” rule applies.*

[2] *Evidence – Affidavit – Interlocutory application – Affidavit stating effect of document – Document not exhibited – Whether affidavit inadmissible as offending “best evidence” rule – Evidence Act, ss. 2 and 182; Civil Procedure (Revised) Rules, 1948, O. 18, r. 3 (K.).*

[3] *Evidence – Affidavits – Whether rules of evidence apply to – Evidence Act, ss. 2 and 182; Civil Procedure (Revised) Rules, 1948, O. 18, r. 3 (K.).*

[4] *Practice – Summary Procedure – Affidavit filed in opposition to application for summary judgment stating effect of document without exhibiting it – Whether admissible – Whether “best evidence” rule applies – Evidence Act, ss. 2 and 182; Civil Procedure (Revised) Rules, 1948, O. 18, r. 3 (K.).*

Editor’s Summary

The plaintiff (respondent in the appeal) sued the defendant for a sum of money alleged to be due to him under two policies of insurance. He alleged that, although the policies were expressed in rupees, he was

entitled to payment in Kenya currency at the rate of Shs. 1/50 per rupee, relying on an alleged implied term in the policies and on the Insurance Act, 1960. After the defendant entered an appearance the plaintiff applied for summary judgment. The defendant resisted, claiming that it had a good defence, and filed an affidavit sworn by its divisional manager. This affidavit stated inter alia that the policies expressly provided for payment in rupees in India. The policies themselves were not, however, exhibited to this affidavit. The judge who heard the application ordered that the defendant should have unconditional leave to defend but entered judgment on an alleged admission for part of the claim. Against these orders the defendant appealed, on the ground that it had not partially admitted the claim. The plaintiff cross-appealed against the order giving leave to defend, arguing (a) that the defendant's affidavit did not disclose triable issues; (b) the same affidavit was inadmissible as offending against the best evidence rule because the policies themselves were not exhibited.

Held – (per De Lestang, V.-P. and Spry, J.A.; Newbold, P. dissenting)

- (i) unless otherwise provided for in a written law, the rules of evidence do not apply to affidavits (ss. 2 and 182, Evidence Act);
- (ii) there being no such written law the best evidence rule does not apply to affidavits;
- (iii) this was an interlocutory application so that O. 18, r. 3 applied to entitle the defendant to include in his affidavit matters of information and belief provided he disclosed the source of his information or the ground of his belief;
- (iv) there is no reason for excluding from affidavits on interlocutory matters statements of facts the knowledge of which was acquired from documents, provided the source of the knowledge is disclosed;
- (v) therefore the defendant's affidavit was not inadmissible merely by reason of the omission to exhibit the documents and the judge below was right to act on it in the circumstances.

Appeal allowed. Cross-appeal dismissed.

Cases referred to in judgment:

- (1) *Standard Discount Co. v. Otard de la Grange* (1877), 3 C.P.D. 67.
- (2) *Standard Goods Corporation v. Harakchand Nathu & Co.* (1950), 17 E.A.C.A. 99.
- (3) *Spencer v. Bailey* (1892), 93 L.T.Jo. 223.
- (4) *Assanand & Sons v. E. A. Records Ltd.*, [1959] E.A. 360.
- (5) *Caspair Ltd. v. Harry Candy*, [1962] E.A. 414.
- (6) *Re Cohen*, [1950] 2 All E.R. 36.

Judgment

Sir Clement De Lestang VP: This appeal raises a point of some importance concerning affidavits in interlocutory proceedings which, surprisingly enough, does not appear to have been decided before. The respondent, whom I shall call the plaintiff, filed a suit in the High Court of Kenya wherein he claimed from the appellant, whom I shall call the defendant, Shs. 9,896/91 alleged to be due under two policies of insurance upon his life which had matured on December 31, 1965. Although the particulars of para. 1 of the plaint indicate that the Divisional Unit office of the defendant whence the policies were issued was in Western India and that the sums assured, bonuses, a loan on the security of the policies and interest thereon were expressed in Indian currency, i.e., rupees, the plaint alleged that the plaintiff was entitled to payment in Kenya currency at the rate of Shs. 1/50 per rupee because (a) “the said contracts of insurance in the absence of contrary provision in the said policies were impliedly for payment within Kenya in Kenya currency at the then current rate of exchange,” and (b) “on the passing of the Insurance Act, 1960, with effect from May 11, 1961, the said insurance policies, under s. 38 thereof, became expressed in shillings at the then rate of exchange, viz. Shs. 1/50 for every rupee, and became payable accordingly, as the prescribed steps to have it expressed and payable in any other currency were not taken.”

The defendant entered an appearance and soon afterwards the plaintiff applied for summary judgment

under O. 35, r. 2. The relevant portion of that rule for the purposes of this case reads as follows:

- “2. In all suits where a plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising:

- (a) upon a contract express or implied . . .

where the defendant enters an appearance the plaintiff may, on affidavit made by himself, or by any other person who can swear positively to the facts verifying the cause of action, and the amount claimed (if any) and stating that in his belief there is no defence to the suit, apply to the court to pronounce judgment in his favour for the amount claimed together with interest (if any) . . . and costs. The court may thereupon, unless the defendant by affidavit, by his own *viva voce* evidence or otherwise, shall satisfy it that he has a good defence on the merits, or discloses such facts as may be deemed sufficient to entitle him defend, pronounce judgment accordingly.”

It is convenient also to set out at this stage rr. 4 and 7 of the same Order:

- “4 (a) The defendant may show cause against such an application by affidavit, or the court may allow him to be examined upon oath.
- (b) The affidavit shall state whether the defence alleged goes to the whole or to part only, and (if so) to what part of the plaintiff’s claim.
- (c) The court may, if it thinks fit, order the defendant, or in the case of a corporation any officer thereof, to attend and be examined upon oath, or to produce any leases, deeds, books or documents, or copies of or extracts therefrom.
7. Leave to defend may be given unconditionally, or subject to such terms as to giving security or time of trial or otherwise, as the court may think fit.”

The plaintiff’s application was supported by an affidavit sworn by himself which merely repeated the contents of the plaint and to which was annexed some correspondence before action which it is unnecessary to set out.

The defendant resisted the application on the ground that it had a good defence to the whole of the plaintiff’s claim. It filed an affidavit sworn to by its divisional manager stating, inter alia, that the policies expressly provided that the sums assured were payable in rupees at Satara City, India and denying both that the plaintiff was entitled to payment in Kenya or in shillings in Kenya or elsewhere and that the policies had become expressed in shillings by virtue of the passing of the Insurance Act, 1960. For some unexplained reason neither the plaintiff nor the defendant attached the policies of insurance to their respective affidavits.

The learned judge held that there were clear triable issues in the case entitling the defendant to unconditional leave to defend but, being of the opinion that it had admitted liability before action in the sum of Shs. 6,277/10, entered judgment for that sum with interest and costs and granted unconditional leave to defend in regard to the rest of the claim. He also ordered each party to bear its own costs.

The defendant appeals against the entering of judgment for Shs. 6,277/10 on the ground that the learned judge was wrong to hold that it had partially admitted the claim. The plaintiff counter appeals against the granting of unconditional leave to defend. Both parties also appeal against the order for costs each claiming to be entitled to the costs of the application.

At the hearing of the appeal counsel for the plaintiff did not attempt to support the learned judge’s reasoning for entering judgment for part of the claim and very properly conceded that the defendant’s appeal wholly succeeded unless his cross-appeal were also to succeed. In support of his cross-appeal he argued a two-fold contention, namely that the learned judge was in error (a) in

holding that the defendant's affidavit disclosed triable issues, and (b) in acting on the affidavit which he alleged was inadmissible as offending against the best evidence rule.

With respect I am quite unable to agree with the first leg of counsel for the plaintiff's contention. It is obvious from the references which I have made already to the defendant's affidavit that it raises several defences such as, in what currency are the policies payable, where must payment be made, when did the payments become due, if payable in shillings in Kenya at what rate of exchange, etc. Counsel for the plaintiff, however, submitted that the law on all these matters is so well settled that they are not arguable. Quite apart from the fact that the defences raise questions of fact as well as of law, like the learned judge below I find it impossible to agree that the points raised are unarguable. Indeed I consider that they raise questions of major importance in the case but for reasons which will become apparent later the less said about them at this stage the better.

As regards the second leg of counsel for the plaintiff's submission it will be recalled that the defendant's affidavit purports to state some of the contents of the policies of insurance without exhibiting them and counsel for the plaintiff submits that such an affidavit is inadmissible as contravening the well known rule of evidence which demands that the contents of a document must, in the absence of legal excuse, be proved by production of the document itself. If this is the law then it is surprising that it has not been enforced by the courts in the past as, in my experience, rarely, if at all, are original documents attached to affidavits in interlocutory proceedings. Even in the present case copies and not the originals of the correspondence were annexed to the plaintiff's affidavit and that he should be the one to question a course which he has himself adopted is to say the least remarkable indeed. Be that as it may, the question for decision is simply whether an affidavit in an interlocutory application which sets out facts derived from a document without the document itself being exhibited or its absence explained is invalid. The answer to that question requires an examination of the relevant statutory provisions relating to affidavits. The first important provision, if not indeed the most important, is to be found in s. 2 of the Evidence Act which expressly excludes affidavits from the application of the Act. The Act is entitled "An Act to Declare the Law of Evidence" and as I understand it, contains the whole of the law of evidence in Kenya with one reservation. That reservation stems from s. 182 of the Act which provides that save as otherwise expressly provided in the Act nothing in it shall be deemed to derogate from the provision of any other written law which relates to matters of evidence. It follows, therefore, that unless otherwise provided for in a written law the rules of evidence do not apply to affidavits; and, as I have not been referred to any written law applying the best evidence rule to affidavits and know of none, the foundation of counsel for the plaintiff's submission disappears.

The other provision is to be found in O. 18, rr. 2 and 3 of the Civil Procedure (Revised) Rules, 1948 which read as follows:

- "2(1) Upon any application, evidence may be given by affidavit, but the court may, at the instance of either party, order the attendance for cross-examination of the deponent.
- (2) Such attendance shall be in court, unless the deponent is exempted from personal appearance in court, or the court otherwise directs.
- 3(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted, provided that the grounds thereof are stated.

- (2) The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter or copies of or extracts from documents, shall (unless the court otherwise directs) be paid by the party filing the same."

These rules are clear and unambiguous; they require affidavits to state facts and those facts must themselves be within the deponent's own knowledge except in interlocutory applications where "statements of his belief may be admitted provided the grounds thereof are stated". It was suggested, in reliance no doubt upon the maxim *expressio unius est exclusio alterius*, that the mere fact of r. 3 providing for affidavits to contain hearsay evidence supports the contention that the best evidence rule is not excluded. I am unable to agree. If r. 3 had merely authorised hearsay evidence without more this contention might have been arguable but the rule contains an important proviso, namely, that the ground of the deponent's belief must be stated. This in my view shows that r. 3 does not really create an exception to the applicability of the rules of evidence to affidavits but merely provides a safeguard where an affidavit contains hearsay evidence by requiring the ground upon which the hearsay evidence is founded to be stated.

If I am right in the view that the rules of evidence do not apply to affidavits and that nevertheless affidavits must conform to O. 18, r. 3 and only state facts within the deponent's own knowledge, except in interlocutory applications, on which statements as to his belief with the grounds thereof may be admitted, then I can see no logical reason for excluding from affidavits statements of facts the knowledge of which was acquired from documents provided the source of the knowledge is disclosed. Although Mr. Khanna submitted otherwise I am satisfied that the defendant's affidavit in the present case complies with that requirement. It states in the case of each relevant fact that the policies expressly so provide. I am consequently of the opinion that the defendant's affidavit was not inadmissible merely by reason of the omission to exhibit the policies of insurance. This does not mean, however, that it is unnecessary or inadvisable to exhibit documents to affidavits. Indeed in certain circumstances there may be a grave risk in not doing so. It will be observed that r. 3 gives the court a discretion whether or not to admit statements of information and belief in any given case and since before granting leave to defend it has to be satisfied that the defendant has a good defence on the merits or has disclosed facts entitling him to defend, whenever primary evidence of facts is readily available it should be placed before the court and failure to do so may very well result in the affidavit being found inadequate. In the present case the learned judge, notwithstanding the criticisms of the affidavit by counsel for the plaintiff, saw fit to act on it and I think rightly in all the circumstances of this case as there was ample support for the statements in the affidavit in the plaint itself. If the plaintiff had disputed the accuracy of the statements the deponent could have been required to submit to cross-examination. Likewise if the learned judge had had any doubts about them he could have ordered the production of the policies. Neither of these courses was taken.

Moreover the omission to exhibit the policies was common to both parties and, if anything, was graver in the case of the plaintiff since the burden on a plaintiff seeking to obtain summary judgment is undoubtedly heavier than that on a defendant to disclose a good defence. It is plain from O. 35, r. 2, already quoted, that the affidavit in support of an application for summary judgment must be by a person who can swear positively to the facts while the affidavit of a defendant may be made by any person on statement of information or belief though the sources and grounds thereof must be stated. For these reasons the cross-appeal in my view fails. I would, therefore, allow the appeal and set aside the orders of the court below and substitute an order granting

the defendant unconditional leave to defend the whole suit and allowing him the costs of the application. I would dismiss the cross-appeal and award the costs both of the appeal and the cross-appeal to the appellant.

Spry JA: I have had the advantage of reading in draft the judgment of De Lestang, V.-P., with which I am in complete agreement, and there is little that I need add.

I am satisfied that an application under O. 35 of the Civil Procedure (Revised) Rules, 1948, for leave to defend is interlocutory, because all that the court has to decide on it is whether or not there is a triable issue; if there is such an issue, it is only determined at the trial of the suit. That such applications are interlocutory seems to have been the law in England since *Standard Discount Company v. Otard de la Grange* (1) and I am of opinion that it is the law of Kenya also.

That being so, the appellant was entitled, under O. 18, r. 3, to include matters of information and belief in his affidavit, provided he disclosed, in that affidavit, the source of his information or the ground of his belief. The rule does not specifically refer to sources of information but it has been so interpreted by this court, notably in *Standard Goods Corporation v. Harakchand Nathu & Co.* (2).

The affidavit of the Divisional Manager of the appellant company is certainly not entirely satisfactory but when he states that two policies of insurance “expressly stated” that the sum assured was to be payable in rupees at Satara City in India, I think it is implicit that the source of his information was the policies themselves or the duplicates or copies of them retained by the appellant company. Counsel for the plaintiff argued that because there was no express statement in the affidavit that the deponent had derived his information from perusal of the policies, the affidavit should be rejected as offending against O. 18, r. 3. While I agree that the affidavit is badly drawn, I do not regard the defect as fatal.

Counsel for the plaintiff went further, however, and argued that the “best evidence” rule applies to affidavits and therefore that as the original policies were not exhibited, the references to their contents in the affidavit were inadmissible. He based his argument on the Evidence Act, but when his attention was drawn to s. 2 of that Act, which expressly states that the Act does not apply to affidavits presented to any court, he submitted that local legislation left unimpaired the common law rule.

I am unable to agree with this submission. In deciding whether the affidavit filed on behalf of the appellant company was admissible, I think the only test was whether it complied with the requirements of O. 18, r. 3. Other considerations, of course, apply when deciding what weight should be given to an affidavit, and there each case will depend on its own particular facts. But I know of no reason in law why an affidavit, in interlocutory proceedings, should be rejected because it refers to the contents of a document without exhibiting that document or accounting for its absence. Nor can I see any objection in principle: if a statement in an affidavit regarding the contents of a document is untrue, that fact can easily be brought out in cross-examination, if any question arises as to the interpretation of the document, that is an issue for trial, not a matter to be decided on the interlocutory proceedings.

I know of no East African authority on the subject but I find some support for my view in what I understand to be the English practice, which, though in no way binding on us, has persuasive value. In Phipson on Evidence (10th Edn.), at para. 1602 there is a statement that:

“Upon interlocutory motions the affidavits may contain statements as to the deponent’s information and belief, provided the sources thereof are given, otherwise the affidavits will be inadmissible, as well as secondary evidence of the contents of documents without accounting for the absence of the originals.”

The authority for the last part of this statement is given as *Spencer v. Bailey* (3). Unfortunately, no report of that case is available here, but it is referred to also in a footnote to 15 Halsbury’s Laws (3rd Edn.), p. 468, as authority for a statement that:

“An attested copy of a document may be exhibited as affording grounds for belief, although no evidence is adduced to account for non-production of the original.”

I agree with the order proposed by the learned Vice-President.

Sir Charles Newbold P: The respondent (hereinafter referred to as the plaintiff) sued the appellant (an insurance company hereinafter referred to as the defendant) for the sum of Shs. 9,896/91 in Kenya currency allegedly due on policies of insurance. The plaintiff took out a motion under O. 35 asking for judgment on the amount claimed and supported that motion by an affidavit sworn to by him which referred to the policies of insurance and stated that “the said contracts of insurance in the absence of contrary provision in the said policies were impliedly for payment within Kenya in Kenya currency at the current rate of exchange.” Neither of the policies was annexed to the affidavit though there was annexed a bundle of correspondence. The defendant sought unconditional leave to defend and for that purpose filed an affidavit by its divisional manager. In that affidavit it was stated:

“It is denied that the said two policies were for payment within Kenya or in Kenya currency. The said two policies expressly provided that the sum assured or such other sum as might be payable under the said policies which were expressed in rupees shall be paid in rupees at Satara City in India.”

Neither of the two policies was annexed to this affidavit either.

When the motion came before a judge of the High Court the judge entered judgment for a part of the claim, gave unconditional leave to defend in respect of the remainder of the claim and ordered each side to pay its own costs of the application. From that decision the defendant appealed on the grounds that unconditional leave to defend the whole of the claim should have been granted and that the defendant should have been awarded the costs of the motion. The plaintiff cross-appealed on the grounds that the order for costs was wrong and that the judge should have refused leave to defend as he should not have relied upon the affidavit filed on behalf of the defendants which gave secondary evidence of the contents of the insurance policies.

Counsel for the plaintiff very properly conceded that subject to any decision on the cross-appeal the appeal itself must succeed. The sole question therefore is whether the judge should have refused leave to defend because the policies were not annexed to the affidavit filed on behalf of the defendant.

It is quite clear that what the court, on the hearing of the action, would be asked to decide is the construction of the two policies of insurance and whether under those policies the plaintiff is entitled to payment in Kenya of a certain amount of Kenya shillings. It is also quite clear that what the judge on the motion to enter judgment had to decide was whether judgment should be entered for the plaintiff or whether there were any triable issues which arose on his

claim. The determination of these matters depended upon the construction of the policies of insurance, but for some extraordinary reason neither party thought fit to place the policies of insurance before the court by annexing them to either of the affidavits. In the result each of the affidavits contains statements as to the meaning of the policies, but whether either of those meanings was possible is precisely what the court was called upon to determine, without, however, having the policies before it. This fact in itself shows how necessary it is for evidence given by affidavit to comply with all the fundamental rules of evidence, one of which rules is that secondary evidence cannot, save in certain circumstances which are inapplicable here, be given of the contents of documents.

It is said that because s. 2 of the Evidence Act, 1963, states that the Act shall not apply “to affidavits presented to any court or officer nor to proceedings before an arbitrator”, therefore there are no rules of evidence relating to what can be set out in affidavits, other than the rule contained in O. 18, r. 3 (1), which confines affidavits “to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted, providing that the grounds thereof are stated”, or relating to what can be placed before an arbitrator. I reject such a proposition completely; and I say that it is not only wrong but manifestly wrong. Affidavits are intended to be probative of the facts which the party filing the affidavits seeks to prove before the court in the particular proceedings in which the affidavits are filed. The accumulated wisdom of the courts over the ages has laid it down that any attempt to prove facts save in accordance with such rules as the experience of the courts has shown to be essential is worthless. I cannot accept that because the provisions of the Evidence Act do not apply to affidavits or to arbitration proceedings therefore there exist no rules as to what may be set out in affidavits, other than r. 3 of O. 18, or as to what evidence may be led before an arbitrator. To accept that would be to substitute chaos for order and to permit of any sort of evidence being placed before a court or an arbitrator as probative of the fact sought to be proved. Such an astounding position would require the highest authority before I would accept it, but no single authority is quoted in favour of it. I confess that I have been unable to find any decision of a court specifically on the point; but that is because the proposition is so manifestly wrong that no one has had the temerity in the past to advance it. The very provisions of O. 18, r. 3 (1), which permit in certain applications statements in affidavits to be based on belief thus relaxing in those circumstances the hearsay rule, shows that r. 3 is based upon the assumption that the normal rules of evidence apply to affidavits. Were it otherwise r. 3 would be a classic example of straining at a gnat but swallowing a camel. Even in relation to r. 3 this court has laid down certain requirements so as to ensure that the relaxation of the hearsay rule is kept within very close confines and that the courts are not asked to act upon evidence which experience has shown to be valueless of any fact. Sir Kenneth O'Connor, P. in *Assanand & Sons v. E. A. Records Ltd.* (4), said ([1959] E.A. at p. 364):

“The affidavit of Mr. Campbell was deficient in three respects. First, it did not set out the deponent’s means of knowledge or his grounds of belief regarding the matters stated on information and belief, and, secondly, it did not distinguish between matters stated on information and belief and matters deposed to from the deponent’s knowledge . . . The court should not have acted upon the affidavit so drawn. Thirdly, the assertion that payment of the account was to be made at Nairobi was a bare assertion not based on any alleged facts. There was nothing to show whether this assertion was a fact, an inference from undisclosed facts, or a conclusion of law.”

Sir Alistair Forbes, V.-P. in *Caspair Ltd. v. Harry Candy* (5) said ([1962] E.A. at p. 417):

“Mr. D’Silva does not state the means of his knowledge or the grounds of his belief regarding the matters set out in his affidavit; he does not distinguish between matters stated on information and belief and matters deposed to from his own knowledge; and the assertions in para. 9 are bare assertions on the basis of any alleged facts. In my opinion the learned judge ought not to have acted on Mr. D’Silva’s affidavit . . .”

It is abundantly clear from these quotations that this court, even where there is a specific statutory exception to the hearsay rule in evidence tendered by affidavit, will not accept the affidavit as probative of the fact sought to be proved unless there is set out precisely which are the facts based on information and the source of that information. To suggest that this court would have adopted that position if no rules of evidence applied to what could be set out in affidavits is, in my view, manifestly absurd. In the United Kingdom, where a rule similar to r. 3 exists, the courts will not act on affidavits stating facts based on belief if the decision on the interlocutory application would decide the rights of the parties.

It is true that what this court has to decide is the law of Kenya and it is true that the Evidence Act does not apply to affidavits tendered to the court but it is also true, as is shown by the judgments in the cases to which I have referred, that the basic rules of evidence nevertheless apply to evidence tendered by affidavit and if those basic rules are not complied with then the evidence is of no probative value whatsoever and should be rejected. The law of evidence in Kenya is based, via the Indian Evidence Act, upon the law of evidence in England. In Phipson on Evidence (10th Edn.), p. 621, para. 1592, it is stated:

“It is important to observe that unless there is a specific provision excepting the rule, the contents of affidavits must be confined to such matters as are admissible by the rules of evidence.”

In Re Cohen (6) Sir Raymond Evershed, M.R. said ([1950] 2 All E.R. at p.37):

“. . . but, unless the rules of evidence are properly adhered to, the whole justification for the use of affidavit evidence, instead of oral evidence, is destroyed at a blow.”

The ludicrous result of holding that except for O. 18, r. 3, there are no rules of evidence governing the contents of affidavits is exemplified by the application of rr. 1 and 2 of O. 18. Under those rules a deponent may be required to attend for cross-examination and on such cross-examination it is clear that the Evidence Act is applicable. What then is the position? Is the deponent precluded from being cross-examined upon evidence contained in the affidavit but which is clearly inadmissible? Or is the deponent, who has stated in his affidavits the contents of the document, to be cross-examined on those contents without the document being produced? This ludicrous position is taken even further by rr. 2 and 4 of O. 35. Under those rules the defendant may resist an application for summary judgment either by affidavit or by giving viva voce evidence. Is it to be suggested that if he resists by affidavit there are no limits to what may be set out in the affidavit, whereas if he resists by giving viva voce evidence he is circumscribed by the rules of evidence contained in the Evidence Act. The mere fact that this rule permits a defendant alternative modes of proving the facts necessary to raise triable issues shows that, subject to the specific statutory exception contained in O. 18, r. 3, the rules of evidence relative to both rules are fundamentally the same. If the defendant has sought to resist this application

by going into the box and giving evidence he could not have given secondary evidence of the contents of the insurance policies. Why therefore can he do so if the mode of resisting the application is by affidavit? I am completely satisfied that all the basic rules of evidence apply to affidavits and that one of those basic rules is that the courts will not, save in certain well-known circumstances, regard as probative of the contents of a document any evidence other than the document itself. The wisdom for such a course is high-lighted by what has happened in this case. Each of the parties is saying that the policies of insurance mean something different and the court was asked to decide whether one of those different meanings was arguable without seeing the document. To hold that this is permissible would be to depart from the practice of the courts from time immemorial and I will have no part in any such decision.

I am satisfied, therefore, that the affidavit filed on behalf of the defendant was an improper one and that the court should not have acted upon it. To that extent, therefore, the cross-appeal succeeds. This however does not mean that as a result judgment should have been entered for the plaintiff on the application under O. 35 for the simple reason that the affidavit of the plaintiff in support of his application erred equally, and accordingly the judge should not have acted on that either, with the result that the application would fail.

For these reasons in my view the appeal should be allowed with costs and the order of the High Court set aside and there be substituted therefore an order giving to the defendant unconditional leave to defend and awarding the defendant the costs of the application. As far as the cross-appeal is concerned I would hold that it succeeds in the sense that the judge should not have acted on the affidavit filed on behalf of the defendant. But it is an abortive success since the judge should not have acted either on the affidavit filed by the plaintiff; and if he had not acted on that affidavit there would have been no necessity to look at the affidavit of the defendant. In the result, therefore, the cross-appeal has, though successful, achieved nothing. The other members of the court agree with the order proposed in so far as the appeal is concerned and it is ordered accordingly. As far as the cross-appeal is concerned, they are of a different view, so an order will be made in the terms proposed by Sir Clement De Lestang, V.-P.

Appeal allowed. Orders of court below set aside. Order granting the defendant unconditional leave to defend with costs of the application substituted. Cross-appeal dismissed. Costs of appeal and cross-appeal to the appellant.

For the appellant:

J. M. Nazareth, Q.C. and S. K. Kapila, Nairobi

For the respondent:

Khanna & Co., Nairobi

D. N. Khanna

Raichura Ltd v Sondhi
[1967] 1 EA 624 (CAM)

Division: Court of Appeal at Mombasa

Date of judgment: 4 July 1967

Case Number: 47/1966 (140)
Before: Sir Charles Newbold P, Duffus and Spry JJA
Sourced by: LawAfrica
Appeal from: The High Court of Kenya at Mombasa – Wicks, J.

[1] *Evidence – Privilege – Whether court can enquire into claim for – Extent of privilege – Evidence Act, s. 132 (K.).*

[2] *Evidence – Privileged communication – Meaning of – Evidence Act, s. 132 (K.).*

Editor’s Summary

In 1963 the plaintiff deposited iron sheets with the defendant, a warehouseman. The written terms upon which the iron sheets were deposited included an exemption clause which purported to exempt the warehouseman from any responsibility for the loss of the iron sheets due to the negligence of the defendant warehouse company or its servants. After the plaintiff had withdrawn some of the iron sheets in August, 1964 the plaintiff demanded the balance of the iron sheets which weighed some twenty tons. The defendant alleged that the iron sheets had been stolen and so could not be delivered. At the trial the damages resulting from a failure to deliver were agreed at Shs. 42,033/10. The main issue, the onus of which was on the defendant, was to satisfy the court that the goods had been stolen. A police inspector who had made enquiries into the theft gave evidence on behalf of the defendant. He stated as his conclusion that goods had been stolen without the complicity of the defendant or any of its servants but, claiming privilege under s. 132 of the Evidence Act, refused to state the facts upon which he reached his conclusion. The trial judge upholding the claim of privilege and accepting the inspector’s conclusion as part of the evidence held that the iron sheets had been stolen without any negligence of the defendant and gave judgment for the defendant. On appeal the plaintiff contended that (i) the trial judge erred in upholding the claim of privilege; (ii) the defendant had failed to adduce sufficient evidence upon which the trial judge might reasonably be satisfied that the iron sheets had been stolen.

Held –

- (i) the inspector of police was not entitled to claim privilege;
- (ii) on s. 132 of the Evidence Act:
 - (a) (per Newbold, P. and Spry, J.A., Duffus, J.A. dissenting) “communications made to the official in the course of his duty” read with the marginal note “Privilege of official communications” ordinarily relates to official communications made to a public officer from an official source; (per Duffus, J.A., the communication is not restricted to a communication from an official source).
 - (b) if privilege is claimed the witness may be required by the court to explain the circumstances in which the privilege is claimed to enable the court to decide whether the public interest would suffer by the disclosure (per Newbold, P.) but (per Spry, J.A.) not to the extent of considering whether the communication is in fact one of which disclosure ought not to be compelled;

(iii) the evidence was insufficient to establish that the iron sheets had been stolen.

Appeal allowed.

Cases referred to in judgment:

(1) *Chhatrisha v. Purachand*, [1959] E.A. 746.

(2) *Duncan v. Cammell Laird & Co. Ltd.*, [1942] 1 All E.R. 587.

- (3) *Merricks v. Nott-Bower*, [1965] 1 Q.B. 57.
- (4) *In re Grosvenor Hotel, London* (No. 2), [1965] 1 Ch. 1210.
- (5) *Re Grosvenor Hotel, London*, [1963] 3 All E.R. 426.
- (6) *Conway v. Rimmer* (1967), *Times*, 9th June.
- (7) *Visram v. Bhatt*, [1965] E.A. 789.

Judgment

Sir Charles Newbold P: In 1963 the plaintiff company (hereinafter referred to as the plaintiff), which carried on business as general merchants, deposited with the defendant, who carried on business as a warehouseman, a large quantity of galvanised iron sheets. It was a condition of the warehousing contract that the defendant “shall not be responsible for any loss, destruction of or damage or deterioration to any goods warehoused or bailed with the company, whether such loss, destruction, partial destruction, damage or deterioration is due to the negligence of the company or its servants or otherwise”.

On occasions thereafter the plaintiff withdrew various amounts of these iron sheets and in August, 1964, demanded from the defendant the balance of the iron sheets, this balance being a considerable number of sheets, weighing about 20 tons. The defendant did not deliver the iron sheets and explained his inability to do so by alleging that they had been stolen from the warehouse. The plaintiff sued the defendant for the loss caused due to the failure to deliver the sheets. The defence, so far as is relevant to this appeal, was, first, that the loss had been caused through theft without any negligence, and therefore under the common law the defendant was not liable; and, secondly, that if the loss was caused through theft due to his negligence, then he was protected from liability by reason of the condition of the warehousing contract to which I have referred. It was agreed at the trial that should the plaintiff succeed the damages it was to receive was Shs. 42,033/10 and that certain iron sheets which were still in the possession of the defendant were to be retained by the defendant as his property. On the action coming for trial before Wicks, J. in the High Court of Kenya judgment was given in favour of the defendant. The trial judge set out that the issue between the parties, as accepted by them, was whether the defendant, having failed to deliver the iron sheets on demand, had discharged the onus which was on him to establish the reason for non-delivery, as unless he had done so the defendant could not rely on the exemption clause. The judge accepted this statement of the basic issue and it was not challenged on appeal before us. I would also accept that unless the defendant establishes the reason for the non-delivery that he is liable for the loss notwithstanding the exemption clause. (See *Chhatrisha v. Purachand* (1).)

The defendant led evidence to show that the reason for non-delivery was that the goods were stolen. He also led evidence to show that they were stolen through no negligence on his part and he submitted that even if the evidence had disclosed negligence the exemption clause gave to him protection as he had explained the reason for non-delivery. The judge held that the goods had been stolen and that on the evidence they had not been stolen through the negligence of the defendant. He accordingly gave judgment for the defendant. From this judgment the plaintiff appealed. The two main issues argued on appeal were, first, whether the judge was correct in upholding a claim by a police officer that he was privileged from answering questions; and, secondly, whether there was any sufficient evidence given before the judge to enable him to come to the conclusion that the onus on the defendant of showing that the reason for non-delivery was that the goods had been stolen, had been satisfied.

Dealing with the first issue, the following are the relevant facts. The loss of the goods was discovered on July 14, 1964, and for various reasons the defendant alleged that the loss must have taken place between July 10 and 14. The evidence was that the building was a very secure building; that there was no sign of breaking into the building or of any damage to it; and that the only place through which the sheets could have been removed was a door at which during the night a night watchman had his main station. The evidence also showed that all the locks, which had been recently changed, on the doors were not only undamaged but, indeed, on no occasion had been found to be unlocked. Having regard to the large quantity of iron sheets it would have taken an appreciable time to move them from the warehouse and they would have filled four 5 ton lorries. When the loss was discovered the police were called but the goods were never recovered nor was anyone prosecuted for the theft. One of the policemen who was concerned with the enquiries was Inspector Sembenje and he was called to give evidence on behalf of the defendant. His evidence, given in July, 1966, was to the effect that he had come to the conclusion that the goods had been stolen and that he had ruled out the possibility of the defendant or any of his servants having committed the theft. The record of that part of the cross-examination which gives rise to this first issue is as follows:

“Q. You say you ruled out the possibility of the defendant or any of his servants having committed the theft? How did you come to this conclusion?

A. That was the result of considering all the evidence that came into my possession.

Q. The evidence you obtained, was it factual evidence?

A. It was factual evidence.

Q. Gathered by you?

A. By me and my detectives.

Q. What was the factual evidence?

A. I claim privilege.

Ram Hira: The question does not relate to the pleadings. Nowhere is it pleaded that the defendant's employees stole the goods or that they were lost by his negligence. Section 132 of the Evidence Act.

Witness: I consider that the public interest would suffer if I disclosed this. My information came from many sources and the thief has not been caught yet and we are still looking.

Anjarwalla: If the court rules on s. 132. The general view was that justice would be served if all the facts relating to it was disclosed.

Ruling: The witness is a public officer and the evidence came into his possession in the course of his duty. He states that he considers that the public interest would suffer by the disclosure and he is privileged from answering the question.”

It was submitted that though s. 132 of the Evidence Act (Cap. 80) appears to be worded in the widest terms nevertheless some restriction must be placed on its ambit. It was urged that unless this was done the proper administration of justice would be undermined in two important aspects. First, a party to litigation would be precluded from placing before the court relevant evidence where a claim of privilege is made without any examination of the justification for such claim. Secondly, where a claim of privilege is made the judge would be put in the position, as he was in this case, either of accepting the conclusion of the witness without knowing the facts upon which that conclusion is based, thus

abrogating the judge's duty of coming to a conclusion on the facts, or of discarding the evidence of the witness for the very reason that to accept it would abrogate the judge's functions.

This issue raises a matter of the very greatest importance, not only in respect of this case but in respect generally of the administration of justice and the interpretation of the relevant sections of the Evidence Act. Those sections, which come within a part headed "Compellability and Privileges of Witnesses" are ss. 131, 132 and 133, and they read as follows:

"Privilege
relating to
official records

131 Whenever it is stated on oath (whether by affidavit or otherwise) by a Minister, or by the Secretary-General of the Organisation, that he has examined the contents of any document forming part of any unpublished official records, the production of which document has been called for in any proceedings, and that he is of the opinion that such production would be prejudicial to the public service, either by reason of the content thereof or of the fact that it belongs to a class which, on grounds of public policy, should be with-held from such production, the document shall not be admissible.

Privilege of
official
communications.

132. No public officer shall be compelled to disclose communications made to him in the course of his duty, when he considers that the public interest would suffer by the disclosure.

Privilege
relating to
information of
commission of
offences.

133 (1) No judge, magistrate or police officer shall be compelled to say whence he got any information as to the commission of any offence, and no revenue officer shall be compelled to say whence he got any information as to the commission of any offence relating to the public revenue or to income tax, customs or excise.

- (2) For the purposes of this section, 'revenue officer' means any officer employed in or about the business of any branch of the public revenue, including any branch of the income tax, customs and excise departments."

These three sections set out that part of the law of evidence which deals with the conflict between the interest of the State and the interest of the individual. It is of course, in the interest of the individual litigant that he should be able to present to the court all relevant evidence so as to enable the judge to come to a conclusion on that evidence. It may, however, be in the interest of the State that evidence which the individual litigant may desire to lead should not be disclosed. It is these conflicting interests which are resolved in these three sections. In England the law on the subject is largely case law, though rules of court also deal with the matter. In Kenya the conflict is resolved by statutory provisions, which, though they owe their basic concepts to the English rules of evidence via the Indian legislation, nevertheless, by reason of being contained in an Act, the courts must follow. In England, broadly, the law is that where the disclosure of any facts or documents would be prejudicial to the State or to public interest and the claim of privilege is properly made the courts will not require the disclosure and, normally, will not inquire into the grounds for making the claim. This is the broad position which arose as a result of the well-known speech of Viscount Simon, L.C. in the House of Lords in *Duncan v. Cammell Laird & Co.*

Ltd. (2). The proposition that the courts will not normally inquire into the grounds for making the claim has, however, been increasingly the subject of question and the present position in England is by no means clear. (See *Merricks v. Nott-Bower* (3); *In re Grosvenor Hotel London* (No.2) (4); *Re Grosvenor Hotel, London* (5); and *Conway v. Rimmer* (6)). In England, also, the courts have protected from disclosure any evidence which, in relation to the detection of crime, would disclose the name of an informant or the nature of the channel of information. It is to be noted that very broadly s. 131 deals with what may be regarded as affairs of state and requires the claim to be made on oath by a Minister, or a person of equivalent status, that is by a person who would obviously be in a position to state whether or not the disclosure of any particular document would be prejudicial to the public interest, while s. 133 deals with the non-disclosure of the names of informants and channels of information in relation to the detection of crime. Section 132 is, however, on the face of it extremely wide and would appear to give any public officer – a phrase which would include, having regard to the definition in the Interpretation and General Provisions Act (Ch. 2), any person holding office, permanent or temporary, paid or unpaid, in the service of Kenya no matter how humble the office may be – the right to refuse to disclose information given to him in the course of his duty, if he considers that such disclosure would be contrary to the public interest. If this section means what it appears to say then the most extraordinary results will follow, results which I am sure the legislature never intended. For example, it would appear to give to the most junior messenger in a government department who in the course of his duty is conveying a large sum of money and to whom a senior officer says “give me the money I propose to take it home” the right to refuse to give evidence of that fact if the senior officer is subsequently charged with theft because the messenger thinks that the public interest would suffer if he discloses a fact which shows that his superior had stolen the money. It would, for another example, entitle a police constable to refuse to disclose that a senior police officer had confessed to murder because the constable thought that the public interest would suffer if it became known that the murder had been committed by a policeman. In fact, if the section is carefully examined it would appear to place within the hands of any public officer the right to decide what evidence he will give no matter how patent it may be that the interest of the State requires that the evidence be given, and to place it beyond the power of the court to inquire into the propriety of any such claim. This simply cannot be the law. A section which is designed to protect the interest of the State should not be construed in a manner which would endanger the interest of the State. That it is not the law is shown by the very existence of ss. 131 and 133 on each side of s. 132. This being so it is clear that s. 132 requires to be construed in a restrictive manner.

The wording of the section at once raises two questions: first, what is meant by “communications made to him in the course of his duty” and, secondly, what is meant by “he considers that the public interest would suffer by the disclosure”. As regards the first question some indication is given of the answer by the marginal note of the section which reads “Privilege of official communications”. In *Visram v. Bhatt* (7) this court decided that marginal notes are to be used in the interpretation of the substantive part of a section and I consider that this marginal note gives a clear indication of the scope of the section. The word “official” appears both in the marginal note and the substantive part of s. 131, but that word appears nowhere in s. 133. In s. 131 the word obviously means, in relation to a document, one which forms part of the records of an office, that is a department, of the State. Similarly in s. 132 in relation to a communication, whether it be oral or written, I consider it means one which emanated internally from an office or department of state. It is well-known that within government

departments there are constant communications between public officers, some of which communications are secret and some of which are confidential. It is communications, whether oral or written, of this nature which the section is designed to protect. I do not wish to lay down any inflexible rule but I consider that broadly the privilege relates to official communications made to a public officer, whether orally or in writing, by his fellow public officers or by persons holding political office in the State. Certainly I do not consider that the section means that a police officer may refuse to give evidence of any factual evidence in his possession arising from inquiries in respect of an ordinary crime unless some very good reason for claiming privilege exists.

As regards the second question, although it must be the public officer who decides to make the claim of privilege, having made it the judge may require that he be informed of the circumstances in which the claim is made so that he can determine whether the claim comes within the ambit of the section. If such is not broadly the construction to be given to this section then the courts might, as regards the evidence of a public officer, be forever required to perform their functions in the dark. Such a position I could not but regard as being deplorable, contrary to public policy and contrary to the basic interests of the State, one of which interests is the proper administration of justice. I am satisfied, therefore, that when this claim for privilege was made it was the duty of the judge to enquire into the circumstances of the claim and to decide whether, in those circumstances, it was justifiable for the police officer to make the claim. I am also satisfied that in so far as the claim appears to be made in respect of what was described as factual evidence, apparently obtained from sources other than official sources, the claim was a wrong claim, especially as it was made two years after the loss. In my view the judge was wrong in ruling as he did.

The second issue was whether there was any sufficient evidence before the judge to enable him to come to the conclusion that the onus on the defendant of showing the reason for the loss had been satisfied. That evidence, excluding the evidence of the police officer, was that the iron sheets had not been mis-delivered and that the condition of the warehouse and the general circumstances of the warehousing were such that a large quantity of iron sheets could not, within a short period of time, have been stolen. As no other explanation for the loss was given, the result would be that the defendant had failed to establish the reason for non-delivery and thus had failed to absolve himself from liability. It was urged, however, that the evidence of Inspector Sembenje provided the necessary evidence of the loss being due to theft and that the judge had held that the inspector's evidence was not questioned and he accepted it. I regret that I am unable to agree. With respect to the judge, his ruling had prevented the inspector's evidence from being challenged so I do not consider that the judge was correct in suggesting that the plaintiff had accepted the inspector's evidence. In any event the inspector's evidence simply amounted to this: that his conclusion (that is his opinion) was that the goods had been stolen by some one other than the defendant or his servant. This conclusion, I assume, would be based on facts. All the facts known to the judge pointed to a different conclusion. In the result, therefore, the only evidence before the judge of the loss being due to theft was the opinion of a police officer founded upon unknown facts or theories when all the known facts pointed to a different conclusion. In my view there was no sufficient evidence before the judge on which he could hold that the loss was caused by theft. To hold the contrary would in effect be to take the determination of this litigation away from the judge and place it upon the opinion of a police inspector founded upon facts or theories which he had refused to divulge. That obviously would be wrong.

For these reasons I would allow the appeal, set aside the judgment and decree of the High Court and substitute therefore a judgment and decree in favour of the

plaintiff for Shs. 42,033/10, with an order that the iron sheets in the possession of the defendant should become the property of the defendant, together with an order that the plaintiff should get the taxed costs of the suit. I would also allow the the plaintiff the costs of the appeal with a certificate for two advocates. As the other members of the court agree it is so ordered.

Duffus JA: The facts have been fully set out in the judgment of my Lord the President. This is a case in which the respondent, as a bailee, stored goods for the appellant company in his warehouse and then failed to produce these goods on demand. It was agreed at the trial and before this court that the onus was on the respondent as bailee to explain the loss before he could bring himself within the exemption clause of the contract for bailment. The defence was that these goods had been stolen.

I entirely agree with my Lord President that there was not sufficient evidence before the learned trial judge to justify his finding that the goods had been stolen. In coming to this decision the judge based his findings on a conclusion reached by the inspector of police who investigated the matter. In his evidence the inspector of police stated that he came to the conclusion that the goods were stolen as a result of his investigation and also on facts that he had discovered, but the inspector claimed privilege and refused to disclose these facts. The judge upheld his claim for privilege and no evidence was led to show what investigation the inspector made or what were the facts which he ascertained and on which he acted. The learned judge in accepting the bare fact of the inspector's conclusion in effect accepted this as if it was a judgment of a court which was conclusive and had a binding effect on his court. This was in my view quite wrong. The judge had to come to his own decision on the facts as to whether there had been a theft. The inspector's conclusion was not relevant in this case and should not have been considered or acted upon by the judge. I agree that the respondent failed to prove what had happened to the missing goods and I agree that the appeal be allowed and judgment entered for the appellant in accordance with the order set out by the learned President.

I regard the question as to the privilege claimed by the inspector of police under s. 132 of the Evidence Act as a matter of considerable importance. Section 132 is very widely worded and as my Lord President points out if given a wide interpretation could lead to the most extraordinary results. There are two aspects to this section. First is the question as to the type of communication referred to. I agree that the marginal note should be taken into account but the word "official" here could either relate to the source from which the communication emanated, or it could relate more widely to the definition of the communication itself. The section itself uses the words "disclose communications made to him in the course of his duties." Now a communication made to a public officer in the course of his duty is a communication made to him by virtue of his office. That is a communication made to him officially as opposed to one which does not relate to his work but rather to his private life. I think that this is the clear meaning of the section itself and the words in the marginal note would only be a summary to show that this section applied to an official communication, that is to any communication made to a public officer in the course of the duties attached to his office and should not here be restricted to "a communication from 'an official source' made to him in the course of his official duties."

The other question that arises would be whether the courts have any discretion or control in the matter or is the determination left entirely to the discretion of the public officer. There can be no doubt that the court can compel a witness to answer a question and further it is clear that it is for the public officer to claim the privilege under the section. If a public officer does claim privilege the court must undoubtedly satisfy itself that the communication comes within

the definition of an official communication and I agree with the learned President that the court must then have some discretion in deciding whether public interest would suffer by the disclosure. I agree that the courts must be able to inquire into the circumstances under which the claim is made so as to satisfy itself that the claim to privilege under s. 132 is properly made. This gives a broad construction to this part of the section but I am satisfied that this must have been the intention of the legislature as to hold otherwise may lead to a complete denial of justice in cases in which the privilege claimed could not possibly come within the meaning of s. 132.

Spry JA: I have had the advantage of reading in draft the judgments of Sir Charles Newbold, P., and Duffus, J.A., and there is only one question on which I think I should add a few words of my own.

I agree that s. 132 of the Evidence Act, read with the sections that precede and follow it, must be given a more restricted meaning than it would appear to have if read in isolation. I agree also that in interpreting the section regard must be had to the marginal note. I have had some difficulty in deciding what meaning should be given to the words “official communication” but my conclusion is that the word “official” must relate to the source of the communication. I think that is a legitimate interpretation and, if so, it is, I think, to be preferred to any other as being more compatible with s. 131.

I agree also that the trial judge is entitled to make such enquiries, if any, as he may consider necessary to satisfy himself that s. 132 is being properly invoked, although this will not, in my view, extend to considering whether the communication is in fact one the disclosure of which ought not to be compelled.

On all other questions arising on this appeal, I agree with the judgment of my Lord the President and I agree with the order that he proposes.

Appeal allowed. Judgment and decree of High Court set aside. Judgment in favour of appellant substituted.

For the appellant:

J. A. Mackie-Robertson, Q.C. and Sadiq Ghalia, Mombasa

For the respondent:

Ram Hira, Mombasa

Ram Hira and C. K. Kanji

Funu and others v Uganda **[1967] 1 EA 632 (HCU)**

Division:	High Court of Uganda at Kampala
Date of judgment:	26 May 1967
Case Number:	62-69/1967 (83)
Before:	Sir Udo Udoma CJ
Sourced by:	LawAfrica

[1] *Criminal law – Conviction for different offence than that charged – Theft substituted for robbery – Criminal Procedure Code, ss. 180 and 331 (2) (ii) (U.).*

[2] *Criminal law – Robbery – Goods on lorry – Whether driver or turnboy is person in possession and control.*

[3] *Criminal law – Robbery – Conspiracy – Accomplice “robbed” of his master’s goods by sham show of force – Whether court can convict.*

Editor’s Summary

The appellants were involved in a plot to steal goods from a lorry. Some of the appellants were charged with robbery, and the charge averred that they had robbed the driver of the lorry of goods from the lorry. The trial magistrate found that the driver was in fact in the plot and was an accomplice although he was put forward by the prosecution as a truthful witness. He then went on to convict these appellants of robbery not from the driver but from the turn boys on the lorry (who were not accomplices), and he did so without any amendment of the charge.

Held –

- (i) the charge as laid was not established by the evidence;
- (ii) the turnboys were not in possession and control of the goods;
- (iii) the magistrate was not entitled to make a new case other than that put forward by the prosecution; but should either have caused the charge to be amended or convicted the appellants of a minor cognate offence;
- (iv) the evidence was sufficient to constitute the offence of theft.

Appeals dismissed. Convictions of theft substituted.

Cases referred to in judgment:

- (1) *Smith v. Desmond and Another*, [1965] 1 All E.R. 976; [1965] Cr. App. Rep. 246.
- (2) *R. v. Hollingberry* (1825), 4 B. & C. 329; 107 E.R. 1081.
- (3) *R. v. O’Brien* (1911), 6 Cr. App. Rep. 108, C.C.A.

Judgment

Sir Udo Udoma CJ: The eight appellants are each appealing against his conviction and sentence by the Magistrate Grade 1, Magistrate’s Court, Masaka.

Before the commencement of the trial originally there were altogether six counts in the charge against the appellants and four other persons. The counts in the charge were distributed as follows:

- (1) In the first count the first appellant, Joseph Funo, the second appellant, Ernesti Muyamba, Fransisko Kato, the third appellant Ernest Kabagosa, the fourth appellant, Paulo Muwanga, the fifth appellant, Peregrino Lubega and Yakobo Kanana, were jointly charged with robbery contrary to s. 272 and punishable under s. 273 of the Penal Code.

- (2) In the second count Lulenti Sebowa was alone charged with theft by a servant contrary to s. 252 and punishable under s. 258 of the Penal Code; and
- (3) In the third, fourth, fifth and sixth counts the sixth appellant, Eneriko Serumkuma, and the eighth appellant, Felix Bbosa; the eighth appellant, Felix Bbosa, alone; the seventh appellant Emmanuel Matovu alone; and Konkolodia also alone, were respectively charged with receiving or retaining stolen property contrary to s. 298 (1) of the Penal Code.

On November 4, 1965 when the trial commenced, the charge against Lulenti Sebowa, as contained in count 2, was by leave withdrawn. The magistrate was then informed that Yakobo Kanana, had already been convicted and sentenced to a term of imprisonment by another magistrate on his own plea of guilty to the charge against him.

In the course of the proceedings, however, both Lulenti Sebowa, and Yakobo Kanana were called by the prosecution as witnesses.

The trial proceeded against the first, second, third, fourth, fifth appellants and Fransisko Kato on the first count of robbery; and against the sixth, seventh, eighth appellants and Konkolodia Namatovu, according to their respective counts as contained in the charge of receiving or retaining stolen property.

At the conclusion of the case for the prosecution, the learned trial magistrate rightly ruled that there was no case made out against Fransisko Kato and accordingly acquitted and discharged him.

The appellants were then called upon for their defence. The appellants and their witnesses gave evidence on oath.

In his judgment, the learned trial magistrate found all the appellants, including Konkolodia Namatovu, guilty. He convicted them all; and sentenced them, except Konkolodia Namatovu, to various terms of imprisonment. Konkolodia Namatovu was bound over because, according to the magistrate, she was such a weakly looking woman of about eighty years of age that in the court she appeared as if she might drop down dead at any given moment. The trial, protracted as it was, must have been an ordeal to her.

This appeal is brought by the first, second, third, fourth and fifth appellants against their conviction and sentence on the first count of the charge, which was robbery; by the sixth and eighth appellants against their conviction and sentence on the third count of receiving or retaining stolen property; by the eighth appellant alone against his conviction and sentence on the fourth count receiving or retaining stolen property; and by the seventh appellant against his conviction and sentence on the fifth count in which he was charged alone with receiving or retaining stolen property.

At the hearing of the appeal the first, second, fifth, sixth, seventh and eighth appellants appeared in person and argued their appeals. The third and fourth appellants were represented by Mr. Kiwanuka, while the State, as respondent, was represented by Mr. Khan, State Attorney.

In his original memorandum counsel for the third and fourth appellants had set down two grounds of appeal, namely:

- (1) That the trial magistrate had no jurisdiction to try this case and the trial was therefore a nullity.
- (2) That generally the conviction of the appellants was wrong in law so far as there was no sufficient and/or reliable evidence to establish that the appellants participated in the robbery.

The first ground of appeal was, however, abandoned, it having been overtaken by events. Jurisdiction was subsequently conferred on the magistrate with retrospective effect by an Act of Parliament.

In his submissions on the second ground, which was the only ground of appeal argued before this court, counsel for the third and fourth appellants contended that the charge on the count of robbery was not proved by the prosecution since, on the finding of the learned trial magistrate, Lulenti Sebowa was an accomplice, the offence having been committed with his complicity and as a result of a conspiracy between him and others, including Yakobo Kanana and one John Musoke.

Counsel submitted that in a charge of robbery with aggravation an essential ingredient or element to constitute the offence is the use of force or violence. That element was lacking in the instant case since the force purported to have been used was a mere stage acting. On the evidence accepted by the magistrate no force of any kind was or could have been used against Lulenti Sebowa, since he was a fellow conspirator; and that the trial magistrate was therefore wrong in law to have convicted the appellants.

It was further contended by counsel that, on the evidence, the case of the prosecution on the first count of the charge had completely broken down, because the person against whom force was alleged to have been used and against whom the robbery was alleged to have been committed (the central figure in the count that is) was an accomplice.

It was wrong in law, said counsel, for the magistrate to have held that the force used and consequently the robbery committed was against Wilson Sentumba and Jackson Lukibya whose names never appeared in the count. There was no evidence to support the finding by the magistrate that both Wilson Sentumba and Jackson Lukibya were custodians of the goods loaded on the lorry; and that in any case, the charge not having been amended, to hold that the two turn boys were the persons robbed, as the magistrate had done, was wrong in law. Therefore the conviction of the appellants on the first count could not be sustained in law.

On the evidence generally, counsel submitted that the evidence of the incident as given by Yakobo Kanana which was to the effect that when the robbery took place only the first, second, sixth and seventh appellants were with him, was accepted by the trial magistrate and therefore it was wrong in law for him also to have accepted the evidence of Wilson Sentumba and Jackson Lukibya both of whom had sworn that the third and fourth appellants were also there.

Counsel therefore submitted that the two sets of evidence were inconsistent and incompatible. Finally, counsel submitted that the appeal of the third and fourth appellants be allowed and the appellants acquitted and discharged.

In arguing their appeals, the first, second, fifth, sixth, seventh and eighth appellants, to the extent that the submissions made by counsel for the third and fourth affected their case, associated themselves with submissions made by counsel while others referred the court to their petitions of appeal. The first and second appellants submitted that it was a mistake for Yakobo Kanana to have picked them out during the identification parade. The fifth contended that Yakobo Kanana lied against him and the magistrate was wrong to have accepted and acted upon such lies. The sixth appellant maintained that it was Felix Bbosa, the eighth appellant, who had told him that he had some goods for sale and that the goods alleged to have been found in his possession were found in the bush. Both the seventh and eighth appellants denied the charges against them. [The learned Chief Justice dealt with the facts at length and then continued]:

In their defence, which was carefully summarised and examined by the learned trial magistrate, each of the appellants did his best to exculpate himself. As already stated the findings of the magistrate on the evidence were not seriously challenged even by counsel for the third and fourth appellants except in so far as counsel had urged upon the court to hold that the evidence of Yakobo Kanana appeared to be inconsistent with the evidence given by the turn boys, Wilson Sentumba and Jackson Lukibya in that, whereas Yakobo Kanana did not mention that the third and fourth appellants were seen by him, Wilson Sentumba and Jackson Lukibya were insistent that they were there at the scene of the crime.

It was not, however, submitted that the decision of the learned trial magistrate was unreasonable, unwarranted and could not be supported having regard to the evidence. That was not made a ground of appeal by counsel on behalf of the third and fourth appellants. I do not therefore propose to travel through the grounds already well covered by the learned trial magistrate. On a reasonable view of the case as a whole there is no doubt that the evidence against each of the appellants was overwhelming.

As I understand counsel, his main and only real ground of complaint was that the learned trial magistrate, having accepted the evidence of Yakobo Kanana as a result of which he had held that Lulenti Sebowa was an accomplice, the learned magistrate was wrong in law to have held also that the charge of robbery had been established on the ground which was quite foreign to the charge, namely, that the persons robbed were the two turn boys, Wilson Sentumba and Jackson Lukibya without the charge having been amended.

Having carefully studied and scrutinised the whole of the evidence in this case, I am bound to hold that counsel for the third and fourth appellants' submission on the main ground of law argued by him is sound. The charge as laid under count 1 was not established by the evidence.

The case of the prosecution was not that it was Wilson Sentumba and Jackson Lukibya who were robbed having been "put in fear of their life" by the robbers by a show "of force", nor was it even suggested that the two turn boys were employed to "keep vigilance" to use the learned magistrate's expression, over their master's goods, nor could it be said in law that they were in possession and control of the goods.

During the journey from Kampala the only person in effective control and possession of the lorry and its contents was the driver, Lulenti Sebowa. He was the person entrusted with the goods.

The two turn boys were merely his aid and they were under his control and direction during the journey. I think that it is clear from the evidence of Inspector Nsibambi Paul, to which I shall make reference later.

It is clear that the magistrate correctly directed himself in the undermentioned passage of his judgment when he said:

"In count 1 there is an averment that Lulenti Sebowa was robbed of trade goods belonging to G. S. Patel and that violence was used on the said Lulenti Sebowa; but on my finding that he was an accomplice or a dishonest witness, whose evidence requires independent corroboration, can it be argued that the elements of the charge of robbery as framed must fail?"

The correct answer to that question should have been "yes"; because from the evidence of Inspector Nsibambi Paul the prosecution were anxious to show that Lulenti Sebowa's report to the police was genuine and that he was the person frightened and assaulted by the robbers.

That that was the attitude of the police was conspicuously brought out by Inspector Nsibambi Paul in

this passage of his evidence. He said:

“At the beginning of this case I forgot to mention the physical state of Lulenti, the driver, when he brought a report to me on the night of July 20, 1965. He had some bruises, some mud marks on his clothes, his eyes were red, he had chilly powder marks on his head; he said to me that he was driving towards Mbarara and that as he was climbing a hill, he saw someone walking in the middle of the road; for fear he might kill the man, he stopped. On stopping, a gang of people rushed to the motor vehicle, pulled him out after throwing chilly powder in his eyes, shots were fired and they drove away with the lorry. He ran away and came to Masaka.”

This evidence was repeated on oath by Lulenti Sebowa with slight variations.

In his judgment the learned trial magistrate had himself dismissed this aspect of the case in the following words:

“I must inexorably regard Lulenti Sebowa as a person, if not as an accomplice, at least as a witness whose actions are tainted with complicity. I do not believe his evidence as truthful.”

The learned trial magistrate was also correct in quoting the observation of Lord Pearce in *Smith v. Desmond* (1) ([1965] 1 All E.R. at p. 992) to the effect that:

“The essence of the offence [of robbery] is that violence is done or threatened to the person of the custodian, who stands between the robber and the property, in order to prevent or overcome his resistance and to oblige him to part with the property and submit to the thief stealing it. Thus the offence against the person and the theft are combined”,

as the test to be applied in order to determine whether the offence of robbery has been established. But, with respect, the learned trial magistrate failed to apply that test correctly to the facts of the instant case as put before him by the prosecution, both in the charge and on the evidence.

The learned magistrate in his judgment went on to say:

“There is sufficient evidence that these two turn boys were as much custodians of the property belonging to G. S. Patel their master, as the driver Lulenti Sebowa, and owed as much duty to G. S. Patel to look after his property. If the accused by their acts caused the victims, namely the two turn boys, to relinquish or surrender or make powerless to prevent the taking of the goods, they are guilty of robbery.”

The above passage of the learned trial magistrate’s judgment is a misdirection in law, because that was not the case put before him by the prosecution. The magistrate was not entitled to make a new case other than the case put before him by the prosecution; because an accused person is entitled to be told in the charge what case he has to meet.

Had that been the case of the prosecution then their duty was to have said so in the particulars of the charge in count 1. On the other hand the magistrate, having heard the evidence and noted the drift of the case, two courses were open to him. In the first place it was competent for him to have caused the charge to be amended in that respect in the exercise of his powers under s. 213 of the Criminal Procedure Code. Alternatively he could have convicted the appellants of a minor cognate offence acting under s. 180 of the Criminal Procedure Code.

There is no doubt that the evidence before the court had disclosed a very serious and strong case against all the appellants. The crime itself was the result of a conspiracy. A whole lorry load of trade goods worth over shs. 80,000/-

was stolen by the appellants mentioned in count 1. The theft was most carefully planned and most carefully executed. The appellants were playing for high stakes. It is impossible for this court to shut its eyes to a crime so heinous as the present one.

Having regard to the view which I take that the learned trial magistrate was wrong in law to have held that the appellants concerned with count 1 were guilty of robbery, before indicating the attitude the court proposes to take in regard to count 1 of the charge, I think it is convenient at this juncture first to dispose of the submission of counsel in connection with the evidence given by Yakobo Kanana and that of Wilson Sentumba and Jackson Lukibya.

I must say at once that I find no substance in the submission of counsel that there was inconsistency in the evidence given by Yakobo Kanana and that given by Wilson Sentumba and Jackson Lukibya.

The learned trial magistrate was right to have accepted their evidence. This was a question of fact. On a reasonable view of the evidence there was nothing inconsistent with both the evidence of Yakobo Kanana and that given by Wilson Sentumba and Jackson Lukibya.

It should be noted that Yakobo Kanana was never examined or cross-examined on the point as to whether he also saw the third and fourth appellants at the scene of the crime. On the other hand the turn boys actually saw the third and fourth appellants when they boarded the lorry in Kampala. They also saw them disembark at mile ten for drinks and return thereafter and board the lorry. There was no evidence that thereafter the third and fourth appellants had subsequently disembarked from the lorry.

It must also be remembered that, on the evidence, at the scene of the incident at mile twenty-three Masaka/Mbarara road there were many people who had surrounded the lorry. It was dark. But the lights of the car were fully on and those who surrounded the lorry had torches which they were flashing all the time. Yakobo Kanana did not in his evidence say that he knew all the people who took part in the robbery. On the contrary, the evidence is that John Musoke was anxious to muster as many people as possible as the lorry was overladen with trade goods of considerable value and required a large number of people to participate in the handling of the same.

In respect of the appeal of the sixth, seventh and eighth appellants, as already indicated, on the charge of receiving or retaining stolen property knowing the same to have been stolen, I am satisfied that the evidence against each of the appellants was overwhelming. In my considered view the learned trial magistrate came to a right conclusion in finding the sixth, seventh and eighth appellants guilty of the offence with which they were charged. It is impossible to hold that his decision was unreasonable, unwarranted and could not be supported on the evidence.

The appeal of the sixth, seventh and eighth appellants fails and must be dismissed. Their conviction and sentences are confirmed. The sixth appellant was sentenced to two years' imprisonment on the third count. The seventh appellant was sentenced to six years' imprisonment on the fifth count and the eighth appellant to four years' imprisonment on the third and fourth counts; the sentences to run concurrently in respect of the eighth appellant.

I now turn to consider the position in law in regard to the error committed by the magistrate in respect of which counsel for the third and fourth appellants had submitted that the conviction of the third and fourth appellants should be set aside and the appellants acquitted and discharged.

Under the common law on a charge of burglary and stealing goods, if no burglary is proved; or of robbery, if the property is not taken from the person

by violence or putting in fear, the prisoner may be convicted of a simple larceny. Indeed on indictment for robbery the prisoner may be convicted either of the robbery, or of stealing from the person, or of simple larceny.

In *R. v. Hollingberry* (2), the defendants were indicted for conspiring falsely to indict one A. B. for keeping a gaming house for the purpose of extorting money from the said A. B. The jury found the defendants guilty of conspiring to indict A. B. for the purpose of extorting money but not to indict him falsely.

On the following day a rule for a new trial was moved for on the ground that the verdict was against the evidence.

Chitty, on behalf of Hollingberry, moved in arrest of judgment, as the finding of the jury had negated the charge as laid, viz. that the defendant conspired falsely to indict A. B.

Per Curiam. In criminal cases it is sufficient for the prosecution to prove so much of the charge as constitutes an offence punishable by law. This was an indictment for conspiring falsely to indict a person for the purpose of extorting money. The jury found the defendants guilty of conspiring to prefer an indictment for the purpose of extorting money, and that is a misdemeanour, whether the charge be or be not false. The rule was refused.

In *R. v. O'Brien* (3) it was held that on an indictment for riot there may be a conviction for common assault.

Under s. 331 (2) (ii) of the Criminal Procedure Code, it is provided that:

“Subject to the provisions of sub-s. (1) of this section, the High Court on appeal may;

- (i);
- (ii) alter the finding and find the appellant guilty of another offence, maintaining the sentence, or without altering the findings, reduce or increase the sentence.”

The provisions of s. 180 of the Criminal Procedure Code are in the following terms:

“180: When a person is charged with an offence and facts are proved which reduce it to a minor cognate offence, he may be convicted of a minor offence although he was not charged with it.”

In view of the provisions of ss. 331 (2) (ii) and 180 of the Criminal Procedure Code, the question which naturally arises is as to whether the evidence as accepted by the learned trial magistrate is sufficient to constitute an offence punishable by law other than the robbery charge in count 1, so as to entitle this court to alter the finding by the learned trial magistrate and to find the appellants in count 1 guilty of such other offence.

That question must be answered in the affirmative. It is true, of course, that the appellants were charged with robbery contrary to s. 272 and punishable under s. 273 of the Penal Code. The maximum penalty under that section prior to the amendment made under the Penal Code Amendment Act No. 1 of 1966, which has considerably enhanced the penalty, was fourteen years' imprisonment.

The maximum penalty prescribed under s. 256 (c) of the Penal Code is seven years' imprisonment.

I have given considerable thought to the charge under count 1 as against the appellants affected by the said count. I am satisfied on the evidence as a whole that the appellants were guilty of theft contrary to s. 252 and punishable under s. 256 (c) of the Penal Code. Accordingly I here and now alter the finding of

the

learned trial magistrate upon which the appellants were convicted of robbery contrary to ss. 272 and 273 of the Penal Code. The first appellant was sentenced to ten years' imprisonment with fourteen strokes; the second to the fifth appellants to fourteen years' imprisonment with fourteen strokes each.

Since I now find the appellants guilty on count 1 of theft punishable under s. 256 (c) of the Penal Code I accordingly convict them of that offence. The sentences passed upon them by the learned trial magistrate are also set aside and the following sentences substituted therefor:

The first appellant is sentenced to five years' imprisonment;

The second to the fifth appellants to six years' imprisonment each.

These sentences are to date from the date when the appellants were convicted by the magistrate.

The appeals are therefore dismissed.

Order accordingly.

The other appellants in person.

For the third and fourth appellants:

Kiwanuka & Co., Kampala

B. M. Kiwanuka

For the respondent:

Attorney General, Uganda

A. M. Khan (State Attorney, Uganda)

Mwagiru v Mumbi [1967] 1 EA 639 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	23 March 1967
Case Number:	268/1966 (131)
Before:	Miller J
Sourced by:	LawAfrica

[1] *Native law and custom – Marriage – Kikuyu customary marriage – Necessary formalities for – Consent of bride necessary.*

[2] *Marriage – Marriage by Kikuyu customary law – Formalities for – Consent of bride necessary.*

The plaintiff sought a declaration that there was a valid and subsisting marriage between himself and the defendant by Kikuyu custom, both parties being Kikuyu. The defendant alleged that no such marriage existed because she had not given her consent and had not even been present at the essential ceremony. She admitted that she had lived with the plaintiff at his house for a short time but claimed that she had been forced into doing so by her father. She had gone through a civil marriage ceremony with another man with whom she had a longstanding association a short time after she had escaped from the plaintiff; and she alleged that she was in fact married to this man and not to the plaintiff.

Held –

- (i) the signifying of consent by the bride is necessary at two stages of the ceremonies which are vital to a regular Kikuyu customary marriage;
- (ii) on the evidence the defendant was not present and consenting at at least one of these stages, and the plaintiff had therefore failed to prove his case.

Case dismissed with costs.

No cases referred to in judgment.

Judgment

Miller J: In this suit the plaintiff, George Njau Mwagiru, a businessman carrying on business in Nairobi, is seeking a declaration that there is a valid and subsisting marriage between himself and the defendant Mary Goretti Mumbi daughter of Charles Kigwe, the said marriage having been regularly performed according to the rules, rites and ceremonies demanded by Kikuyu Custom. It is not in dispute that the plaintiff and defendant are both of the Kikuyu tribe and capable of acquiring marital status according to their tribal custom. It is the contention of the defendant, however, that she was never a party to any arrangement for the marriage alleged by the plaintiff, that her consent was never sought or given and, more particularly, that she was not even present at the vital stage in the chain of events necessary to constitute a valid Kikuyu customary marriage; but that she was forcibly taken by her father against her will to live with the plaintiff at the plaintiff's house whence she escaped after a few days.

It has been shown in evidence that the defendant went through a form of marriage before the District Commissioner, Nakuru with one Raphael Mugwanja on February 15, 1966, a matter of about thirty-eight days after the defendant was in fact taken to the plaintiff's house by her father pursuant to the alleged Kikuyu customary marriage.

It is perhaps worthwhile to point out that this suit and indeed the task of the court do not in any way entail a comparative study of historical or sociological concepts touching the two forms of marriage involved in the case. Marriage by Kikuyu custom or under the Marriage Act can result in perfectly valid marriages providing that there has been compliance with the rules which govern each form of marriage. Moreover, there are legal penalties for certain acts which amount to failure to recognise validly created marriages under Native Law and Custom as well as under the Act. Section 35 (1) of the Marriage Act Cap. 150 provides:

“No marriage in Kenya shall be valid which, if celebrated in England, would be null and void on the ground of kindred or affinity, or where either of the parties thereto at the time of the celebration of such marriage is married by native law or custom to any person other than the person with whom such marriage is had.”

The duty of the court in this case is to decide whether as a matter of fact the alleged Kikuyu customary marriage was regularly performed and was subsisting at the time when the defendant went through the form of marriage before the district commissioner at Nakuru. If the decision is in the affirmative the marriage before the district commissioner is *prima facie* invalid and may be declared invalid as an ensuing legal consequence upon examination of its regularity *per se*.

The plaintiff was supported in evidence by the defendant's father and one of the latter's nephews, the defendant's mother and the plaintiff's first or senior wife. The plaintiff stated that he has been a friend of the defendant's father for a long time and came to love the defendant. He put it thus:

“From a long friendship I had with the father I came to love the defendant. The friendship started at the beginning of 1965. I think after a long time that I should inform the parents according to our Kikuyu custom. On August 22, 1965 I took Njurio to the house of the defendant. Before August 22, 1965, before I did this I had talked with her on August 10. We agreed then to marry each other that is why I took the Kikuyu token to the

parents as is our custom. I found her father and mother and because the old man has more than two wives I asked him to call the other two wives into the house. I do not know the name of the defendant's mother but I know the names of the other two."

Led by his counsel the plaintiff continued:

"Gladys Wambui is the name of the real mother of the defendant. When I mentioned the cause of my beer the father sent for the closest man of their relatives. I told them that that day's beer which I took there was not the ordinary beer but to inform the father that it was because of asking the girl's hand. The closest man who was called came. His name is Henry. They then told me to put it properly to Henry what the beer was for. I told him – This beer here before you is because after a long friendship with one of your daughters, the daughter and myself agreed that she would marry me if you would like it so I brought this beer here as 'Njurio'. They then spoke to one another and said they could not decide it until they called the daughter. They called her and explained the reason why we were there and the beer was there. They asked her whether she would like to marry me. She said she would like to marry me and they could drink the beer from her own permission. They drank the beer as well as myself. Mary did not drink she just said . . . (Witness indicates 'No' by sign of hand and continues) I went that day with my first wife and one Silas. After the drinking the man who was called told me, also the girl's father said that the door was open. We went back to our home leaving Mary. In our custom there is also the question of dowry called 'Ruratio'. I told them to give me time and I would bring this. After this we had several parties either at mine or the girl's house. It was for me to mention when I was ready to pay the dowry. All the time I was preparing the dowry. After a few months I mentioned the day as December 26, 1965. I sent Silas with this message to the girl's father. After they accepted that day I sent one big ram and a sheep to mark the ceremony. On December 26, 1965 I went there and asked them to tell me the number of goats they would like me to pay. They said fifty goats and I should prepare some more gifts, i.e. an axe, a basket, a pot, a blanket, a sheet and a simi. I did not have actual goats I had money so I paid them £50 instead of goats and shs. 300/- in lieu of the gifts. This is permissible. They said that they must kill the ram to witness the dowry. This signifies pouring out the blood of unity. We killed the ram and before we did this my first wife called at the ceremony and allowed them to kill the ram. She said – As I said the first day you carry on'. They then asked me to bring honey they call it 'Okaay'. I brought them many calabashes, English beer and whisky. We drank until the small hours of the morning. Having done this it was me to go and send 'juhoye' and 'muiretu'. All of this was performed at Gatitu in the house of the defendant's father. He had three large stone buildings in the same compound. Before December 26 the defendant and I used to meet privately and have discussions. According to our custom she is not my wife until she comes to my house; this should have been on January 1, 1966. On this day I took local beer to the house to signify that from that day the defendant should be my wife. I did not take her to my house that day but on January 8, 1966. My house is about thirty miles away from the father's house. I asked the father or the family to help remove the girl to my house. The father has a Mercedes car. I thought it was nice for her to come in that as I only have a Peugeot. The father did this. He had a few members of his family with them. I am surprised to hear that defendant said she was brought by force. The father brought her about noon and stayed until about six p.m. We sat in the sitting room speaking. Defendant

was happy and in good mood. She stayed; and after one week on January 15 at my shop in Bazaar Street, Nairobi she escaped. After that day she did not return to my shop. She used to go to the market from my shop and return but this day she did not return. For the week she was with me we stayed as man and wife; she performed each and every duty as a wife. It is not true that she did not co-habit with me during that period. Defendant is the person who gave her parents her consent after consenting to me. Since January 15, 1966 I have not seen her until to-day, but I heard that she went through an English marriage at Nakuru. I informed the father on the day that she disappeared. A notice was thrown into the car of the father saying that someone was getting married to the defendant at Nakuru. I saw the letter giving this notice. When we got the letter from the car we did not go to Nakuru the same day. We went the next day and found that the marriage took place two days previous to that day. We went to Nakuru around February 18. The letter notice is dated January 30. We then came and instructed my advocate. I did not see the defendant at Nakuru. I maintain that I was married to the defendant on January 8, 1966 and this marriage has not been dissolved. On January 14 or 15 she was still my wife.”

The plaintiff’s evidence as to his association with the defendant’s father, and the various steps of the alleged customary marriage was substantially the same as that of his witnesses. In particular the plaintiff was supported in his allegation that the defendant was present and in fact gave her consent to the two most important items in the chain of rites of Kikuyu customary marriage, i.e. the first and the fourth stages. The first may conveniently be called the declaration of mutual interest with a view to setting up marital relationship, the accent being on the signifying of consent on the part of the woman and approval by her parents; and the fourth the slaughtering of the sacrificial ram after which, it appears from the evidence, the parties are deemed to be married the only outstanding act is the woman’s taking up residence with the man.

The defendant called as a witness Mr. G. S. Monoru, a law lecturer at University College, Nairobi. He informed the court that he is himself a Kikuyu by tribe and made special study of Kikuyu customary law. His explanations of the various stages necessary to constitute a valid Kikuyu customary marriage differed in certain details from those given by the plaintiff and his chief witness Charles Kigwe on the same matters. For example, at the “Njurio” stage Mr. Monoru explained that the woman’s consent is determined if she does or does not fetch the horn to serve the beer when called upon to do so and further that if she fetches the horn, when the beer is poured into it she takes a small sip and passes it to her father who takes a sip, touches her with the horn and pours a bit on the ground. It would be recalled that the plaintiff said that the defendant did not drink but indicated “No” by a wave of her hand. Mr. Monoru also explained that at the fourth stage, i.e. the slaughtering of the ram, the woman is asked to fetch the knife to indicate her consent, she takes part in the slaughtering and after the slaughtering the kidneys are roasted and she eats them as a further signal of her consent so that relatives and friends may proceed further with the ceremony. By the plaintiff’s evidence the defendant is alleged to have said “Yes the ram may be slaughtered” with none of the further acts stated by Mr. Monoru. Mr. Monoru also explained the fifth and final stage in entirely different manner as stated by the plaintiff and the defendant’s father. He said that this is in effect a mock capture staged by females of the same age group of the “bride” who seize the bride and take her to the husband’s house. Mr. Monoru was emphatic that this is never done by males as the evidence for the plaintiff indicates. Another difference is that whereas Mr. Monoru said that the age of the female is not the true test and that a girl may marry providing she is adult, i.e. that “she is menstrual”, the defendant’s father said she cannot marry below

twenty years of age. I may mention in passing that as Mr. Kigwe was cross-examined as to the giving of the defendant's date of birth for the obtaining of her birth certificate dated February 23, 1966 he informed the court that he gave the date of birth to the District Commissioner from a book in which he had recorded the date. He was ordered by the court to produce this book on the following day and he undertook to do so but failed even although the trial lasted for three days after the order and promise to produce. Returning to the question of differing versions of the details of the stages of marriage referred to above, it is not improbable that there are slight variations to be found due to district or clan but the signifying of consent is held out by both versions to be necessary to the first and fourth stages which both plaintiff and defendant agree are vital to a regular Kikuyu customary marriage. The court accepts this as true and necessary to the "Njurio" and the slaughtering of ram ceremonies.

The contention of the defendant is that she has never even contemplated the plaintiff as a prospective husband, that she was not present at the alleged ceremonies and consequently and in fact never gave her consent to any of them and further that consistent with these matters she escaped from the plaintiff as soon as the opportunity arose. The defendant tendered in evidence a number of letters she wrote to Raphael Mugwanja whom she married at Nakuru on February 15, 1966. These letters cover the period December 31, 1964 to January 6, 1966 in support of her oral testimony that she became friendly with Raphael Mugwanja on April 4, 1964. Raphael Mugwanja confirmed this in his evidence. If I correctly understand the defence these letters were tendered as evidence of the defendant's state of mind towards Raphael Mugwanja some eight months before and covering the same period the plaintiff claims that he started a friendship with the defendant, leading up to an agreement to marry. Nothing appears to suggest that these letters are not genuine and the defendant vehemently denied the suggestion that they were secret love letters. The defendant claimed that she had told her father that Raphael Mugwanja was her friend. It is not necessary to reproduce these letters but it is enough to say that they depict a most amorous relationship between the defendant and Raphael Mugwanja. This court is satisfied that by the terms of the letter Exhibit C the defendant and Mugwanja were behaving as man and wife at least from December, 1964 and the defendant was completely resigned to her fate if their activities resulted in her bearing a child for Mugwanja at that time. Subsequent letters show that the defendant was in the habit of spending days and the occasional night with Mugwanja. The defendant has also tendered in evidence group photographs to support her claim that she was accepted by members of Mugwanja's family and that at least so far as she was concerned her inclinations if not her resolve moved towards that family. The defendant asks the court by this section of the defence evidence to consider whether in these circumstances she would concurrently be in love with the plaintiff and agree to marry him. In the defendant's letter to Mugwanja of December 17, 1965 (Ex. E) the defendant wrote thus:

"In case I shall not marry you I do not think whether I shall dream of marrying another man and I better hang myself instead of missing you. Lastly let us come on December 24, 1965 you just tell me whether you want me to wait you at Kigwe's home, or little house or Richard's home . . ."

Following this letter (Ex. E) the evidence of Richard Kamau, Raphael Mugwanja, the defendant and Francis Ndungu concerning the movements of the defendant is to the effect that these four defence witnesses moved together from December 24, 1965 when Mugwanja in accordance with Ex. E arrived in the district where the defendant lived. Each of these four witnesses outlined the activities of their party in highly confirming detail covering the period

December 24, 1965 to the morning of December 27, 1965 and they were at one that the defendant was not at her father's house on December 26, 1965 that she moved about with all or a few of their number during the daytime and early evening and slept with Mugwanja in the house of Francis Ndungu her former school teacher for three nights, i.e. the nights of December 24, 25 and 26. The school teacher Francis Ndungu was quite frank on the matter. He said:

"For three nights I left Mary and Raphael in my house to sleep and make love. I am a strong friend of both both of them I knew she was not married in 1965 when she and Raphael were meeting at my house".

At this juncture the court cannot but pause to consider whether the close association of these four defence witnesses including and ending immediately after December 26 was not a deliberate plan to keep the defendant away from the ceremony of December 26; but that is not the plaintiff's case, it is the presence of the defendant at this vital ceremony of December 26 which has been asserted. To concede her absence would be an end of the plaintiff's case and the foundation for a reasonable probability that in the face of that disappointment she was caught and forcibly put into the plaintiff's house.

The defendant supported by Mugwanja and two other witnesses related the incident of the defendant's alleged capture on January 8, 1966 as she walked along the Thika road with Mugwanja. The account of these witnesses was detailed and raises a proposition of plain truth or the most ingenious lies. Plaintiff's counsel observed that the defendant's alleged capture at Thika and forcible taking to the plaintiff's house were not put to Charles Kigwe in cross-examination. The alleged capture and taking to the plaintiff's house against the will of the defendant were expressly pleaded. Charles Kigwe's evidence gives the impression that he and the defendant alone went to the plaintiff's house on January 8, 1966 whilst the defendant was specific that her father and two of his sons caught, bound and took her to that house. The plaintiff himself said: "The father had a few members of his family with them." The court gets very little assistance from the nature of the evidence on this aspect of the alleged events of January 8, 1966.

This is a case where it is clear that either the plaintiff or the defendant has not spoken the truth, and the position becomes more tedious as it is largely a matter of the oath of parent against that of child. Upon reviewing the evidence as a whole the court prefers specific consideration of the question of the defendant's consent in all the circumstances of the case as the medium of guidance in deciding which of the parties ought to be believed particularly with reference to the very important fourth stage ceremony alleged to have taken place on December 26, 1965. Temporarily inclining to the evidence of the plaintiff the court is of the view that there was in fact the drinking party at Kigwe's house on August 22, 1965, that Kigwe, the plaintiff and relatives there present understood the occasion to be the seeking of the defendant's hand in marriage. The defendant may have gone as far as to consent to the drinking of the token liquor by the assembly but significantly refused to partake of the drink and from that moment she more seriously decided to lean towards Mugwanja and to abstain from the fourth stage ceremony of December 26 and as this date approached she fortified herself with the immediate presence and affections of Mugwanja and a few confidential friends and kept away from the father's house over that important period. This however would lead to the result of no valid marriage ceremony even if there was genuine consent on her part on August 22, 1965 according to the evidence of the customs as given in the case. The court finds that the nature and period of the association between the defendant and Mugwanja even if clandestine so far as the defendant's parents were concerned raise a reasonable probability that the defendant would not have

consented to marrying the plaintiff. The court believes the evidence of the defendant's whereabouts between December 24 and 27 and finds that she was not present and consenting at the ceremony of December 26 as alleged by the plaintiff and his witnesses.

The plaintiff has failed to prove his case.

The plaintiff's case is dismissed with costs to the defendant.

Suit dismissed with costs.

For the plaintiff:

A. H. Malik & Co., Nairobi

M. T. A. Malik

For the defendant:

B. J. Hawkes, Nairobi

Rashid Moledina & Co (Mombasa) Ltd and others v Hoima Ginners Ltd
[1967] 1 EA 645 (CAM)

Division:	Court of Appeal at Mombasa
Date of judgment:	4 July 1967
Case Number:	45/1966 (139)
Before:	Sir Charles Newbold P, Duffus and Spry JJA
Sourced by:	LawAfrica
Appeal from:	High Court of Kenya – Wicks, J.

[1] *Arbitration – Award – Application to Court to remit or set aside award of arbitrator – Principles to be applied – Error of law – Arbitration Rules, rr. 7 and 17 – Arbitration Act, ss. 11, 12 and 19 (K.).*

[2] *Arbitration – Costs – High Court remitting or setting aside award – Whether court has power to make an award of costs before the arbitrator.*

[3] *Contract – Repudiation – Repudiation by conduct – Test for.*

[4] *Contract – Repudiation – Letter sent to party repudiating by conduct – Whether party sending letter bound to rely only on reasons given in such letter in subsequent proceedings.*

[5] *Statute – Interpretation – Effect of previous decisions of English courts on same or similar words – Court of Appeal – Observations as to.*

[6] *Stare Decisis – Court of Appeal – Decisions of Commonwealth courts – Previous decisions of Court of Appeal – Observations as to.*

Editor's Summary

The respondent contracted to deliver coffee to the appellants on certain dates in 1964. The respondent, being in short supply, attempted to settle its obligations to the appellants by negotiation, without success. The respondent failed to supply any coffee on specific dates to third parties with whom the respondent was also under contract. The appellants, expecting a failure by the respondent to deliver under its contracts with them, declared that the respondent by its conduct had repudiated the contracts. The matter went to arbitration under the Arbitration Act and an award was made which on appeal was in effect confirmed by an Appeal Committee. By originating summons under rr. 7 and 17 of the Arbitration Rules made under the provisions of the Arbitration Act, the High Court was asked to remit for consideration or to set aside the award under ss. 11 and 12 of the Act, the relevant parts of which read:

“11(1) The court may, from time to time, remit the award to the reconsideration of the arbitrators or umpire. . . .”

“12. Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the court may set aside the award.”

The High Court was asked to consider whether the arbitrator was correct on the facts in concluding that the appellants were justified in treating the respondent's conduct as sufficient to amount to repudiation of their respective contracts. The High Court set aside the award and remitted it to the Appeal Committee. On appeal to the Court of Appeal two main issues were argued:

- (a) whether, having regard to the terms of the award, the High Court judge had any jurisdiction to set aside or to remit the award to the Appeal Committee;
- (b) whether, on the facts found in the award, the arbitrator was in law justified in his alternate findings that either the respondent had repudiated the contracts made with the appellants or that the respondent's conduct entitled each of the appellants to infer that the respondent did not intend to implement his obligations under each of the contracts with the appellants.

Held –

- (i) the courts will be slow to interfere with the award in an arbitration; but will do so whenever this becomes necessary in the interests of justice and will act if it is shown that the arbitrators in arriving at their decision have done so on a wrong understanding or interpretation of the law;
- (ii) the correct test for repudiation where there has been no expressed intention to repudiate is: was the conduct of the respondent through its representatives such as to have caused a reasonable person to come to the conclusion that the respondent did not intend to or was unable to fulfil its contracts?
- (iii) there was no error of law apparent on the face of the award;
- (iv) the appellants (and the arbitrators) were entitled to take into account all the relevant factors; and the appellants would not be bound later to rely only on the reasons given in their letters of repudiation;
- (v) there were sufficient facts to support the award.

Observations by Newbold, P. and Spry, J.A. obiter on the doctrine of stare decisis and interpretation of statutes.

Appeal allowed.

Cases referred to in judgment:

- (1) *Sohan Lal v. East African Builders' Merchants* (1951), 18 E.A.C.A. 50.
- (2) *Re Baxters & Midland Ry. Co.* (1906), 95 L.T. 20.
- (3) *Universal Cargo Carriers v. Citati*, [1957] 2 All E.R. 70; [1957] 1 W.L.R. 979.
- (4) *Forslind v. Bechely Crundall*, [1922] S.C. (H.L.) 173.
- (5) *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.* (1884), 9 App. Cas. 434.
- (6) *Carswell v. Collard* (1893), 20 R. (Ct. of Sess.) 47.
- (7) *Bank Line Ltd. v. Capel (Arthur) & Co.*, [1919] A.C. 435.

- (8) *Tame v. Zagoritis*, [1960] E.A. 370.
- (9) *Champsey Bhara & Co. v. Jivraj Balloo Spinning and Weaving Co. Ltd.*, [1923] A.C. 480.
- (10) *Landauer v. Asser*, [1905] 2 K.B. 184.
- (11) *Re Montgomery, Jones & Co. and Liebenthal & Co.* (1898), 78 L.T. 406.

(12) *Margulies Bros. Ltd. v. Dafnis Thomaides & Co. (U.K.) Ltd.*, [1958] 1 All E.R. 777.

C.A.V.

Judgment

Duffus JA: This is an appeal from the decision of the High Court on an originating summons brought under the provisions of the Arbitration Act (Cap. 49). The arbitration, the subject of this appeal, arose out of a dispute between the several appellant companies and the respondent company over the fulfilment of various contracts for the sale and delivery of coffee. It was agreed that these contracts were subject to the rules and regulations of the Hard Coffee Trade Association of Eastern Africa.

I will deal more fully with the facts that were found by the arbitrator but briefly the position was that the respondent company, Hoima Ginners Ltd., entered into some nine quite different and separate contracts with the four appellant companies for the delivery of coffee during the months of July, August and September, 1964. At the end of March, 1964 the respondent company found itself in short supply of coffee and approached the various appellant companies through a Mr. Vasant to endeavour to arrange a settlement of the contracts as it found itself unlikely to be able to perform the contracts. No settlement had been arrived at but the respondent company in the months of April, May and June failed to deliver any coffee under contracts with other members of the Association. On June 16, 1964 the High Court of Uganda appointed the Official Receiver to be provisional liquidator of the respondent company and then on various dates between June 29, 1964 and July 6, 1964 each of the appellant companies informed the liquidator that it treated the appellants' failure to deliver coffee under the contracts with the other members of the Association as a repudiation of their own respective contracts with effect from April 30, 1964. The appointment of the provisional liquidator was rescinded on July 9, 1964 and on that same date the respondent company's advocate notified each of the appellant companies of its intention to claim damages.

The dispute between all the parties was then referred to arbitration in accordance with the rules and regulations of the Hard Coffee Trade Association. Each of the disputes was, of course, a separate issue and a separate arbitration submission but by consent, as the issues were the same, all the arbitrations were consolidated and dealt with as one. It is agreed that the arbitrator was governed by the arbitration rules of the Mombasa and Kampala Coffee Exchange of the Hard Coffee Trade Association of Eastern Africa and by the Arbitration Act (Cap. 49).

The matter was first referred to a single arbitrator and it will be convenient here to refer to his award. In his award the arbitrator after reciting his appointment and the agreement to consolidate the various disputes made twelve findings of fact. In his first finding he set out details of the nine various contracts, the subject of the dispute, and it is to be noted here that these nine contracts concern the delivery of some 10,500 bags of coffee and each contract required the delivery of various amounts of bags in each of the months of July, August and September, 1964. The other eleven findings of fact are all relevant to the issue of this appeal and I would set out these in full:

- "2. That each of the said contracts was registered in accordance with the custom and rules of the Hard Coffee Trade Association of Eastern Africa.
3. That each of the said contracts constituted one contract for the whole of the said quantity of coffee stated therein, respectively although each was divisible as to its performance.

4. That the applicant made no attempt to purchase any of the said coffee during the months of January, February and March, 1964, to meet forward commitments and, in the month of March, 1964, settled one contract for the delivery of 250 bags to Moshi Trading Co. Ltd. in the said month by payment of an agreed difference.
5. That by the end of March, 1964, the applicant was short of the said coffee required to meet his commitments for deliveries thereof during the months of April, May, June, July, August and September, 1964 respectively to the extent of a total amount of between 5,800 and 6,000 tons.
6. That at or about the end of March, 1964, the applicant requested and authorized one V.V. Vasant, a coffee broker known throughout the trade as 'Bachubhai', to endeavour to effect a settlement of all the applicant's outstanding contracts with the respondents and other members of the Hard Coffee Trade Association of Eastern Africa, and gave the said Bachubhai a list of such contracts.
7. That, in pursuance of such request and authority, the said Bachubhai informed the said respondents and other members of the said association that:
 - (1) the applicant was short of 5,800 to 6,000 tons of coffee as mentioned in para. 5 above, and would lose Shs. 5 to 6 million if it had to buy in;
 - (2) The applicant was unlikely to perform any of its contracts to deliver the said coffee during any of the said months;
 - (3) The applicant requested agreement in principle to effect a settlement as aforesaid.
8. That, despite willingness on the part of the respondents and the majority of the said members, the applicant failed to make any further proposals for a settlement of the said contracts.
9. That the applicant failed to deliver any coffee under contracts with other members of the said Association during the months of April, May and June, 1964, or to make any, or any proposals for cash settlements thereof.
10. That on June 16, 1964, the High Court of Uganda made an order appointing the Official Receiver to be provisional liquidator of the applicant company. The said order was subsequently rescinded by a further order of the said court, dated July 9, 1964.
11. That the first and fourth respondents on June 30, 1964, the second respondent on June 29, 1964, and the third respondent on July 6, 1964, respectively, notified the said provisional liquidator that each of them treated the applicant's failure to deliver large quantities of the said coffee in the month of April, 1964, under contracts with other members of the said Association, as a repudiation by it of their respective contracts with the respondents aforesaid, with effect from April 30, 1964.
12. That, by telegrams dated July 9, 1964, the applicant's advocates notified each of the respondents of the applicant's intention to claim damages against them severally for breach of contracts."

Having found these facts the arbitrator then made his award as follows:

"And, I, the said S. H. Miller, having duly considered the said matters submitted to me, do hereby make an award as follows:

1. That the applicant severally repudiated each of the said contracts made with the respondents respectively, as set out in the first paragraph herein.

2. Alternatively, that the applicant's conduct was such as reasonably to tend to the inference that the applicant would fail to deliver any of the said coffee under the said contracts during the months of July, August or September, 1964, respectively, and the respondents, were and each of them was, entitled to anticipate such breaches on the part of the applicant.
3. That the applicant's claims for damages fail against each of the respondents respectively.
4. That the applicant will pay the costs of this arbitration, as under:

Arbitration Fees	Shs. 105/-
Exchange Fees	Shs. 100/-
	<hr/>
	Shs. 205/-
Plus legal expenses	Shs. 21,000/-

Dated Jan. 13, 1965.”

Under the provisions of r. 8 of the Arbitration Rules of the Association the respondent company appealed against the award to an appeal committee appointed by virtue of these rules. The appeal committee heard the appeal and made their decision upholding the findings and award of the arbitrator. I here set out the material portions of the appeal committee's award:

“AND WHEREAS each of the said respondents has agreed with the Applicant that the said matters in difference between them respectively shall be consolidated and form part of this one appeal only,

NOW, we, the said P.E. Winch, and J.H. Arthur, having duly considered the evidence and listened to the exhaustive arguments of Counsel for and against the Award find that we are in full agreement with the findings of the Arbitrator and uphold his award in every respect.

This Appeal, therefore, fails and the Applicant will pay the costs as under:

Arbitration Fees	Shs. 210/-
Exchange Fees	Shs. 150/-
	<hr/>
	Shs. 360/-
Plus legal expenses	Shs. 21,000/-

Dated December 2, 1965.”

The matter was then brought to the High Court on an originating summons under rr. 7 and 17 of the Arbitration Rules made under the provisions of the Arbitration Act, Cap. 49. Section 19 of the Act is also applicable to the procedure. The powers of the High Court to act in an application of this nature are set out in ss. 11 and 12 of the Act. The relevant portions of these sections state:

“11(1) The court may, from time to time, remit the award to the reconsideration of the arbitrators or umpire.

...

12. Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the court may set aside the award.”

These sections are in some respects similar to ss. 22 and 23 of the English Arbitration Act 1950. There are very few authorities on the interpretation of the Arbitration Act of Kenya and the only decision of this Court to which we were referred was that of *Sohan Lal v. East African Builders' Merchants* (1) which, although helpful, was a reference made by order of the Court to arbitrators under the Civil

Procedure (Revised) Rules 1948. The courts are given

wide powers under the provisions of ss. 11 and 12 to remit or set aside an arbitration. The legislature has not laid down any particular circumstances which would restrict the power of the court to remit under s. 11, while under s. 12 the power to set aside the award may be exercised when the arbitrator has misconducted himself or the arbitration has been improperly obtained. In England the word “misconduct” has been given a liberal interpretation and includes cases where arbitrators have made a mistake in fact or in law.

Generally speaking the courts will be slow to interfere with the award in an arbitration having regard to the fact that the parties to the dispute have chosen this method of settling their dispute and have agreed to be bound by the arbitrator’s decision, but the courts will do so whenever this becomes necessary in the interests of justice, and will act if it is shown, as it is alleged in this case, that the arbitrators in arriving at their decision have done so on a wrong understanding or interpretation of the law. In this respect I would like to refer to the following passage from the judgment of Moulton, L.J. in the case of *Re Baxters & Midland Ry. Co.* (2) which was accepted by the Court of Appeal in England in the case of *Universal Cargo Carriers v. Citati* (3), and which in my view correctly sets out the powers of the courts when acting under the provisions of ss. 11 or 12 of the Arbitration Act in Kenya (95 L.T. at p. 23):

“The jurisdiction of the court is statutory, and cannot be increased or cut down in that way. The reported decisions of the court only show the principles which have guided the court from time to time in exercising its jurisdiction, and, though they may afford a valuable guidance, they do not restrict either the jurisdiction of the court in deciding other cases, or the duty of the court to look at the facts in each particular case. When the facts of any particular case before the court are the same as the facts in the cases cited, no doubt the court will follow those cases. But it must not be supposed that reported decisions prevent the court from deciding whether in the interests of justice it ought to send the matter back to the arbitrator.”

In this particular case the application on the face of it appears to be made under s. 12 of the Act as it asks the court to set aside the award although it goes on to ask the court to grant damages to the respondent company. In fact, however, I agree with counsel for the appellant companies that the court was really asked to act under s. 11 of the Act and to remit the proceedings for the reconsideration of the arbitrators. This is also the section under which the learned trial judge appears to have acted as he remitted the award to the arbitrators. In the formal order however, the order both seeks to set aside the award and then to remit this to the arbitrators. The “setting aside” here, however, would not in my view mean a setting aside under s. 12 which would possibly have had the effect of rendering the arbitrators functus officio, but was rather a setting aside of the award for the purpose of the arbitrators being able to reconsider and make a fresh award in the light of the judgment of the High Court.

The High Court was asked to set aside the award on four grounds which are as follows:

- “1. That the Arbitration Appeal Committee misconducted itself in not setting aside the arbitrator’s award dated 13th day of January 1965 in that the arbitrator and the appeal committee did not concern itself on the legal implications of the evidence of Mr. V.V. Vasant (Bachubhai) which evidence was quite inadmissible against the applicants.
2. That even if the said evidence was admissible there was no evidence that he was the authorized agent of the applicants and that he had authority to commit anything on behalf of the applicants.

3. That the appeal committee/arbitrator should not have taken into account any other matter or contracts entered into by the applicants with other parties while dealing with specific contracts with the respondents.
4. That the arbitration appeal committee and the arbitrator failed to take into account the fact that the respondents had repudiated their contracts by their letters.”

The first and second grounds of the objection relate to the evidence given by Mr. V.V. Vasant. It was agreed at the hearing of the originating summons and also by counsel for the appellants and counsel for the respondents on this appeal that the court will not consider the evidence in this case but would accept the arbitrator’s findings of fact.

The real question then before the High Court and also on this appeal was whether the arbitrators were correct on their findings of fact in coming to the conclusion that the appellant companies were justified in treating the respondent company’s conduct as sufficient to amount to a repudiation of their respective contracts.

In arriving at his final conclusion that the arbitrators were incorrect in their award the learned trial judge said:

“The conclusion is clear and it is that the applicant’s failure in the performance of past contracts is not a relevant factor affecting their ability to perform present ones. This being so there were no facts on which it could be found that the applicants had been guilty of conduct which was a repudiation by them of its contracts. It follows that, as claimed in the fourth ground of appeal, the respondents by their letters themselves repudiated their contracts and it was the duty of the Arbitrator to have made his award on this basis.”

Counsel for the appellants submitted that in coming to his conclusion the learned judge failed to take into account the other fact found by the arbitrators and that on a full consideration of all these facts that the arbitrators were justified in finding that the respondent company had, by its conduct, repudiated the several contracts, the subject to the arbitration. Before, however, considering this matter the question was raised at the appeal as to whether the award of the appeal committee included the award of the first arbitrator, but this point was conceded by counsel for the appellants and undoubtedly the appeal committee in confirming the first award undoubtedly incorporated this award as a part of their award and in effect the findings of fact and the award that we have to consider is that by the first arbitrator.

A further question also arose as to whether the courts have to accept the award without examining and considering the findings of fact as set out by the arbitrator. In my view the findings of fact form part of the award and it is the duty of the court to consider these findings and determine whether they justify the arbitrators’ conclusions in law and their final award. The findings of fact in this case appear on the award and are a part of the award, and the question before the court was whether the arbitrator’s conclusion in law was justified on these facts. Here clearly, in my view, was a legal proposition on which the whole award depended, and which the court was asked to examine, and then to determine whether the arbitrators had come to a correct or erroneous decision. The respondent’s case was that the decision was an error of law apparent on the face of the award.

By the Law of Contract Act (Cap. 23) the common law of England as related to contracts extends to and applies to Kenya but subject to the modifications in the Act. The arbitrator’s award was that the respondent company’s claim for damages against each of the appellant companies failed as the respondent

company had, by its conduct, repudiated each of the contracts with the appellant companies. This finding was made by way of alternative awards as set out in paras. 1 and 2 but in effect these alternatives both amount to the same finding that the respondent company's conduct was such as to justify the appellant companies regarding this as a renunciation of the several contracts. There are a number of reported cases in England on this question to which I would first refer. I consider that the law applicable was most fully set out and explained in the House of Lord's decision in *Forslind v. Bechely Crundall* (4). Counsel for the appellants largely relied on this case in his submissions to this court and I would refer to two passages from the judgments in this case. First, in the judgment of Lord Shaw where he states:

"In such circumstances, with the urgencies of business and of markets necessitating prompt compliance with obligations, I think upon the whole that it is fair, without abandoning the idea underlying Lord Coleridge's language, to take the proper and more workable propositions of Lord Selborne in the *Mersey Steel and Iron Co.* case (5) (9 App. Cas. at p. 438) – 'you must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other' – and of Lord Herschell in *Carswell v. Collard* (6) (20 R. (Ct. of Sess.) at p. 48): 'Of course, the question was not what actually influenced the defender, but what effect the conduct of the pursuer would be reasonably calculated to have upon a reasonable person.' "

and then further to the following passage from the judgment of Viscount Haldane where he stated this:

"But the case made by the appellant is, not that a reasonable time has elapsed so that in this respect there was a breach of contract, but that the conduct of the respondent was such as to evince the intention to make default in the performance of the contract as a whole, in such a fashion that the appellant was entitled to elect to treat it as repudiated in toto, without waiting for the arrival of the time at which specific implement could in the ordinary course be demanded. Whether what amounted to such repudiation actually took place is largely a question of fact, to be determined by consideration of the circumstances and of the action of the respondent in these circumstances . . . In Scotland, as in England, it is that the pursuer is dispensed from waiting for the arrival of the stipulated period for performance, if the defender has intimated in advance an intention to refuse to perform his obligations under it, and the pursuer elects to treat this as an entire breach and to act on it. If the defender has behaved in such a way that a reasonable person would properly conclude that he does not intend to perform the obligations he has undertaken, that is sufficient."

The matter is also very succinctly stated by Devlin, J. in *Universal Cargo Carriers Corporation v. Citati* (3) ([1957] 2 All E.R. at p. 84):

"A renunciation can be made either by words or by conduct, provided it is clearly made. It is often put that the party renouncing must 'evince an intention' not to go on with the contract. The intention can be evinced either by words or by conduct. The test of whether an intention is sufficiently evinced by conduct is whether the party renouncing has acted in such a way as to lead a reasonable person to the conclusion that he does not intend to fulfil his part of the contract."

In this case the respondent company had not expressly stated its intention to break the contract and the test must be: whether, on the facts as found by the

arbitrators, was the conduct of the respondent company through its representatives such as to have caused a reasonable person to come to the conclusion that the company did not intend to or was unable to fulfil its contracts?

I would refer again to the facts. Fact No. 4 finds that the respondent company made no attempt to purchase any of the coffee necessary to meet its commitments for the six months' period ensuing from April, 1964 during the months of January, February and March while fact No. 5 finds that the respondent company was at the end of March, 1964 short of the amount of coffee required to meet its commitments during the months of April to September, 1964 by a total amount of 5,800 to 6,000 tons. The significance of this shortage at this stage is not clear, it could be that in the "coffee trade" coffee had to be purchased or arranged for during these early months of the year so as to meet the trade commitments later in the year, but apparently it was possible for the trade to anticipate with some degree of accuracy the forecast for a trader's coffee supply in the forthcoming months. That this was the position is borne by findings 6 and 7 when the respondent company had to appoint a Mr. V.V. Vasant, a coffee broker known throughout the trade as "Bachubhai", to endeavour to arrange a settlement of the contracts outstanding with the appellant companies and other members of the Hard Coffee Trade Association. The arbitrator found as a fact that Mr. Vasant acting on behalf of the respondent company informed the appellant companies and other members of the Association that:

- (1) The respondent company was short of 5,800 to 6,000 tons of coffee and would lose five to six million shillings if it had to buy this in.
- (2) The respondent company was unlikely to perform any of its contracts to deliver during any of these months April to September.
- (3) The respondent company requested agreement in principle to effect a settlement of its contracts.

The next finding shows that the respondent and the majority of the members were willing to effect a settlement but that the respondent company failed to make any further proposals on the matter. There is no specific finding to this effect but it does appear clear that the respondent company never at any time told the appellant companies that it was, despite Mr. Vasant's declarations and negotiations, now in a position to supply the coffee.

It appears that the respondent company took no further action and what then followed was that the respondent company failed to perform any of its contracts with the other members of the association as they fell due for performance during the months of April, May and June nor did it make any proposals to settle its liability under these contracts and then on June 16 a provisional liquidator, the Official Receiver, is appointed by the court to act for the respondent company. This liquidation order remained in force from June 16 until July 9 when it was rescinded by a further order of the court but it was during that period that the appellant companies notified the official receiver that they treated the respondent company's failure to deliver coffee under the contracts with other members of the Association in April, 1964 as a repudiation of their contracts with effect from April 30, 1964.

There are no other facts showing how the Official Receiver was appointed as a provisional liquidator and counsel for the appellants accepts that this appointment does not mean that the respondent company was insolvent but he regards this as another cause justifying the appellant companies' decision to regard the various contracts as having been repudiated by the respondent company.

The learned judge does not appear to have placed much value on Mr. Vasant's negotiations and the statements he made on behalf of the respondent company.

He based his judgment on the fact that the failure in the performance of other contracts was not a relevant factor affecting the ability to perform the present contracts.

On this question it is clear that what must be considered are the facts as known to the purchasers, the appellant companies, at the particular time at which each company came to its decision and also what effect these known factors would have had on a company judging its standard from that of the reasonable person. The appellant companies were entitled to take into account all the relevant factors known to them at the time and the arbitrators in deciding whether these companies were justified in their decisions must consider and take into account all these relevant factors. The appellant companies would not be bound to rely only on the reasons given in the letters of repudiation written to the provisional liquidator. The following short extract from the judgment of Lord Sumner in *Bank Line Ltd. v. Arthur Capel & Co.* (7) ([1919] A.C. at p. 454) sets out the correct position:

“The question must be considered at the trial as it had to be considered by the parties, when they came to know of the cause and the probabilities of the delay and had to decide what to do. On this the judgments in the above cases substantially agree. Rights ought not to be left in suspense or to hang on the chances of subsequent events. The contract binds or it does not bind, and the law ought to be that the parties can gather their fate then and there.”

To summarise the facts again, these shew that the respondent company was very much in short supply of coffee and attempted to settle these contracts, and then there were the definite statements of its agent Mr. Vasant to the effect that the company was unlikely to perform any of its contracts during the months of April to September, and then the subsequent failure of the company to carry out its contracts with other members of the association in the months of April, May and June, the fact of the appointment of the provisional liquidator at the end of June and also the fact that the respondent company had taken no steps to settle these contracts. These were, in my view, all circumstances which clearly supported the findings of the arbitrators to the effect that the appellant companies were justified in their conclusion that the respondent company had by its conduct repudiated the several contracts.

There were therefore in my view sufficient facts to support the findings of the arbitrators’ award and I would allow this appeal and set aside the decision of the High Court and order that the award of the appeal committee be reinstated.

I would allow the appellants the cost of the proceedings in the High Court with a certificate for two counsel and I would also allow the appellants the costs in this court and also a certificate for two counsel.

Sir Charles Newbold P: This is an appeal from a decision of a judge of the High Court given on an application to set aside an award made by an appeal committee on an appeal from an award made by an arbitrator. The judge allowed the application and directed that the award be remitted to the appeal committee and he also gave a direction in respect of the costs of the arbitration. The order made consequent upon the judge’s decision set out that the award of the appeal committee be set aside and remitted to the appeal committee; but it is not clear what this means or what the appeal committee was to do following the remission. The terms of the awards of the appeal committee and of the arbitrator are set out in the judgment of Duffus, J.A.; in addition, his judgment sets out the facts and I find it unnecessary to restate these matters.

Two main issues were argued on the appeal; first, whether, having regard to the terms of the award of the appeal committee, the judge had any jurisdiction either to set aside the award or to remit it to the appeal committee; and, secondly, whether on the facts found in the award of the arbitrator, which it was accepted was impliedly incorporated into the award of the appeal committee, the arbitrator was in law justified in his alternate findings either that the respondent had repudiated each of the contracts made with each of the appellants or that the respondent's conduct was such as to entitle each of the appellants to infer that in respect of each contract the respondent did not intend to implement his obligation under the contract.

Section 12 of the Arbitration Act (Cap. 49) gives to the court a power to set aside an award when an arbitrator has misconducted himself or the award has been improperly procured; and these proceedings were apparently taken out under that section. It is not suggested that there was any misconduct on the part of the appeal committee or the arbitrator (whom I shall collectively refer to as the arbitrators) other than the fact that the arbitrators had misdirected themselves in law. If the parties to a dispute choose to refer the determination of that dispute, whether it be on a matter of fact, or a matter of law or a mixed matter of fact and law, to an arbitrator, then the parties have chosen their own tribunal and neither should have the right, save for a very good reason, to set aside the award. A good reason for setting aside the award would obviously be, as is set out in s.12 misconduct of the arbitrator or the improper procuring of the award. It has also been held (see *Tame v. Zagoritis* (8)) that another good reason is where an error of law is apparent on the face of the record, though as was pointed out by this court in *Sohan Lal v. East African Builders' Merchants* (1), it is perhaps unfortunate that this ground for upsetting an award exists. It was urged that this court should now take the opportunity to abolish this ground for upsetting an award. I would not, however, do so for two reasons; first, it has been well established as a ground for a very long time; and, secondly, so long as the ground is kept within proper limits its existence may enable the courts to correct a manifest injustice. In the *Sohan Lal* case (1) this court followed a decision of the Privy Council in *Champsey v. Jivraj Balloo* (9) and held that an error of law on the face of the record only exists where there appears in the award, or in some document incorporated therein, some legal proposition which is the basis of the award and which is erroneous. It has been urged on behalf of the respondent that this court is not bound to English decisions and that it should over-rule the decision in the *Sohan Lal* case (1) as that decision was given at a time when this court was subordinate to the Privy Council. It is clear that this court is not bound by any English decision, whether given before or after Independence. Nevertheless this court would pay due regard to the decision of any Commonwealth court where a similar system of law to that appertaining in East Africa exists and will, of course, pay especial regard to the decision of the English courts, especially where those decisions enunciate the common law or equity or interpret statutes of general application or statutes which have been substantially copied in East Africa. As regards previous decisions of this court, whether before or after Independence, I would not wish to express an opinion as to the precise application of the doctrine of stare decisis as the matter was not fully argued before us and in any even I am quite convinced that the decision in the *Sohan Lal* case (1) was correct and should be followed. The question therefore is: was there in the award of the arbitrators any legal proposition which was the basis of the award and which could be said to be erroneous? In my view there quite clearly was none. It does not appear that the trial judge considered that there was any such legal proposition, as he appears to have based his decision upon the ground that the facts set out in the award did not justify the arbitrators in

finding that the respondent had been guilty of conduct which was a repudiation of its contracts. As there was no legal proposition in the award which was erroneous and which was the basis of the award, and as there was no suggestion of any other form of misconduct on the part of the arbitrators, it follows that the trial judge had no jurisdiction to set aside the award and that the appeal should succeed.

In view of my opinion on the first issue it is strictly unnecessary to consider the second. On the facts found by the arbitrators, however, I am satisfied that the only reasonable inference which each of the appellants would draw from the conduct of the respondent was that the respondent did not really mean to fulfil his part of the contract unless, of course, conditions changed radically. In these circumstances each of the appellants was not required to remain in suspense as to whether or not the contract was still in existence and was entitled to do what each appellant did, that is, to inform the respondent that the conduct of the respondent would be treated as a repudiation by it of the various contracts. On this point it was urged that the grounds given in the notice of renunciation were not by themselves sufficient, and that none of the other facts could be prayed in aid to establish circumstances which would justify the appellants in giving the notice. In my view the fact that one party to a contract in his notice states that he treats the actions of the other as repudiating the contract for a reason which by itself is not sufficient to justify such a stand, does not preclude that party from giving evidence of other facts which, if they existed and were known to him, would justify him in that attitude. It is clear that if no specific reason had been given for the notice, then the party giving the notice could pray in aid all facts which would be of assistance to him; and I cannot see that because he has given one reason which by itself is insufficient he is thereby precluded from setting out all the other reasons and using them as justification for his notice. As regards this issue I agree with the views of Duffus, J.A.

For these reasons I would allow the appeal and set aside the decision of the High Court and order that the award of the appeal committee be reinstated. I would allow the appellants the costs of the proceedings in the High Court, with a certificate for two counsel, and I would allow the appellants the costs of this appeal, with a certificate for two counsel.

I think I should here state that the decision of the judge included an award of costs before the arbitrator and it was accepted by both parties that this decision could not stand as the judge had no power to make an award of costs before either the appeal committee or the arbitrator.

Spry JA: The facts out of which this appeal rose are set out in the judgment of Duffus, J.A., and I shall not repeat them.

The first ground of appeal argued by counsel for the appellants was that the learned judge of the High Court erred in not considering whether there was an error of law apparent on the face of the arbitrator's award (which I am satisfied is to be regarded as incorporated in the award of the appeal committee) or, in the alternative, in deciding, if he did so decide, that there was such an error.

Before dealing with the merits of that ground of appeal, it may be convenient to dispose of a submission made by counsel for the respondent company. Counsel submitted that this court should look to the Arbitration Act (Cap. 49) and not consider itself bound by English decisions or by decisions of this court given when its decisions were subject to appeal to the Judicial Committee of the Privy Council and should treat English decisions as irrelevant, except so far as this court might agree with and adopt the reasoning to be found in them. With respect, I cannot agree. I would, of course, agree that this court is not bound by English decisions but in the interpretation of the Arbitration Act,

much of which (including ss. 11 and 12) is clearly derived from the English Arbitration Act, 1889, respect should be shown to English decisions on that Act, particularly those given prior to the enactment of the Kenya statute because, in the absence of any indication to the contrary, it is reasonable to suppose that the legislature enacted the Kenya statute with knowledge of those decisions. As regards the pre-independence decisions of this court, the legislature has, on each of the constitutional changes, expressly maintained the existing law and therefore those decisions should carry just as much weight as if there had been no constitutional changes.

I do not propose to review all the relevant English cases. Under the statute law, an award can only be set aside for misconduct on the part of the arbitrator and that has been extended by interpretation (subject to an exception not relevant to these proceedings) to include an error of law apparent on the face of the award (*Landauer v. Asser* (10)). In this respect, the law of East Africa is the same. In *W.J. Tame Ltd. v. Zagoritis Estates Ltd.* (8), Sir Alastair Forbes, V.-P., said (before dealing with the exception):

“There is no doubt that an arbitration award can be set aside by the court if an error of law appears on the face of the award.”

According to the statute, the power to remit is a wider one, indeed it appears to be an unfettered discretion. In practice, however, the courts in England have only exercised that discretion for very limited reasons. The classic exposition of those reasons is contained in the judgment of Chitty, L.J. in *Re Montgomery, Jones & Co. and Liebenthal & Co.* (11) (78 L.T. at p. 408), when he gave, as the only reasons of which he was aware:

“(1) where the award is bad on the face of it (2) where there has been misconduct on the part of the arbitrator (3) where there has been an admitted mistake, and the arbitrator himself asks that the matter may be remitted; and (4) where additional evidence has been discovered after the making of the award.”

It is true, as was pointed out in *Re Baxters & Midland Ry. Co.* (2) and in *Margulies Bros. Ltd. v. Dafnis Thomaides & Co. (U.K.) Ltd.* (12), that this statement cannot limit the court’s discretion and does not purport to be exhaustive but the fact remains that, so far as I am aware, there has been no material departure from it. The courts in East Africa are not, of course, constrained to follow the English practice but they should, in my opinion, only go outside it for very good reason.

What must always be borne in mind is that there is no appeal, in the ordinary sense, from the award of an arbitrator. The parties have chosen their own tribunal and they must, generally speaking, accept the result whether it is right or wrong. The circumstances in which the court will intervene are the exceptions to that general rule.

Applying these principles to the present case, can it be said that there is an error of law on the face of the award? In this connection, reference may be made to the case of *Sohan Lal v. East African Builders’ Merchants* (1). That case arose out of an arbitration under the Civil Procedure (Revised) Rules, 1948, and the court was concerned with the question whether an objection to the legality of the award was apparent upon the face of it. In his judgment, Lockhart-Smith, Ag. V.-P., quoted and adopted the following passage from the judgment of the Judicial Committee in *Champsey Bhara & Co. v. Jivraj Balloo Spinning and Weaving Co. Ltd.* (9):

“An error of law on the face of the award means, in their lordships’ view, that you find in the award or a document actually incorporated thereto,

as for instance a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can say is erroneous.”

He went on to find that in the case with which he was dealing the arbitrator had neither stated a principle of law correctly and then wrongly applied it nor had he erroneously stated any proposition of law.

It seems to me that the position is exactly the same here. Certainly, no proposition of law, right or wrong, appears on the face of the award. There are certain findings of facts, set out in twelve paragraphs and then the arbitrator’s conclusion, in the alternative, that the respondent company had either repudiated its contracts with the appellant companies or had so acted that they could reasonably infer that the respondent company would fail to perform its part of those contracts and could properly anticipate the breach of them. The arbitrator then held that the claim failed and made an order as to costs. Apart from the fact that no proposition of law is expressed in the award, I find it impossible to extract any proposition of law with certainty.

As counsel for the appellants pointed out, the learned judge nowhere said expressly that there was an error of law on the face of the award. It appears that his ground for reversing the award was that the arbitrator had based his decision on the fact that the respondent company had been in breach of other contracts with other persons, because there were no other facts to support it. With respect, I do not think that is correct: the arbitrator made several findings of fact and it is impossible to tell how much weight he gave to any particular fact or combination of facts. The learned judge also said that the breach of other contracts was not relevant to the question whether a breach of his contracts with the appellants could properly be anticipated. Again, I do not think, with respect, that that is correct. I think the arbitrator was entitled to take all the circumstances into account. Whether he gave the correct weight to any particular facts is, of course, a different matter. Furthermore, even if the arbitrator took into account matters which he should have ignored, that in itself would not be a reason for interfering, unless it could be shown that that error was essentially the basis of his decision, which, as I have said, is not the case here.

As I see it, the award contains no proposition of law. The arbitrator merely set out certain facts and then drew an inference from them. I cannot see therefore that there is any error of law apparent on the face of the award. No other form of misconduct on the part of the arbitrator has been alleged. I can see no justification, therefore, for setting aside the award. Similarly, it has not been shown that there is any mistake apparent on the face of the award which would require that it be remitted.

I do not think it was open to the learned judge to consider whether the arbitrator was correct in his conclusion, and I would express no opinion on that question. I would hold that there was no justification for setting aside or remitting the award and I would allow the appeal.

Appeal allowed.

For the appellants:

Bryson, Inamdar and Bowyer, Mombasa

J. A. Mackie-Robertson, Q.C. and I. T. Inamdar

For the respondent:

Patel and Patel, Mombasa

P. J. Wilkinson, Q.C., A. G. Mehta and C. K. Kanji

South British Insurance Co Ltd v Samiullah
[1967] 1 EA 659 (CAN)

Division: Court of Appeal at Nairobi
Date of judgment: 7 July 1967
Case Number: 3/1967 (141)
Before: Charles Newbold P, Sir Clement de Lestang VP and Law JA
Sourced by: LawAfrica
Appeal from: The High Court of Kenya at Nairobi – Miles, J.

[1] Contract – Waiver – Of right to repudiate contract of insurance obtained by concealment – Whether waiver to be implied from delay in repudiation after true facts known.

[2] Insurance – Repudiation of policy – Policy obtained by concealment – Insurer delays after becoming aware of true facts – Whether delay amounts to waiver of right to repudiate.

[3] Practice – Pleading – Amendment – Effect of – Whether amendment of plaint relates back to date of original plaint – Whether such relation back (if it exists) operates to preclude court from taking notice of date of amendment if such date is material.

Editor's Summary

The respondent had a motor policy with the appellant insurance company, covering his car against theft, which policy expired on November 7, 1964. On November 20, 1964 the respondent learnt that his car had been stolen, and later that day he went to the offices of the appellant and handed over a cheque for the renewal premium which he had been told would be a condition precedent to the issue to him of a new policy valid from November 7. Still later on November 20 the respondent, having collected his new policy, notified the appellant that he wanted to make a claim as his car had been stolen. A Mr. Hicks, the manager of the appellant's motor insurance department, there and then concluded from what he was told by the respondent that the respondent must have known that the car had been stolen before receiving the new policy. Instead of repudiating the policy, however, the appellant later wrote to the respondent rejecting the claim as not coming within the policy; and later still the appellant cashed the respondent's cheque for the premium and after a further lapse of time on May 10, 1965, it paid the respondent the amount of his claim. The appellant then, on May 20, 1965, sued the respondent in the High Court claiming the return of the amount paid. The plaint as originally framed alleged that no theft had in fact occurred and that the money was paid over on a fraudulent representation by the respondent that the car had been lost by theft; but in November, 1965 the plaint was amended to allege in the alternative that the appellant was entitled to avoid the policy because it had been obtained by the respondent wrongfully concealing that the car had been stolen before the insurance had been effected. At the trial the appellant conceded that the car had in fact been stolen. The trial judge found that at the time he got the policy the respondent knew of the theft which would have entitled the appellant to repudiate, but in the circumstances the appellant had waived its right to repudiate, relying inter alia on the delay in amending

the plaintiff. The appellant appealed and the respondent cross-appealed. One of the points argued by the appellant was that the amended plaintiff related back to the date of the original plaintiff so that the judge should not have found that there was a delay in repudiating the policy amounting to a waiver.

Held –

- (i) even if an amended plaintiff does relate back to the date of the original plaintiff for some purposes, such relation back cannot operate so as to preclude

a judge from taking note of the date of the amendment if such date is material to the issues for decision (as it was in this case);

- (ii) on the facts the trial judge should have found that the appellant had knowledge on the day when the insurance was effected that the respondent had concealed a material fact before the contract of insurance was effected;
- (iii) that from that moment, or a reasonable time thereafter, the appellant should have repudiated the policy;
- (iv) that when it paid the claim the appellant had constructive notice (through Hicks) of the facts and could not recover the money (*Bilbie v. Lumley* (2) applied).

Appeal dismissed. Cross-appeal allowed.

Cases referred to in judgment:

- (1) *Eastern Radio v. Patel*, [1962] E.A. 818.
- (2) *Bilbie v. Lumley* (1802), 2 East 469; 102 E.R. 448.

Judgment

Law JA: This is an appeal against the judgment and decree of the High Court of Kenya in Civil Case No. 121 of 1965. The plaint in that suit was filed on May 20, 1965, and it claimed from the defendant the sum of Shs. 9,800/- which the plaintiffs, an insurance company, had paid to the defendant on May 10, 1965, under a policy of motor insurance, on the footing that the motor car, the subject of the said policy, had been lost by theft. The plaintiffs alleged that no theft had in fact occurred, and that the money was paid over on a fraudulent representation made by the defendant that the vehicle had been lost by theft. On November 25, 1965, leave of the court having been obtained, an amended plaint was filed containing an alternative cause of action alleging that at the time the insurance was effected the defendant wrongfully concealed from the plaintiffs a material fact then known to him but unknown to the plaintiffs, namely that the vehicle had been stolen to his knowledge prior to the insurance being effected. The plaintiffs accordingly claimed that they were entitled to avoid the contract of insurance and to recover the sum of Shs. 9,800/- paid thereunder. The claim based on a fraudulent misrepresentation was not abandoned until the very end of counsel for the plaintiffs' opening address at the trial of the suit, when he conceded that the car had in fact been stolen. The following agreed issues were then framed:

- "1. When was the contract completed?
- 2. Did the defendant conceal a material fact prior to the completion of the contract?
- 3. If the answer to issue 2 is in the affirmative, did the plaintiffs waive such concealment or are they estopped from relying thereon?"

The learned trial judge found that the contract was concluded on the morning of November 20, 1964, at the plaintiffs' office, and that at that time the defendant, on his own admission, was aware of the theft of the car but did not disclose it, this being a material fact which in ordinary circumstances would have entitled the plaintiffs to avoid the policy. He found that the plaintiffs did not acquire full knowledge of this fact until May 19, 1965, and that instead of immediately repudiating the policy they filed suit on the following day, claiming repayment on the ground of a fraudulent representation, and that it was not until

some months later that they amended their plaint and for the first time claimed to be entitled to avoid the policy. He commented on the fact that the plaintiffs had not returned the premium, and concluded as follows:

“In these circumstances I see no escape from the conclusion that the plaintiffs have waived their right to repudiate the policy. There will accordingly be judgment for the defendant with costs.”

The plaintiffs have appealed to this court from the decision and the defendant has cross-appealed. Henceforth in this judgment I will refer to the plaintiff company as the appellant, and to the defendant as the respondent. The grounds of appeal are as follows:

- “1. The learned judge having found that there was non-disclosure of a material fact sufficient to entitle the appellant to avoid the policy of insurance erred in holding that the appellant had waived its right to repudiate the policy.
2. The learned judge erred in failing to find that payment made on the representation and assurance of the respondent that he was not aware of the theft of the car at the time of the issue of the policy (which representation and assurance the judge has held to be false) was effected without full knowledge of the facts and could not therefore amount to waiver.
3. The learned judge erred in finding that the appellant had waived its right to repudiate the policy upon grounds which were not pleaded in support of the alleged waiver and which in any event did not amount to waiver.”

I will deal with the third ground first. As regards the allegation that the judge found that the appellant had waived its right to repudiate the policy on grounds that were not pleaded, the relevant paragraph of the defence is No. 7 which reads as follows:

- “7. Further or in the alternative the plaintiff is estopped from relying on the alleged wrongful concealment of the alleged material fact or alternatively the plaintiff has waived any right . . . it had to repudiate the suit policy on the ground of such non-disclosure by reason of the facts, namely, that by their letter of November 27, 1964, the plaintiff repudiated the defendant’s said claim made under the suit policy on the ground of the non-disclosure alleged in para. 7A of the plaint but despite its previous objections and after full investigations regarding such objections the plaintiff deliberately recognized the suit policy as valid and binding on it and admittedly made payment thereunder sometime in May, 1965 before allegedly repudiating the suit policy in November, 1965 or thereabouts.”

The judge found that the appellant became possessed of full knowledge of the facts allegedly concealed on May 19, but instead of repudiating the policy filed suit on the following day affirming the policy, and that by not claiming the right to repudiate the policy until the amended plaint was filed more than five months later, it must be deemed to have waived the right to repudiate the policy. I have no doubt at all that this finding comes within para. 7 of the defence as pleaded, and in particular within the words:

“the plaintiff deliberately recognized the suit policy as valid and binding on it . . . before allegedly repudiating the suit policy in November, 1965 or thereabouts.”

As to whether the delay relied upon by the judge as constituting waiver did not amount to waiver, the argument of counsel for the appellant is that an amended plaint relates back to the date of the original plaint; the original plaint was filed on May 20, 1965, only one day after the date upon which the

judge considered that the appellant became aware of the full material facts concealed by the respondent; and that accordingly the plaintiff repudiated the policy at the first possible opportunity so that the judge's finding that the appellant affirmed the policy and did not purport to repudiate it until the inordinate delay of five months is not justified. Counsel quoted English authority for his proposition that an amended plaint relates back for all purposes to the date of the original plaint, and some support for this view is to be found in the judgment of Sir Trevor Gould, J.A. in *Eastern Radio v. Patel* (1). Of the other judges in that appeal, Newbold, J.A. (as he then was) was of the contrary opinion, and the President, Sir Ronald Sinclair, said he preferred to leave the question open. I do not feel it necessary to express any definite opinion on the point in this case, because even if an amended plaint does relate back to the date of the original plaint for some purposes, such relation back cannot in my view operate so as to preclude a judge from taking notice of the date of the amendment, if such date is material to the issues for decision, as it undoubtedly was in this case.

Ground 2 of appeal was to the effect that the judge should have found that the payment made by the appellant to the respondent of his claim under the policy was effected without full knowledge of the facts and could not therefore amount to waiver. This ground was not pressed, no doubt because the judge did not rely on this payment as evidence of waiver.

Ground 1 was to the effect that the judge, having found that there was material non-disclosure on the part of the respondent, erred in holding that the appellant had waived its right to repudiate the policy. I propose to deal with this ground together with ground 2 (iv) of the respondent's cross-appeal. This latter ground supports the judge's findings but would take it further. It reads as follows:

“(iv) The learned judge should have found that Mr. MacDonald authorized the said payment with knowledge that the respondent was aware of the said theft before obtaining the said policy and that accordingly the appellant waived its right to avoid the said policy . . .”

In other words, counsel for the appellants contends that the grounds of waiver relied on by the judge, all of which occurred after payment of the respondent's claim by Mr. MacDonald on May 8, 1965, were insufficient to constitute waiver, whereas counsel for the respondent contends that when payment was made, the appellant was already fully aware that the respondent knew of the theft of his vehicle before the contract of insurance was effected, and in these circumstances was precluded from avoiding the policy subsequent to such payment.

To decide this issue, it is necessary to examine the evidence in some detail. The respondent's original policy expired on November 7, 1964. It was made clear to him by an employee of the appellant, Mr. Acharya, that the appellant would issue him with a policy valid from that date, but not until the respondent paid the premium. At about 7.30 a.m. on November 20, 1964, the respondent heard from his brother that the car had been stolen. At about 11 a.m. on the same day the respondent went to the offices of the appellant and handed a cheque for the full amount of the premium to Mr. Acharya who told him to return in the afternoon to collect the policy. The respondent returned at about 2 p.m. and was handed the policy. After examining the policy, the respondent said it was alright but he wanted to claim as the car had been stolen. Mr. Acharya reported this to Mr. Hicks, who is in charge of the appellant's motor insurance department. This is what Mr. Hicks had to say about what happened next, according to the record, at p. 68:

“I asked him when he came to know that the vehicle was stolen and he replied that his brother had telephoned from Kampala early that morning.

I asked him where the vehicle had been stolen. He replied 'From Kampala outside the place where my brother was staying'. I asked him when it was stolen. He said 'In the early morning of the 20th' . . . I told him that in my opinion he was aware that the vehicle had been stolen before receiving the policy from the company. He said nothing."

Again, at p. 73:

"It is quite clear that the vehicle had been stolen at 6 a.m. and that the defendant had known of this before he had paid the cheque. I made up my mind before November 27, 1964, that there was concealment in my view."

Then he was asked:

"Have you subsequent to November 27, 1964, come to know of any facts which affected your decision on November 27, 1964?"

and he replied:

"No."

Mr. Hicks was accepted by the judge as a truthful witness. The respondent also admitted in evidence that he knew of the theft before he paid the cheque and received the policy. His explanation for not revealing this material fact until after he received the policy was that he considered the contract of insurance to have been completed on an earlier date, November 16 or 18, when he had a telephone conversation with Mr. Acharya, so that he was not on November 20 under any duty to disclose the material fact.

In view of the evidence set out above, and the fact that the judge found that the contract was not effected until the premium had been paid at about 11 a.m. on November 20, I cannot understand why the judge did not find, as in my opinion he ought to have found, that the appellant had knowledge, as early as the afternoon of November 20, that the respondent had concealed a material fact before the contract of insurance was effected. From that moment, or within a reasonable time thereafter, the appellant could have and in my opinion should have repudiated the policy. Instead, what happened? On November 27, 1964, the appellant through Mr. Hicks wrote to the respondent saying, *inter alia*, "I regret that I am not prepared to accept your claims as it is quite clear that this insurance cover was obtained after your vehicle was stolen"; in other words, the claim was rejected as not coming within the policy, but the policy itself was not repudiated. After a lapse of some fifty days, during which consideration was no doubt being given to the matter, the respondent's cheque was cashed by the appellant, a fact consistent with affirming the policy and inconsistent with its repudiation. On May 8, 1965, the appellant's manager, Mr. MacDonald, interviewed the respondent, and accepted "on a balance of probabilities" his assurance that he had not known of the theft when he paid the premium although Mr. Hicks, who knew this was untrue, was present at the time; and Mr. MacDonald ordered payment to the respondent of the full amount of his claim. It is clear that this payment was made at a time when the appellant, through its employee Mr. Hicks, constructively had full knowledge of the material fact concealed by the respondent that he knew of the theft of his car before the contract of insurance came into effect. Money paid under these circumstances, with full knowledge on the part of the insurer, cannot be recovered (*Bilbie v. Lumley* (2)).

It follows from what I have set out above that in my opinion the appeal fails and the cross-appeal succeeds. I would support the judgment of the learned judge in the court below, though to some extent on different grounds. I would dismiss the appeal, with costs, and allow the cross-appeal, also with costs.

Sir Charles Newbold P: I have had the advantage of reading in draft the judgment of Law, J.A. and I agree with it. There will be an order in the terms proposed by him.

Sir Clement De Lestang VP: I agree and have nothing to add.

Appeal dismissed, with costs. Cross-appeal allowed, with costs.

For the appellant:

Macdougall & Wollen, Nairobi

R. N. Sampson

For the respondent:

Hoshang Shroff, Nairobi

Neogy v Neogy
[1967] 1 EA 664 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	25 August 1967
Case Number:	6/1967 (149)
Before:	Sheridan J
Sourced by:	LawAfrica

[1] Divorce – Decree absolute – Whether Uganda court has power to abridge time for applying for, after decree nisi – Divorce Act, s. 38 (1) (U.).

Editor's Summary

There is no power in Uganda for the court to abridge the six month period provided by the Divorce Act, s. 38 (1) between decree nisi and decree absolute.

Case referred to in judgment:

(1) *Semei Nyanzi v. Mrs. Karla Acheng* (Uganda High Court Civil Revision No. 75 of 1967 (unreported)).

Judgment

Sheridan J: This is an application by notice of motion by the petitioner in Divorce Cause No. 6 of 1966 for an order expediting and making absolute the decree nisi which was passed in his favour on July 20, 1967.

The grounds of the application, as appear from the supporting affidavits, are that Miss Barbara Lapchick, with whom the petitioner admitted in his discretion statement that he had been living, is expecting his child on or about September 1, 1967 and they naturally wish to get married so that the child can be born in wedlock. Under the Matrimonial Causes Act, 1965 in the United Kingdom there would be no difficulty about such an application: see Rayden on Divorce (10th Edn.), p. 892.

However, there is an apparent stumbling block under the Uganda Divorce Act (Cap. 215), s. 38 (1) which provides:

“38(1) No decree nisi of dissolution or nullity of marriage shall be made absolute till after the expiration of six months from the date thereof, or such longer period as the Chief Justice may by rule prescribe.”

No such rules have been prescribed. Certainly the Chief Justice would not be entitled to prescribe a shorter period. Sub-ss. (2) and (3) of the section go on to provide:

- “(2) During that period any person may show cause why the said decree should not be made absolute by reason of the same having been obtained by collusion, or by reason of material facts not having been brought before the court.
- (3) On cause being so shown the court shall make the decree absolute or reverse the decree nisi, or require further inquiry, or otherwise deal with the case as justice may demand.”

From this, counsel for the petitioner argues that as under sub-s. (3) the decree may be made absolute before the expiration of six months I should ignore the limitation in sub-s. (1) and read into the sub-section a shorter period than six months. I confess that this seems to be doing violence to the clear wording of the section. In the instant case there has been no suggestion of collusion or of invoking sub-ss. (2) and (3).

It appears that the Act is a hotch-potch of the earlier English Matrimonial Causes Acts 1857, 1860, 1866 and 1868. It is not difficult to point out inconsistencies in it. For instance, s. 39 provides for appeals against all decrees and orders. The only definition of a decree is a decree nisi (s. 9). Under the East African Court of Appeal Rules 1954, r. 54 (2) notice of appeal has to be filed within fourteen days. Unless s. 40 of the Act, which permits remarriage of the parties when the time limit for appealing against a decree of dissolution has expired, is read as limited to an order making the decree of dissolution absolute there could be two subsisting legal marriages at the same time, which cannot have been the intention of the Legislature. This anomaly has already been pointed out by Russell, J. in *Semei Nyanzi v. Mrs. Karla Acheng* (1).

After carefully listening to the submissions of counsel for the applicant and the authorities which he cited I do not consider that I would be justified in departing from the clear wording of s. 38 (1). There is no precedent that I am aware of for prescribing a longer rather than a shorter period.

While I sympathize with the petitioner I am bound by the clear terms of the local Act. In fact I might be rendering him a disservice if I made an order for the decree nisi to be made absolute, which might turn out to be abortive.

The application is dismissed. The Attorney General will have his costs.

Application dismissed.

For the applicant:

R.E. Hunt, Kampala

For the Attorney General:

G. M. Akankwasa (State Attorney, Uganda)

Anselme v Uganda
[1967] 1 EA 666 (HCU)

Division: High Court of Uganda at Kampala

Date of judgment: 14 February 1967

Case Number: 1066/1966 (167)

Before: Sir Udo Udoma CJ
Sourced by: LawAfrica

[1] Criminal law – Plea – Accused required to plead several times on different occasions to same charge – Whether proceedings regular.

Editor's Summary

The appellant was convicted on a plea of guilty. The record below was confused and it was clear that the appellant had admitted the offence, but it appeared that he had been required to plead before different magistrates on different occasions and that at some stage another accused had been brought into the proceedings without any fresh plea being taken from the appellant.

Held – the proceedings were fundamentally irregular and the conviction was bad.

Case remitted for hearing de novo.

No cases referred to in judgment.

Judgment

Sir Udo Udoma CJ: This is an appeal against conviction and sentence. It is brought by Hingiro Anselme against the decision of the Chief Magistrate, Magistrate's Court, Mengo. The ground of complaint as stated in the petition by the appellant is that the learned trial chief magistrate was wrong in law in convicting him on a plea of guilty when in fact he did not plead guilty nor did he intend to do so.

Normally, in an appeal of this sort where the appellant complains that the plea of guilty was entered against him erroneously and that he did not plead guilty nor did he intend to have admitted the facts alleged in the charge against him, there should have been an affidavit sworn to by the appellant in support of his allegation. There is no such affidavit filed in this court by the appellant.

Indeed on a perusal of the record, it is quite plain that the appellant throughout the proceedings pleaded guilty to the charge and the plea was recorded in the manner in which he expressed it. He first said to the first count: "I admit"; and to the second count: "I admit". That was on November 8, 1966.

On November 14, 1966, when he appeared before the chief magistrate he pleaded specifically in respect to Count 1: "I admit the charge. I had it in my possession"; and, in regard to Count 2 again he pleaded: "I admit I had the ammunitions"; so that as far as the plea of the appellant is concerned there is no substance whatsoever in this appeal.

In normal circumstances therefore this court would not have interfered in any way or disturbed the order of the magistrate convicting the appellant of the charge, because it is quite apparent on the record that he did admit having committed the offences.

Unhappily there are special circumstances which necessitate the court interfering with the conviction of the appellant in this case. The state of the record of proceedings is unsatisfactory; and the appellant appeared to have been brought to court before different magistrates on different occasions for the purpose of his plea on the same offence. On the record also he appeared to

have been convicted about three times for the same charge. It is therefore necessary that the record be examined.

The appellant, Hingiro Anselme s/o Kashonga, was alone charged with two counts of being in possession of firearms without a valid certificate contrary to s. 4 (2) (a) of the Firearms Act. On the second count he was alone charged with being in possession of ammunition without a valid firearms certificate contrary to s. 4 (2) (a) of the Firearms Act. Both offences were stated to have been committed by the appellant on November 7, 1966.

On November 8, 1966, the appellant appeared before Mr. Kawere, Magistrate Grade I, Magistrate's Court, Mengo. The charge was read and explained to him according to the record and he pleaded as follows:

"Count 1: I admit.

Count 2: I admit."

The learned trial magistrate thereupon recorded the following:

"Plea entered guilty."

Thereafter the record appears in the following terms:

"Convicted on his own plea.

Facts: Information was received, the accused person's house was searched and the firearm was found. The accused was arrested.

Sentence: Reserved for sentence and production of the firearm. Accused to appear on November 24, 1966."

Then on November 14, 1966, the appellant appeared in court, but this time before the Chief Magistrate, Magistrate's Court, Mengo. The proceedings which took place on that occasion are quite brief and may be set out as follows:

"Kabaga for State.

Charge read and explained.

Count 1: I admit the charge. I had it in my possession.

P.G. entered.

Count 2: Ad: I admit I had the ammunitions.

P. G. entered.

Court: Accused convicted on his own plea.

Accused R. in C. to November 24, 1966."

On November 24, 1966 the proceedings before the chief magistrate were as follows:

"Charges read and explained to them.

Count 1: Accused 1 pleads: I admit the charge.

Accused 2 pleads: I admit the charge.

P. G. entered.

Count 2: Accused 1 pleads: I admit the charge.

Accused 2 pleads: I admit the charge.

P. G. entered.

Court: Both accused convicted on their own pleas on both counts.

Malik for State: The cases of firearms are to be treated as serious.

1964 there were about 178 of shooting, 1965 it was 203 cases of shooting;

105 were in Buganda. In Buganda in 1966 it seems that they are on the increase.

Accused 1: 'I am visitor to Uganda and I do not know the Uganda laws.'

Accused 2: 'Leniency.'

Sentence: Accused are sentenced to four years' imprisonment each.

Order: The Sten gun and ammunition forfeited and handed to Inspector General of Police for disposal as deemed fit after date of appeal.

(sgd) D.L.K. Lubogo."

From the last entries in the record of proceedings, it is not clear how the appellant who was the only person charged and whose name alone figured in the charge with being in possession of a Sten gun and of ammunition without a valid certificate suddenly became two persons. The name of the so-called second accused was not disclosed in the record and appears nowhere in the proceedings. He is not also mentioned in the charge itself.

There is no record that the charge was at any time amended to include another person who might be described as second accused. Had that happened, it would be understandable that the appellant might have been called upon to plead afresh to the amended or altered charge in terms of the provisions of s. 213 of the Criminal Procedure Code. The so-called second accused could of course plead for the first time to the charge.

I have searched in vain throughout the record of proceedings for the name of the second accused who was suddenly mentioned in the proceedings before the learned trial chief magistrate on November 24, 1966. It is not clear how he was brought into the case.

It is even more puzzling why if the magistrate grade I, Mr. Kawere, had accepted the pleas of the appellant and recorded the same as pleas of guilty and had convicted the appellant on such pleas on November 8, 1966, on the two counts of the charge, and had been given the facts of the case, as the result of which he adjourned to November 24 for production of firearm and sentence, the appellant should not have been brought again to him for sentence on the date fixed by the magistrate. Indeed on the face of the record the appellant was never at all brought before Mr. Kawere.

On November 14, 1966, instead of the appellant being taken before Mr. Kawere he was brought before the chief magistrate who had to take the pleas of the appellant afresh. Thereafter he himself accepted the pleas and recorded them as pleas of guilty, convicted the appellant on the said pleas. Thereafter he remanded the appellant in custody presumably for sentence on November 24, 1966.

It is even more doubtful whether the chief magistrate having convicted the appellant for the second time on November 14, 1966, had any jurisdiction to reopen the case once more on November 24, 1966, thereby setting aside his own order convicting the appellant. Such a practice is plainly and fundamentally irregular. There is no reason recorded indicating why the magistrate had to set aside his order of November 14, 1966, convicting the appellant. It was the duty of the learned trial magistrate grade I to have sentenced the appellant and the appellant ought to have been brought before him on November 24, 1966, to which sentence was reserved.

Furthermore the learned chief magistrate had no jurisdiction to have, without the consent of the appellant and without advising the appellant to withdraw his previous plea of guilty, embarked again on November 24, 1966 in the exercise of calling upon the appellant to plead again, and this time with another accused person whose name was not mentioned in the charge nor even in the record of proceedings.

The irregularities in these proceedings are so glaring and fundamental that the conviction of the appellant cannot be maintained.

Then there is the question of the sentence passed by the learned chief magistrate on the appellant and the so-called second accused. The appellant and the second accused were convicted on their own pleas on two separate counts. The learned chief magistrate sentenced both of them to four years' imprisonment each. It is not clear whether by this order, since there were two counts, that the sentences were to be concurrent or consecutive. The sentence is bad in law and must also be set aside. This appeal is therefore allowed. The conviction of both the appellant and the unnamed second accused is quashed. The sentences are set aside.

The application of Mr. Kakembo, State Attorney, that the case be sent back to the magistrate's court for trial de novo is granted. It is ordered that the case be remitted to the magistrate's court for trial de novo by a magistrate of competent jurisdiction. Order accordingly. It is further ordered that in the event of conviction, the periods already served by the appellant and the second accused be taken into consideration in passing sentence. Court below to carry out this order.

Order accordingly.

The appellant in person.

F.W. Kakembo (State Attorney, Uganda) for the respondent.

For the respondent:

Attorney General, Uganda

Commissioner of Income Tax v Law Society of Kenya [1967] 1 EA 669 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	29 June 1967
Case Number:	7/1967 (142)
Before:	Sir Charles Newbold P, Sir Clement de Lestang VP and Law JA
Sourced by:	LawAfrica
Appeal from:	The High Court of Kenya – Farrell, J.

[1] *Income Tax – Assessment – “Club” – Whether Law Society of Kenya is a “club or similar institution” under E.A. Income Tax (Management) Act, 1958, s. 20 (3).*

Editor's Summary

Before Farrell, J. in the High Court the question arose whether the Law Society of Kenya was for the

purposes of income tax “a club or similar institution all the assets of which are owned or held in trust for the members” under s. 20 (3) of E.A. Income Tax (Management) Act, 1958. Argument was directed to the latter part of the sub-section and it was assumed that the Society was “a club or similar institution”. On appeal by the Income Tax Commissioner the issue was whether the Society was a “club or similar institution”.

Held –

- (i) two of the characteristics of a club or similar institution are, (a) the association must be voluntary,
(b) the existence of rules governing admission of members including the right to refuse admission;

- (ii) under the Law Society of Kenya Act, 1963 advocates licensed to practice are bound to join the Society and the Society has no right to refuse to admit them;
- (iii) the Law Society lacked the two characteristics mentioned under (i) above and accordingly was not a “club or similar institution”.

Appeal allowed, and order of assessment against the Society for year of income 1963 restored and affirmed.

By consent of the parties no order as to costs.

Cases referred to in judgment:

- (1) *Bohemians Club v. The Acting Federal Commissioner of Taxation* (1918), 24 C.L.R. 334.
- (2) *Bennett v. Cooper* (1948), 76 C.L.R. 570.
- (3) *Re St. James' Club* (1852), 2 De G.M. & G. 383; 42 E.R. 920, L.C.

C.A.V.

The following judgments were read:

Judgment

Sir Clement De Lestang VP: The short point for decision in this appeal is whether or not the Law Society of Kenya (which I shall hereinafter call the Society for short) is a members' club within the meaning of that expression in s. 20 of the East African Income Tax (Management) Act 1958. Sub-s. (3) of that section defines “member' club” as “a club or similar institution all the assets of which are owned by or held in trust for the members thereof”. It also defines “member” in relation to a members' club as “a person who, while he is such a member, is entitled to an interest in all the assets of such club in the event of its liquidation”.

In the court below it would appear to have been assumed that the Society was a club or similar institution. There were certainly no arguments pro or contra and the decision of the court depended entirely on whether or not the members of the Society would be entitled to an interest in all the assets of the Society in the event of its liquidation. The court held that they would be and that consequently the Society was a members' club.

Against that decision the Income Tax Commissioner appeals and for the first time it falls to be decided whether the Society is a club or similar institution.

The expression “club” is not defined in the East African Income Tax (Management) Act 1958 or for that matter in any written law in force in Kenya. We have not been referred to any statutory definition and know of none. In such a case it must be presumed that the expression is used in the East African Income Tax (Management) Act 1958 in the popular sense of the term, it being for the court to decide in each case whether any given association is or is not a club. The expression itself is however of common usage and well understood. It is defined in dictionaries, in a number of legal textbooks and in at least two decided cases which I have been able to trace. The Shorter Oxford English Dictionary gives six meanings of the noun “club” of which the following three are relevant:

- “(1) An association of persons meeting periodically (under certain regulations), at some house of entertainment, for social intercourse, etc.
- (2) An association of persons interested in the promotion of some object;
- (3) An association of persons formed mainly for social purposes, and having buildings for the exclusive use of the members, and always

open to them as a place of resort, or, in some cases, of temporary residence; the buildings occupied by such a society.”

The expression is also defined by 5 Halsbury’s Laws (3rd Edn.), at para. 586 thus:

“A club may be defined as a society of persons associated together for social intercourse, for the promotion of politics, sport, art, science, or literature, or for any purpose except the acquisition of gain.”

Although these meanings do not expressly state that to constitute a club the association must be voluntary this element is in my view implicit in them since the persons forming the association have come together of their own free will for some common purpose or object other than the acquisition of gain. Moreover the popular conception of a club is an institution which one is free to join or not to join as one pleases. It is not surprising therefore to find “club” defined in the Dictionary of English Law by Earl Jowitt as:

“a voluntary association of persons for social purposes, and sometimes also for purposes of a literary or political nature, or the like.”

The source of that definition is not stated but similar definitions were given by two Chief Justice of the High Court of Australia in two cases separated from each other by an interval of thirty years. In *Bohemians Club v. The Acting Federal Commissioner cf Taxation* (1), an income tax case by the way, Griffith, C.J. (24 C.L.R. at p. 337) describes a club as:

“a voluntary association of persons who agree to maintain for their common personal benefit, and not for profit, an establishment the expenses of which are to be defrayed by equal contributions of an amount estimated to be sufficient to defray those expenses.”

In *Bennett v. Cooper* (2) a fraternal order having for its objects the relief of its necessitous brethren and social purposes was held not to be a club for the purposes of the Licensing Acts 1911-1946. Latham, C.J., said (76 C.L.R. at p. 575):

“There is no precise legal definition of the word ‘club’. The description of a club contained in Wertheimer On Clubs applies to most clubs: ‘A club may be defined to be a voluntary association of a number of persons meeting together for purposes mainly social, each contributing a certain sum either to a common fund for the benefit of the members or to a particular individual for his own benefit.’ . . . Clubs are voluntary, non-profit making associations but they vary almost indefinitely in other characteristics.”

It seems to me therefore that one of the characteristics of a club is the voluntary nature of the association. Another characteristic seems to me to be the existence of rules governing admission of members and in particular the right to refuse admission. It is well known that the rights and duties of the members of a club as between themselves and the internal arrangements for carrying it on depend upon the rules of the club. As Dixon, J., said in *Bennett v. Cooper* (2) (76 C.L.R. at p. 580):

“In most attempts to state the characteristics of a club prominence is given (a) to the nature of the objects for which the members are associated in a body, (b) to the contribution of members to a common fund to meet the expenses, and (c) to the existence of rules governing the mode in which persons may be chosen for admission to membership.”

Also over a century ago in *Re St. James' Club* (3) Lord St. Leonards, L.C., said concerning clubs (42 E.R. at p. 922):

“they are, generally speaking all formed on this principle: the candidate must be elected, he must pay an entrance fee, and also an annual sum or subscription.”

To decide whether the Society is a club or a similar institution it is therefore necessary to determine whether it possesses the characteristics of a club. The Society is a body corporate incorporated by statute, namely the Law Society of Kenya Act 1963. Its objects are set out in s. 4 of the Act and are in a nutshell to maintain and improve the standard of conduct and learning of the legal profession, to facilitate the acquisition of legal knowledge and to protect and assist generally both the public and the lawyers in the practice of the law. None of the objects in itself materially assists in deciding whether the Society is a club or not. Almost the whole of the Society's income is derived from the subscriptions from the members and practising fees. With few exceptions its members consist of practising advocates who are bound by the Act to join the Society. They have no choice in the matter and likewise the Society cannot refuse to admit them. In these circumstances it seems to me that the Society lacks two essential characteristics of a club which I have already mentioned and in my judgment it is not a club.

It is contended that if it is not a club it is a similar institution. I am unable to agree. An institution which does not possess two essential characteristics of a club cannot be said to be similar to a club.

I would accordingly allow the appeal, set aside the decision of the court below and order that assessment No. 52/14981 for the year of income 1963 be restored and affirmed. As the parties agree that there should be no order as to costs I would order accordingly.

Sir Charles Newbold P: I have had the advantage of reading in advance the judgment of Sir Clement De Lestang, V.-P. and I entirely agree with it. There will be an order in the terms proposed by him.

Law JA: I have nothing to add to the judgment delivered by Sir Clement De Lestang, V.-P. which I had the advantage of reading in draft and with which I entirely agree.

Appeal allowed.

For the appellant:

Legal Secretary, E.A.C.S.O.

B. C. W. Lutta and D. G. Ferro

For the respondent:

Kaplan and Stratton, Nairobi

J. A. Couldrey

Ludovico v Republic
[1967] 1 EA 673 (HCT)

Division: High Court of Tanzania at Mwanza

Date of judgment: 7 June 1967

Case Number: 199/1967 (143)

Before: Cross J

Sourced by: LawAfrica

[1] *Criminal Law – Charge – Duplicity – Causing grievous harm to two named persons on separate occasions.*

[2] *Criminal Law – Charge – Unlawful practice of medicine – Whether particulars of charge relating to unlawful practice of medicine may contain reference to several detailed instances of unlawful practice – Medical Practitioners and Dentists Ordinance, s. 36 (1) (b) (T.).*

[3] *Criminal Law – Practice – Fresh charge at trial – Introduction of fresh charge during trial with no opportunity to accused to recall witnesses – Whether proper.*

Editor's Summary

Before the resident magistrate at Kigoma, Tanzania, the appellant was tried for unlawfully practising medicine. It was proved at the trial that he had injected a number of persons which had resulted in infected wounds. At a late stage of the trial the appellant was also charged (on evidence already given) with causing grievous harm under s. 225 of the Penal Code, and convicted of this offence as well as of the offence of practising medicine without a licence. He was sentenced to eighteen months' imprisonment for causing grievous harm and twelve months' imprisonment for unlawfully practising medicine, the sentences to be concurrent. On appeal the High Court reviewed two aspects of the trial. The first, raised by the State Attorney, was whether the particulars of the charge relating to the unlawful practice of medicine was bad for duplicity. The particulars of the charge stated (inter alia) that the appellant practised medicine for gain by injecting five named persons contrary to s. 36 (1) (b) of the Medical Practitioners and Dentists Ordinance. It was contended that the injection of each person constituted a separate offence and the single charge was bad for duplicity. The second point was the late introduction of the second charge of causing grievous harm.

Held –

- (i) the charge was not bad for duplicity since the offence related to an habitual course of conduct and the detailing of the several occasions of injection supported such a course of conduct;
- (ii) (a) the charge, the particulars of which referred to the causing of harm to two persons on different occasions, was bad for duplicity, (b) the charge was to some extent based on evidence already heard and in respect of that evidence the appellant was not given an opportunity to recall the witnesses for further examination, (c) there was a failure of justice, the appellant being prejudiced in his defence.

Conviction and sentence on first charge upheld. Conviction on second charge quashed.

Cases referred to in judgment:

- (1) *Apothecaries Co. v. Jones*, [1893] 1 Q.B. 89.
- (2) *A.-G. v. Ayre* (1915), 24 L.R. (Part II) 126.

Judgment

Cross J: The appellant was convicted by the resident magistrate, Kigoma, on February 21, 1967, on two charges of (1) practising

medicine while not being registered or licensed under the Medical Practitioners and Dentists Ordinance contrary to s. 36 (1) (b) of the said Ordinance and (2) doing grievous harm contrary to s. 225 of the Penal Code. He was sentenced to twelve months' imprisonment on the first charge and eighteen months' imprisonment on the second, the sentences to run concurrently.

The evidence for the prosecution disclosed that on various dates in the month of November, 1966, a number of persons were treated at Kalinzi hospital and Kigoma hospital for infected and suppurating wounds which were the result of injections. These persons all stated in evidence that they had been injected by the appellant. The wounds were extremely serious and, according to the medical evidence, could have been caused by injections with an unsterilized needle. The appellant's defence was a complete denial coupled with the assertion that the complainants were neighbours who may have ill feeling against him. The magistrate, not surprisingly, had little difficulty in accepting the prosecution's case.

Although the grounds of appeal are all concerned with facts, it is of course the duty of the court to satisfy itself that the relevant provisions of the law have been observed and it is in accordance with this duty that I have had to examine the charges preferred against the appellant and the conduct of the proceedings before the magistrate.

The particulars of the offence on the first charge allege that the appellant, during the month of November, 1966, at Nyarubanda Kalinzi village in the district of Kigoma, not being registered under the Medical Practitioners and Dentists Ordinance, did practise medicine for gain by injecting five named persons contrary to s. 36 (1) (b) of the said Ordinance. Learned State Attorney has suggested that this charge is bad for duplicity in that the injection of each person would appear to be a separate offence.

Section 136 (2) of the Criminal Procedure Code provides as follows:

"When more than one offence is charged in a charge or information, a description of each offence so charged shall be set out in a separate paragraph of the charge or information called a count."

In the circumstances of this case, if I had agreed that this charge was bad for duplicity, I would have had no hesitation in invoking the provisions of s. 346 of the Criminal Procedure Code since there is no lack of certainty or particularity nor could there be any doubt in the mind of the accused as to exactly what was alleged against him; there could have been no failure of justice. But I am not convinced that the charge is bad for duplicity.

The relevant portion of s. 36 (1) (b) of the Medical Practitioners and Dentists Ordinance reads as follows:

"Any person who, not being registered or licensed under the provisions of this Ordinance as a medical practitioner, practises or holds himself out, whether directly or by implication, as practising or as being prepared to practise medicine or surgery shall be guilty of an offence."

By s. 2 of the same Ordinance, the expression "practise medicine or surgery" means "to give medical or surgical treatment or advice on one or more occasions for gain". It seems to me that pursuing a customary or habitual course of conduct in the nature of the practice of medicine is one offence. Detailing the individual occasions which the prosecution allege would indicate an habitual course of conduct does not, in my view, render the charge duplex. I am supported in this view by the decision in the case of *Apothecaries Co. v. Jones* (1) in which Hawkins, J. said ([1893] 1 Q.B. at p. 93):

“To practise a calling does not mean to exercise it upon an isolated occasion, but to exercise it frequently, customarily or habitually and although it is true each individual act would afford cumulatively evidence of practising . . .”

This statement was quoted with approval in *A.-G. v. Ayre* (2).

In the *Apothecaries Co.* case (1), the defendant practised as an apothecary without a certificate and gave medical advice and supplied medicine to three different persons at different times on the same day. He was sued for three penalties. It was held that the words “act or practise as an apothecary” were directed against the habitual or continuous course or conduct and the defendant was not guilty of a separate offence in attending each of the three persons and was only liable to one penalty. It seems to me that the definition in s. 2 of the Medical Practitioners and Dentists Ordinance apart from deeming one occasion of giving treatment to be the practice of medicine also gives statutory recognition to the above decision and that consequently the charge is not bad for duplicity. I, therefore, dismiss the appeal on this charge and allow the conviction to stand. I shall deal with the sentence later in this judgment.

I now turn to the second charge of doing grievous harm contrary to s. 225 of the Penal Code which arose in the following circumstances:

The appellant was first charged with the illegal practice of medicine as set out above. In the course of the trial on this charge and after eleven witnesses had given evidence for the prosecution, the magistrate recorded the following note:

“*Prosecutor*: I have decided to introduce another charge of grievous harm contrary to s. 225 of the Penal Code, as the evidence and condition of witnesses show.

Court: As the evidence show (sic) that a fresh charge could be added, the permission is given.”

The charge was explained to the accused and on his saying “It is not true” a plea of not guilty was entered. Two more witnesses then gave evidence and the prosecution closed their case. It is to be observed that one of the complainants named in the new charge had already given evidence before the charge was added. The appellant was not advised of his right to recall this or any other witnesses nor did the magistrate himself recall any of them. This failure was all the more important because of the completely different nature of the new charge both in respect of the medical evidence required and the possible defences open to the appellant. In addition, the particulars of offence in respect of this charge related that the appellant, during the month of November, 1966, unlawfully did grievous harm to Ntaushira d/o Rubandi and Zekeri d/o Masabo. This is plainly bad for duplicity. In the circumstances, I cannot avoid the conclusion that there was a failure of justice and that the appellant was prejudiced in his defence to this charge. The conviction and sentence on this charge cannot be supported. The conviction is accordingly quashed and the sentence set aside.

At the first hearing of this appeal, State Attorney drew the court’s attention to the leniency of the sentences imposed and suggested that the appellant be brought before the court to show cause why they should not be enhanced. I agree that the sentence appears to be somewhat lenient but an appellate court is not entitled to enhance a sentence merely because it would itself have imposed a more severe one if it had been the court of trial. In his judgment, the learned magistrate plainly indicates that he has approached the question of sentence judicially and sets out the considerations which induced him to award

a sentence of twelve months' imprisonment. In the circumstances, I am not disposed to interfere with his sentence.

In the event, the conviction on the first charge is upheld and the sentence maintained. The appeal on the second charge is allowed, the conviction is quashed and the sentence set aside.

Order accordingly.

The appellant did not appear and was not represented.

For the respondent:

Attorney General, Tanzania

B. A. Samatta (State Attorney, Tanzania)

Mugema and another v Republic [1967] 1 EA 676 (HCT)

Division: High Court of Tanzania at Mwanza
Date of judgment: 23 March 1967
Case Number: 956/1966 (144)
Before: Platt J
Sourced by: LawAfrica

[1] *Criminal Law – Practice – Right of accused to be represented by an advocate – Whether failure by an accused to inform the court that he had briefed an advocate until after the case for the prosecution has been closed deprives accused of right to be represented.*

[2] *Criminal Law – Judgment – Effect of failure to sign and date a judgment and to sign an order of committal to prison.*

Editor's Summary

Before the district magistrate four accused were charged with assaulting a police officer in the due execution of his duty. The hearing of the evidence was concluded on September 2, 1966 and the accused were remanded into custody for judgment on September 12, 1966. On the file of the court proceedings there was an undated and unsigned judgment which purported to find the four accused guilty and four unsigned warrants of commitment dated September 14, 1966 purporting to indicate that each of the accused had been sentenced to twelve months' imprisonment and to pay Shs. 50/- compensation. The record did not indicate whether finding and sentence were delivered in the presence of the accused. At the conclusion of the evidence taken for the prosecution one of the accused explained that he had briefed an advocate who was not at the trial. The magistrate concluded that as the accused himself had had the

opportunity to cross-examine the prosecution witnesses he was required to enter into his defence and the trial proceeded. On appeal, the advocate confirmed that on being briefed by one of the accused the advocate had written to the magistrate with a copy to the police commander saying that he had been briefed, but the advocate received no acknowledgment. No copy of the advocate's letter was on the court file.

Held –

- (i) the magistrate was wrong to have refused an adjournment when the accused had pointed out that an advocate had been briefed to defend him. (*Jafferli Abdulla Haji v. R.* (1) followed);
- (ii) the irregularities relating to procedure were such as to render the whole trial a nullity;
- (iii) the accused had been in custody for six months and no retrial would be ordered.

Findings and sentence set aside and the accused set at liberty.

Cases referred to in judgment:

- (1) *R. v. Mary Kingston* (1948), 32 Cr. App. Rep. 183.
- (2) *Jafferali Abdulla Haji v. R.*, [1947] 1 T.L.R. 299.

Judgment

Platt J: The appellants, Daniel Mugema and Kuchibanda Ngombe, were convicted with two other persons, Sanagu Ngato and Masala Magali, of assaulting a police officer in the due execution of his duty contrary to s. 243 (b) of the Penal Code. Only Daniel Mugema and Kuchibanda Ngombe have appealed as far as I know. They were represented by learned counsel Mr. Gurbachan Singh. The appeals were consolidated.

The first point argued on appeal was that raised in ground 3 of the petition of appeal that the district magistrate erred in law in not allowing the first appellant Daniel Mugema to engage an advocate during the trial. It appears that at the close of the prosecution case the appellant Daniel Mugema made a statement as follows:

“I have an advocate G. Singh whom I expected was summoned. I did not know the procedure. I sent in a letter from my advocate.”

The learned magistrate took the view that the appellant had had the opportunity of cross-examining the witnesses for the prosecution, and as he had not informed the court before the commencement of the trial that he wished to be represented, it was “fit and proper and just and fair” for the accused to be compelled to give his defence. Accordingly the appellant gave his evidence on oath.

Learned counsel made a statement from the Bar that he had been briefed before the trial commenced and had written a letter to the magistrate copied to the police commander stating that he had been so briefed. He never received any reply to this letter and indeed it is not to be found on the record. It would appear, however, from the appellant’s statement in court that such a letter must have been written and the question now is whether the magistrate exercised his discretion judicially in compelling the appellant to give his defence.

Learned counsel referred to two authorities *Mary Kingston* (1) and the Tanzania authority *Jafferali Abdulla Haji v. R.* (2). In the latter case four persons had been charged and at the end of the prosecution case advocates appeared on behalf of two of the accused. They asked for an adjournment in order to obtain and peruse copies of the proceedings at the trial up to that date. But their application was refused and they withdrew. The question on appeal was whether the learned magistrate had exercised his discretion properly, and in the course of the judgment it was observed that it was an elementary principle of justice that an accused person should be given every reasonable facility for defending himself against a criminal charge. Strong emphasis, it was said, had to be placed on the word “reasonable”, and where an accused had delayed unreasonably the circumstances might warrant a refusal of his application for an adjournment in order that he should be represented. However, in *Jafferali’s* case the learned judge came to the conclusion that the appellant had had very little time within which to seek the aid of counsel and in the circumstances he thought that it could not be said that the application was unreasonable. He also considered that matters of law were involved which the appellant could not have adequately dealt with by

himself, and further that the facts were not so clear that the accused would not benefit by professional conduct of the case. Therefore it was held that the application should have

succeeded and the adjournment granted. The learned judge then considered what would be the proper course to take in order to rectify the position. He declined to order a retrial de novo but set aside the convictions in the case of each of the accused persons, and ordered that the trial should recommence from the point at which the application had been refused.

With respect, I adopt the reasoning and approach illustrated by *Jafferli's* case. In the present case the appellant Daniel informed the court that he had engaged an advocate whom he had expected would be present to represent him and thought that the court had been so notified. This statement was correctly understood to imply an application for an adjournment to be represented by counsel at least for his defence. But the learned magistrate, both in his ruling at the time, and in his judgment, noted that the appellant was properly required to proceed to give his defence without representation because the appellant had had the opportunity of cross-examining the witnesses and because he had not informed the court at the commencement of the trial that he wanted to be represented. It is not disputed that the first reason given was immaterial, the whole point being that the appellant had wanted the trial to be conducted by counsel. The second point is relevant and it was conceded that the appellant should have informed the magistrate at the beginning of the trial that he wished to be represented. But as he explained he had not known the proper procedure and thought notification of his intention had already been given to the court. It will be seen therefore that this is not a case where the appellant had taken no steps at all until a late stage of the trial, but one where he had taken steps although he had been confused as to what his position was. The learned magistrate may well have thought that as there was no letter on the record the application did not have a very satisfactory basis, but as it turns out there must have been some administrative mishap which accounted for the fact that the appellant's letter did not reach the court. Reviewing the situation therefore from the advantageous position of having all the facts before me, it is clear that the appellant had taken proper steps to engage an advocate but that the advocate did not appear through no fault of the appellant. As in *Jafferli's* case the remaining grounds of appeal show that the evidence was conflicting and there may well have been an important point of law. Accordingly, with all the facts before me, there is no doubt that the appellant should have been allowed an adjournment for counsel to be present and to represent him and that the denial of his right to be represented may well have occasioned a failure of justice.

It follows therefore that the appellant Daniel's conviction must be quashed and consideration must be given as to whether a retrial should be ordered. As this would indirectly affect the other accused persons, namely, the appellant Kuchibanda and the accused Senagu and Masala, it follows therefore that their convictions must also be quashed. Indeed this was the course adopted in *Jafferli's* case. But apart from this there is a further reason why the conviction of all the accused in this case must be quashed. It appears from the record that at the close of the case on September 2, 1966, the accused were remanded in custody for judgment on September 12, 1966. There is then to be found an undated and unsigned judgment at the end of which the accused were found guilty and convicted. The record does not disclose what further proceedings, if any, took place or whether the accused were sentenced. But the record contains four unsigned warrants of commitment dated September 14, 1966, purporting to show that each accused was sentenced to twelve months' imprisonment and to pay Shs. 50/- compensation. It may be therefore that the accused were convicted and sentenced on that date. These omissions constitute gross irregularity and I am not prepared to cure them under s. 346 of the Criminal Procedure Code. It is not at all clear whether judgment was

delivered in the presence of the accused or how they were sentenced. In my view the whole trial is a nullity.

Accordingly the convictions of the present appellants Daniel and Kuchibanda are quashed and whatever sentence was imposed on them is set aside. By virtue of my revisional powers under s. 329 of the Criminal Procedure Code I quash the convictions and set aside the sentence (if any) imposed on the accused Senagu and Masala.

It remains to consider whether I should order a retrial. The accused have now been in custody for six months if they were sentenced on September 14, 1966. With normal remission they would probably complete their sentence if it was twelve months' imprisonment before a retrial could be carried out. To order a retrial therefore would be something of a pyrrhic victory in the event of the accused being further convicted. In addition as I have said there were unsatisfactory allegations in the evidence. In my opinion therefore no useful purpose would be served by ordering a retrial. Consequently I order each accused to be set at liberty forthwith unless held for any other lawful cause.

Order accordingly.

For the appellants:

G. Singh, Mwanza

For the respondent:

Attorney General, Tanzania

G. Liundi (State Attorney, Tanzania)

Lihoha v Meda
[1967] 1 EA 679 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	27 July 1967
Case Number:	101/1967 (145)
Before:	Hamlyn J
Sourced by:	LawAfrica

[1] *Native Law and Custom – Land – Ownership of land – Diversion of water-course – Consequent erosion and re-deposit of soil – Custom in the Iringa area – Magistrates' Courts Act, 1963, Sched. 4, para. 2 (T).*

[2] *Land Law – Customary ownership of soil deposited as a result of diversion of water-course – Magistrates' Courts Act, 1963, Sched. 4, para. 2 (T).*

Editor's Summary

The appellant and respondent were owners of adjacent holdings separated by a water-course, the course of which altered over the years and as a result soil was eroded from the respondent's land and deposited on the land of the appellant. The respondent claimed that he was entitled to take the land so deposited as his and the primary court, following the opinion of its assessors on the customary law applicable, upheld his claim. On appeal to the High Court:

Held – The respondent was entitled to the increment of the land adjoining that of the appellant to the extent of the land which he had lost.

No cases referred to in judgment.

Judgment

Hamlyn J: This is an interesting case, which comes on appeal to this court from the district court of Iringa. The original proceedings were brought in the Mahenge primary court, where the present appellant was plaintiff.

The case concerns a dispute over a portion of land and arose in this way. The appellant and the respondent are owners of adjacent holdings, which are separated by a watercourse. The appellant was granted tenure of his area many years ago and the plantation which he then obtained consisted of land abutting the bank of a stream and also included two islands situated in the stream itself. It appears from the record that these two latter pieces of land were actual islands during the whole of the history of this dispute – the water-course bifurcating and running on either side of the two portions of land. There is unfortunately no map or sketch-plan of the area to which reference can be made and it would have been of considerable help not only to this court but also to the courts below, had there been one on the record. Be that as it may, the general facts of the case are not in dispute between the parties and the decision is purely one of law – the law in the present case being the customary law of the area concerned, the Iringa district.

At some time which is unspecified (presumably in the not very distant past) the flow of the water-course gradually altered by some natural process; there is no allegation that either of the parties caused any diversion of the stream and the alteration appears to have taken place due to some geological or other factor which is not precisely known. The stream thereafter, instead of dividing and flowing along each side of the appellant's two islands, left its customary course and appears (if I understand the evidence correctly) to have confined itself to the channel on the respondent's side of the river. Here it began to erode the respondent's land, such erosion taking place gradually over a period of years. The soil eroded from the respondent's plot was deposited, by one of those freaks of nature which appear to have no reason, on the appellant's side of the river and this process of erosion and of the depositing of silt continued until the appellant's plot was augmented in area by about half an acre, the respondent's land being decreased by about the same amount. The respondent, perhaps feeling that the fates were dealing hardly with him, thereafter crossed the offending stream and began to cultivate the additional land on the appellant's side which was added to the appellant's original holding. I surmise (though this is not specifically stated in the record) that the area of the cultivation was approximately the area which the respondent had lost by the vagaries of nature.

The respondent, in the hearing before the district court, claims that he is entitled to take the land as his, because the stream had deprived him of about that area of his own land and had deposited an additional area of about the same size at the boundary of the appellant's land. He says, somewhat naively, "The water crossed my shamba and that is why I followed my shamba which was cut off". He contends that the status quo ante should be maintained, in so far as the respective areas of the two plots of the appellant and himself are concerned. The appellant for his part says that no customary law entitles a person "to jump waters" (as he puts it) if soil from his plot has been slowly eroded away. That, in brief, is the origin of these unusual and rather interesting proceedings, and it is of course a matter which must be decided purely on the law customarily observed in the area in which the two properties lie.

It is interesting to reflect that problems of this nature are by no means new and that instances of this type of event have arisen probably from earliest times. It will not be surprising therefore if we find a kind of robust commonsense as the basis of the customary law involved, which may or may not conform to early law (so far as it is known) elsewhere in the world. One's mind turns without hesitation to the Roman law doctrine of "Alluvio" – so familiar to law students. This is what may be called "the law of latent increment" and takes place when a river-bank or an island in a river receives accretions of silt deposited by the water; in such case Roman law held that the owner of the land is the owner of the accretions. There are many dicta cited by Justinian in his

“Institutes” (II. i. 20-24), including instances of a main water-course changing from one side of islands in the river to another. But none of these cases exactly represents the present problem – nor indeed would they in any case apply to the instant matter, governed as it is by Hehe law. But it is of interest to find that in Roman law the doctrine of “alluvio” does not apply where an occupier holds land defined by an arbitrary boundary (ager limitatus) and it seems here that the doctrines of Roman law approximate in some way to those of the area concerned in this dispute. In the instant case, the appellant’s boundary, though said to be the river-bank, seems in fact to have been demarcated along the river shore and, if this really is the case, his property would be ager limitatus. Assuming this to be so, then whatever accretions may have occurred along that shore, his property would not be enhanced thereby, the boundary remaining as the former bank, without the increments deposited by the stream.

The two assessors in the district court were clearly of this opinion, for the first assessor somewhat picturesquely says:

“Half an acre is too big. These people are cultivating near a river. Supposing this erosion goes on, the respondent will one day be kicked off . . . This custom applies to very small portions and not to half an acre.”

and the second assessor says:

“The respondent was right in following his soil, because it is clear that he lost half an acre of his shamba.”

The customary law of the area in which the land is situated appears, then, to be that, if the eroded area is considerable and is gradually deposited as an addition to another’s property, the original holder of the eroded land can “follow” it and he retains ownership. This is different from the ordinary view taken by Roman law, where a gradual erosion and deposit elsewhere ensures to the benefit of the owner of the land contiguous to the place of deposit.

It seems clear then that the law governing this matter is governed by the provisions of para. 2 of Sched. 4 to the Magistrates’ Courts Act, 1963, which provides:

“In the exercise of its customary law jurisdiction, a primary court shall apply the customary law prevailing within the area of its local jurisdiction, or if there is more than one such law, the law applicable in the area in which the act, transaction or matter occurred or arose, unless it is satisfied that some other customary law is applicable.”

Here the matter is straight-forward and no difficulty arises in the law applicable. I consequently, following the opinion of the assessors, dismiss this appeal; the respondent is entitled to the increment adjoining the appellant’s land to the extent of his lost half-acre. In order that the dispute may be finally settled, it is directed that an officer of the primary court of Mahenge visit the boundary area with the parties to this dispute and arrange for the demarcation of the boundaries of the two properties in accordance with this judgment. The respondent is to have his costs of this appeal.

Order accordingly.

Both parties in person.

Wason v Wason
[1967] 1 EA 682 (HCK)

Division: High Court of Kenya at Nairobi

Date of judgment: 19 July 1967
Case Number: 31/1967 (147)
Before: Chanan Singh J
Sourced by: LawAfrica

[1] Husband and Wife – Separation and Maintenance – Non-cohabitation order made “by consent” on grounds of wilful neglect – Effect of – Whether equivalent to a decree of judicial separation – Hindu Marriage and Divorce Act, s. 10 (1) (g) (K.).

[2] Husband and Wife – Separation and Maintenance – Non-cohabitation order – Observations on when should be made – Subordinate Courts (Separation and Maintenance) Act, ss. 3 and 4 (K.).

[3] Divorce – Hindu divorce – Judicial separation for two years – Non-cohabitation order by magistrate – Whether has the same effect as a decree of judicial separation – Order made “by consent” and on grounds of wilful neglect – Hindu Marriage and Divorce Act, s. 10 (1) (g) (K.).

Editor’s Summary

The petitioner “by consent” was granted a non-cohabitation order and a maintenance order against her husband by the senior resident magistrate, Nairobi, and later brought this divorce petition under s. 10 (1) (g) of the Hindu Marriage and Divorce Act on the ground that a decree of judicial separation had been in force between the parties for at least two years immediately preceding the petition and the parties had not cohabited since that date.

Held –

- (i) the non-cohabitation order was made for desertion and wilful neglect to provide maintenance and not on a finding of cruelty and therefore could not be regarded as a decree on the ground of cruelty;
- (ii) the order, being made “by consent”, could not in any event be used as a decree of judicial separation for the purposes of s. 10 (1) (g) of the Hindu Marriage and Divorce Act;
- (iii) although a non-cohabitation clause in a magistrate’s order has the effect in all respects of a decree of judicial separation on the grounds of cruelty as per s. 4 (a) of the Subordinate Courts (Separation and Maintenance) Act, it has not the effect of a decree of judicial separation for the purposes of s. 10 (1) (g) of the Hindu Marriage and Divorce Act (*Harriman v. Harriman* (1) and *Gollins v. Gollins* (2) followed).

Observations as to the need for care to be exercised by magistrates in the granting of a non-cohabitation order and upon the circumstances in which such an order is appropriate.

Petition dismissed.

Cases referred to in judgment:

- (1) *Harriman v. Harriman*, [1908-10] All E.R. Rep. 85; [1909] P. 123.

- (2) *Gollins v. Gollins*, [1962] 3 All E.R. 897.
- (3) *Gollins v. Gollins*, [1963] 2 All E.R. 966.
- (4) *Jolliffe v. Jolliffe*, [1963] 3 All E.R. 295.
- (5) *Vaughan v. Vaughan*, [1963] 2 All E.R. 742.
- (6) *Corton v. Corton*, [1962] 3 All E.R. 1025.

Judgment

Chanan Singh J: The petitioner, Mrs. Praful Bala Wason, prays for divorce on the ground that she was granted by the senior

resident magistrate, Nairobi, a non-cohabitation order on March 23, 1965. She has given evidence to the effect that she has not since that date cohabited with the respondent.

The petitioner was born in Kenya and has lived here all her life but for brief periods of holiday outside. Her parents reside in Kenya permanently and she lived with them before her marriage and she has also lived with them since desertion by her husband on December 28, 1963. The petitioner says that the respondent is domiciled in Kenya. I have no reason to doubt this.

In any case I have jurisdiction to decide this cause either because the petitioner is domiciled here or because she has ordinarily resided here for three years immediately preceding the date of presentation of the petition.

The Hindu Marriage and Divorce Act (Cap. 157) which applies to the parties in this case makes it a ground of divorce that “a decree of judicial separation has been in force between the parties for a period of at least two years immediately preceding the presentation of the petition, and the parties have not cohabited since the date of the decree” – s. 10 (1) (g).

The same Act gives in s. 12 the grounds on which a decree of judicial separation may be pronounced. The petitioner did not obtain a decree under s. 12. If she had done this, there would have been no difficulty.

What she did was to make an application to the senior resident magistrate under s. 3 of the Subordinate Courts (Separation and Maintenance) Act (Cap. 153). This was in 1965. She has produced a certified copy of the Order made by the learned senior resident magistrate on March 23, 1965, which recites that “the defendant, on or about December 28, 1963, deserted her, the complainant and since December 28, 1963, has been guilty of wilful neglect to provide reasonable or any maintenance for her” and then states as follows:

“It is ordered by consent on this 23rd day of March, 1965, that the applicant be and is hereby no longer bound to cohabit with her husband, the respondent herein, and that the respondent shall pay to the applicant a sum of Shs. 400/- per month, being maintenance, with effect from April 1, 1965 and thereafter on the first day of every succeeding month until September 1, 1965, and thereafter Shs. 200/- per month with effect from the 1st day of October, 1965 . . .”.

The most important part of this Order is the non-cohabitation clause which, under s. 4 (a) of the Subordinate Courts (Separation and Maintenance) Act (Cap. 153), has “the effect in all respects of a decree of judicial separation on the ground of cruelty.” Attempts were made quite early in the history of the corresponding legislation in England to use a magistrate’s order as proof of cruelty or desertion. In *Harriman v. Harriman* (1), Fletcher-Moulton, L.J., said this in dismissing an appeal ([1909]) P. at p. 143):

“It is obvious that the court was justified in holding that the magistrate’s order was not sufficient to satisfy it as to the matrimonial crime of cruelty or . . . desertion . . . having been committed. The order itself shews that there never was any allegation or proof of the offence of cruelty having been committed, or that the desertion therein spoken of was desertion for a period of two years . . . I desire to add, however, that in my opinion the Legislature intended that an order rightly containing the non-cohabitation clause, by reason of the complaint being based on a charge of cruelty by the husband which has been proved before it, is entitled to be treated by the court as having the same evidential effect as between the parties as a decree of judicial separation granted by the divorce court itself on the ground of cruelty. This seems to me to be the intention of the Legislature clearly

expressed in the Act, and the courts are bound to give to that language its full effect.”

In the same case, Cozens-Hardy, M.R., said this (Ibid. at p. 131):

“... it is contended that, although cruelty was neither alleged nor proved, the effect of Section 5 (a) of the Act of 1895 is to make the non-cohabitation provision in the magistrate’s order have the effect in all respects of a decree of judicial separation on the ground of cruelty, and thus indirectly to treat the desertion as equivalent to cruelty, and thus to justify a divorce. I am unable to follow this argument. What is the effect of a decree of judicial separation on the ground of cruelty? It has the same force and the same consequence as a divorce a mensa et thoro under the old law ... and it makes the wife a femme sole so far as property and contract and suing and being sued are concerned ... Beyond this it has no absolute effect.”

These principles have been followed in several subsequent cases. Davies, L.J., stated in *Gollins v. Gollins* (2) ([1962] 3 All E.R. at p. 905):

“In the great majority of orders made on wilful neglect to maintain it would be inappropriate to insert a non-cohabitation clause”.

When this case went up to the House of Lords (3), Lord Hodson clarified the matter further by saying ([1963] 2 All E.R. at p. 983):

“Although the statute does enable justices to pronounce a separation even on the finding of wilful neglect to maintain, it is not the practice to do so.”

His Lordship then quoted with approval the following statement of Kennedy, L.J., in the *Harriman* case (1) (supra at p. 151):

“I am clearly of the opinion that it is neither in accordance with the intention of the legislature as appearing in this statute, nor in the interest of the wife or of public morals, that the provision should be included in an order which is sought for and obtained solely on the ground of the husband’s desertion.”

Sir Jocelyn Simon, P., in *Jolliffe v. Jolliffe* (4) stated this ([1963] 3 All E.R. at p. 300):

“The non-cohabitation clause, even though available, is inappropriate in a case of simple desertion because it denies the deserter his locus poenitentiae, his inherent right to terminate his desertion at any time by returning to co-habitation. Similarly, in the case of wilful neglect to maintain it precludes the offender from exercising his inherent right to terminate his offence at any time by offering to support his wife in a ‘joint home’.”

The same learned judge in *Vaughan v. Vaughan* (5) paraphrased the decision in the *Jolliffe* case (4) in these words ([1963] 2 All E.R. at p. 744):

“A non-cohabitation clause is inappropriate to a justices’ order based on the ground of wilful neglect to maintain, when there are no other circumstances which make a separation order necessary for the protection of wife or children.”

In another case (*Corton v. Corton* (6)), Sir Jocelyn suggested three questions which magistrates should ask themselves when considering the insertion of a non-cohabitation clause. These are ([1962] 3 All E.R. at p. 1026):

- (1) “Is a separate order really necessary for the protection of the complainant?”
- (2) Is the case ‘a more than ordinarily serious case’?
- (3) Is there ‘reasonable prospect of a reconciliation’?”

On the subject of his first question, the learned judge quoted with approval a statement from Stone's Justices' Manual "In practice it is only required when physical violence is likely: or, I may add, when molestation of the wife by the husband is feared".

These authorities can be fairly summarized as follows. A non-cohabitation clause is appropriate to cases where cruelty has taken place or is reasonably apprehended or where molestation is feared. Where an application is based on other grounds (e.g. desertion, neglect to maintain), magistrates have a discretion to insert a non-cohabitation clause only if exceptional circumstances exist.

It has to be borne in mind that the authorities I have quoted relate to matters which are relevant to a law like our Matrimonial Causes Act. There, judicial separation itself is not a ground for divorce but a non-cohabitation clause has certain evidential value because it has the same effect as "a decree of judicial separation on the ground of cruelty". That evidential value disappears or at least diminishes, unless the application is based on cruelty. The phrase "in all respects" was intended to have, as Cozens-Hardy, M.R. explained in the *Harriman* case (1) (supra), the same meaning as the old divorce a mensa et thoro had, no more, no less. The legislature in England and in Kenya which used the phrase "in all respects" could not possibly foresee a distant development in Hindu law. They could not, in other words, have intended that a non-cohabitation order should automatically entitle an aggrieved Hindu spouse to a dissolution of marriage at the end of two years.

I am far from saying, however, that a statutory provision can never apply to a situation which did not exist, and could not reasonably have been foreseen, at the time the particular provision was enacted. Words of a statute once passed stay but the society for which legislation is passed moves on. I am firmly of the view that if a situation is covered by the words of a statute, then that statute governs that situation. Such a progressive principle of interpretation is necessary for a progressive society.

I am of this opinion even though the grounds on which a decree of judicial separation can be made are specified in the Hindu Marriage and Divorce Act. The Matrimonial Causes Act also specifies the grounds on which persons governed by that Act can obtain decrees of judicial separation. If a non-cohabitation order made by a magistrate under the powers of the Subordinate Courts (Separation and Maintenance) Act has "the effect in all respects of a decree of judicial separation" for the purposes of the Matrimonial Causes Act then it has also to be regarded "in all respects" as a decree of judicial separation for the purposes of the Hindu Marriage and Divorce Act. But it has, on the basis of the authorities I have mentioned, to be regarded as such a decree "on the ground of cruelty". While magistrates, it seems, have a discretion to grant a non-cohabitation order on other grounds also, I do not see how an order granted because of "desertion", for example, can be regarded as a decree on the ground of "cruelty". Divorce under either the Matrimonial Causes Act or the Hindu Marriage and Divorce Act can be granted only on the ground of a proved matrimonial offence. Whatever other effects it has – I have tried to indicate them above – a non-cohabitation order made by a magistrate can be used as a basis of Hindu divorce if it is made on a finding of cruelty, on the merits. In the present case the order was, on the face of it, made for desertion and for wilful neglect to provide maintenance.

I should perhaps add that there is need to appreciate the nature and limitations of the remedies provided by the Subordinate Courts (Separation and Maintenance) Act. It gives a cheap and speedy method of obtaining maintenance and protection for deserted or neglected wives and children. One of its provisions – namely, that empowering magistrates to make a non-cohabitation

order – needs, however, to be used with care. It is a double-edged weapon: it protects wives from the violence or molestation of husbands but, it makes divorce more difficult. The non-cohabitation clause can be used effectively by vengeful wives who do not want to remarry and who want to stop their husbands from remarrying.

Even if I am wrong in the broad conclusions at which I have arrived, I consider that the non-cohabitation clause which is the subject matter of the present petition cannot have the effect of a decree of judicial separation for the purposes of s. 10 (1) (g) of the Hindu Marriage and Divorce Act. This clause was inserted “by consent” of the parties. If it could entitle one of the parties to a decree of divorce, it would mean in effect that a divorce could be obtained by consent. The parties would take out a non-cohabitation order by consent and, after the lapse of two years, would demand – that is what it would come to – a divorce. There is nothing more obnoxious to the Hindu Marriage and Divorce Act – and, for that matter, to the Matrimonial Causes Act – than a divorce by consent.

I have considerable sympathy with the petitioner who at her young age finds herself embroiled in matrimonial troubles accentuated by the technicalities of the law. But the law as it stands does not allow me to grant her petition on the ground on which it is presented and I dismiss it. If she intends to pursue the matter she will no doubt take such steps as she may be advised.

Petition dismissed.

For the petitioner:

Kean and Kean, Nairobi

S. L. Chawla

The respondent did not appear and was not represented.

Vaz v Rutafufura and others
[1967] 1 EA 686 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	18 August 1967
Case Number:	534/1963 (148)
Before:	Sir Udo Udoma CJ
Sourced by:	LawAfrica

[1] *Highway – Dedication – Proof of user by members of public – Acquiescence by the Crown – Whether tenant can dedicate.*

[2] *Mine – Owner of mining right obstructing road – Whether lawful – Mining Act, s. 90 (1) (U.).*

Editor's Summary

The plaintiff was the lessee of a piece of land which was previously leased by Kagera Mines Ltd., who were actively engaged in mining operations on the said land until 1957 when the company closed down. The plaintiff claimed that Kagera Mines Ltd. had constructed a road in 1940 which came to be used by members of the public to and from the main Kabale-Kikagati road and Rwamuiiri village. The plaintiff further alleged that Kagera Mines Ltd. also built a bridge across the swampy part of the road and erected a barrier to prevent motor vehicles not belonging to the company from using the road. The defendants, who were all inhabitants of Rwamuiiri village, denied that the road in dispute was constructed by Kagera Mines Ltd. and claimed that it was in existence long before the advent of the mining company. The plaintiff's claim was that the defendants wrongfully entered his land and filled in a trench dug across the road, wrongfully used the plaintiff's road, broke gates, blocked a channel or

tunnel, caused damage to the plaintiff's land, used abusive language and wrongfully refused to leave the plaintiff's land although requested to do so. The defendants, on the other hand, pleaded that the road in dispute was a public right of way; they contended that all that Kagera Mines Ltd. did in 1940 was to widen the old passage-way or footpath used by the inhabitants of Rwamuiiri village and to render the same motorable. They admitted having filled in a trench which was wrongfully dug across the access road used by members of the public, with or without vehicles, leading from their village of Rwamuiiri to the main trunk road. They also admitted having removed a cross-beam which constituted a barrier to users of the road in dispute. The defendants denied having obstructed the channel or tunnel under the bridge allegedly built by Kagera Mines Ltd. and contended that they were wrongfully prevented by the plaintiff from passing through the road with their cars and lorries and were therefore justified in filing in the trench and removing the barricade from the road. The plaintiff claimed damages and an injunction whereas the defendants counter-claimed a declaratory order, damages and an injunction.

Held –

- (i) that there was evidence of long user of the road in dispute by members of the public;
- (ii) the Crown as owner of the soil knew about the existence of the road and acquiesced in the dedication of the said road to the use of members of the public; the road was therefore a public road;
- (iii) the custom of barricading the road at night was one introduced by the plaintiff thereby preventing the defendants from making use of the road in dispute; this action was unlawful;
- (iv) the defendants and their people were wrongfully prevented by the plaintiff from passing through the road with their cars and lorries and were therefore justified in closing the trench and removing the barricade from the road.

Judgment for the defendants in regard to declaratory order, injunction and half costs.

Cases referred to in judgment:

- (1) *Wood v. Veal* (1822), 5 B. & Ald. 454; 106 E.R. 1257.
- (2) *Hall v. The Corporation of Bootle* (1881), 44 T.L.R. 873.
- (3) *Poole v. Huskinson* (1843), 11 M. & W. 827; 152 E.R. 1039.
- (4) *Folkestone Corporation v. Brockman*, [1914-1915] All E.R. Rep. 720.
- (5) *Mann v. Brodie* (1885), 10 A.C. 378.
- (6) *George Napier Turner v. William Walsh* (1881), 6 A.C. 636.
- (7) *Attorney-General v. Esher Linoleum Co. Ltd.*, [1901] 2 Ch. 647.
- (8) *R. v. Tything of Eastmark* (1848), 17 L.J. (N.S.) 177.
- (9) *Ngambo Estate and Saw Mills Ltd. v. Sikh Saw Mills Ltd.*, [1957] E.A. 537.

Judgment

Sir Udo Udoma CJ: This suit has been instituted by the plaintiff Victor Vaz against the three

defendants, James Rutafufura, Anderson Sendi and Edward Buzaire – all of Rwamuiiri village in Ankole. It is not stated whether they are sued jointly or severally. For the purpose of this judgment, however, there being nothing to the contrary, it would be assumed that they are sued jointly.

The suit has had a rather chequered and long history. Originally it was instituted against four defendants but, at the hearing, the claim against the then third defendant, Lukulube, was by leave withdrawn. His name was accordingly struck off.

The hearing of the suit was first commenced by me on April 2, 1964. Then on April 3, in the course of the hearing, para. 1 of the plaint was by leave amended by inserting the words "locations numbers 2385 to 2388" between the word "as" and "in Ankole" appearing in the second line of the said paragraph and deleting therefrom the words "location number 2386"; and thereafter the words hereunder set forth:

"and the lessee of the piece or parcel of land verged green on the plan Exhibit A"

were added to the said line. The paragraph as thus amended reads as follows:

- "1. The plaintiff is and was at all material times in possession of the land known as locations numbers 2385 to 2388 in Ankole and the lessee of the piece or parcel of the land verged green on the plan Exhibit A."

The hearing was thereafter continued, but on May 29, 1964, by consent of both counsel, the suit was adjourned for a composite plan containing essential features in the area in dispute to be prepared. The plan was accordingly prepared but was not ready until much later than the period fixed by the court.

On June 14, 1967, the case again came up for hearing. Owing to the length of the time which had elapsed since the last adjournment, by consent of both counsel, it was decided that the case be heard de novo on the basis of the new composite plan, Exhibit C, and subject to the evidence given by Arthur Leslie Job, a Commissioner of Mines in the Government of Uganda, who has since retired, being admitted in and forming part of the proceedings. On that footing the hearing was resumed de novo on June 14, 1967, and was continued de die in diem, and concluded on June 23, 1967.

The claim is for special and general damages and an injunction to restrain "the defendants from continuing or repeating the acts complained" of. The ground for the claim is set out in para. 2 of the plaint. It is therein alleged that "on or about April 27, 1963, the defendants wrongfully entered plaintiff's said land and broke gates, caused damage to plaintiff's dam on the said land, and filled in a trench prepared for an adit and wrongfully used plaintiff's road on the said location and used abusive and insulting language to the plaintiff and the members of his family and though repeatedly requested by the plaintiff to depart, wrongfully refused to do so and remained on the said land acting as aforesaid for a period of about two hours."

The special damages claimed are also set out in para. 2 of the plaint as amounting to the total sum of Shs. 2360/-.

In their defence, the defendants pleaded justification under public right of way. They admitted having entered upon the land in question and filling up the trench which was wrongfully dug across an access road or passageway, which was in use by the general public with or without vehicles leading from their village of Rwamuri and passing through the plaintiff's land into the main trunk road shown on the plans, Exhibits A and C, and known as the Kabale-Kikagati road. The defendants also admitted having removed a cross-beam the ends of which had rested on two posts one on either side of the road now in dispute, which cross-beam had constituted an obstruction or barrier to all users of the road and, in particular, to other people of Rwamuri village which lies opposite the trunk road Kabale-Kikagati.

There is also a counterclaim by the defendants for a declaration that the plaintiff had unlawfully obstructed the defendants and other users of the road – a public road – which runs from the Kabale-Kikagati main trunk road through the plaintiff's land mining location into the defendants' village of Rwamuri, an injunction restraining the plaintiff, his servants and agents from any further

acts of obstruction of the said road; and general damages for wrongful obstruction. The defendants have denied having blocked the tunnel or dam as alleged by the plaintiff.

In his reply to the statement of defence filed by the defendants, the plaintiff joined issue with the defendants as regards the road being a public road. He denied in para. 3 of the reply having put any barrier preventing the public from using the said "access road".

The case of the plaintiff is that in or about 1927 or 1928 Kagera Mines Limited – a mining company – were granted a mining lease numbered 578 by the Government of Uganda over the whole piece of land at Mwirasandu, which stretches from the opposite side of the Kabale-Kikagati main road and across the road into the area of land and mining locations including parts of the defendants' village of Rwamuiiri. The road now in dispute branches off from the main Kabale-Kikagati road at the junction marked C B of ML 578 on the plan, Exhibit C, and thence runs through the triangular shaped piece of land verged red on the said plan demised to the plaintiff by the Government of Uganda in 1960 for ten years, and a number of mining locations into the defendants' village of Rwamuiiri. This road will hereafter be referred to as the road in dispute.

It is the plaintiff's case that he was employed by Kagera Mines Limited as their acting secretary in 1930. At that time the company was in possession of Mwirasandu land and actively engaged in mining operations; and he continued so to act until 1956 when the company closed down, even though the mining lease granted to it had still one year to run. He was able to buy the mining rights but not the mining lease of the company only in respect of two of their mining locations, namely locations numbers 2385 and 2386.

The mining lease and rights over the mining locations granted to Kagera Mines Limited expired finally in 1957.

The plaintiff says that the road verged light blue on the plan, Exhibit C, that is the road in dispute, was constructed by Kagera Mines Ltd. in 1940 as their private road for their private enterprise; and that the barrier which was in existence even before the construction of the road was always kept locked by the company. It was never open for the use of the public; only vehicles belonging to the company were allowed access into the mining area through the barrier by a messenger whose duty it was to be at the barrier all the time.

According to the plaintiff, before the construction of the road in dispute, there was no road or footpath or passageway leading from the main Kabale-Kikagati road along the route followed by the road in dispute into Rwamuiiri village. The only footpath which then existed was situate where there is at present the barrier or gate. It started at a point about 500 ft. away from the present junction of the road in dispute with the Kabale-Kikagati main road, and thereafter ran across the triangular piece of land verged red in the plan, Exhibit C, into Rwamuiiri village.

With the construction of the road in dispute in 1940, people began to make use of the new road in going to and coming from Rwamuiiri village, although the Kagera Mines Ltd. had constructed it as a private road for their mining purposes. The result was that the old footpath or passageway fell into disuse and grew into bush.

When constructing the road in dispute, Kagera Mines Ltd. also built a bridge across the swampy part of the road. The barrier was erected to prevent motor vehicles not belonging to the company from passing through it into the mines area and therefrom into Rwamuiiri village, and also to prevent thieves entering

into the mining area because, prior to the erection of the barrier, the property of the company was often stolen by thieves.

The barrier created by Kagera Mines Ltd. consisted of two posts erected one on either side of the road in dispute and thereon was placed a beam across the road. The ends of the beam rested on the posts on both sides of the road. One end of the beam was fixed with hinges to one of the posts, while on the opposite end thereof was fitted a padlock for locking the barrier when necessary.

By the sides of the two posts on which the cross-beam was placed were to be found footpaths or passageways, which were still used by pedestrians and cyclists – members of the public – including the defendants and the whole people of Rwamuiiri village even when the barrier was locked. No members of the public including the people of Rwamuiiri village were ever prevented from using the road and passing by the said passageway or footpaths by the two posts to and from the mines location and thence to the village of Rwamuiiri.

For the proper control of motor traffic on the road in dispute, Kagera Mines Ltd. employed a number of office messengers, part of whose duties was to lift off the barrier during the day for the admittance of vehicles approved by the company but to have it locked at night.

Then in 1958, on his application, the plaintiff says he was granted mining rights over the two locations numbered 2385 and 2386. Thereafter he was also granted a lease of the triangular piece or parcel of land by the then Government of Uganda. The land was demised to him on January 1, 1960, for a term of ten years. It was only for residential purposes.

Under the lease the plaintiff covenanted to maintain existing buildings on the land in good and substantial repair to the satisfaction of the Governor. Having so acquired the leasehold property, the plaintiff says he immediately went into possession of the same and therefrom continued his mining operations on the two locations.

While in occupation of the land and carrying on his mining operations he also maintained the barrier, which had previously been maintained by Kagera Mines Ltd., and also made use of the road in dispute in furtherance of his mining business. He had however only mining rights but not a mining lease over the two mining locations.

Following the practice already established by Kagera Mines Ltd., he also employed a gatekeeper whose sole duty was to lock and unlock the barrier as might be required for the entry or exit of motor vehicles approved by him into and out of the mining locations. The plaintiff also, like Kagera Mines Ltd. before him, never prevented the people of Rwamuiiri or other members of the public or pedestrians from using the road and passing through the barrier; and that even when the barrier was shut and locked the defendants and their fellow-villagers and other members of the public were never prevented from using the said footpath or passageway and crossing the barrier into Rwamuiiri village.

He however never used to allow them or any other members of the public to cross the barrier with motor vehicles into the location and thence to the village of Rwamuiiri.

Then in April, 1963, he dug a trench across the road in dispute within location No. 2386. As a result the defendants and a large number of other people of Rwamuiiri entered upon the land and closed up the trench. Not content with that, they also went to the spot shown on the plan, Exhibit C, as site of the gate and therefrom removed the barrier and destroyed the posts. At the spot shown on the plan, Exhibit C, as a bridge they blocked the channel or tunnel underneath the bridge, thereby preventing the flow of water from one side of the bridge to the other. The defendants and several other people from their village, in their destructive activities completely ignored the warnings to desist from such destruction issued to them

by police officers who were there present.

It is the plaintiff's case that, by the activities of the defendants and their fellow-villagers, he had suffered special and general damages. Hence this action.

In their defence the defendants, as already stated, pleaded justification on the ground that the road was a public road; that the trench was wrongfully and wilfully dug across the road or passageway in use by the general public; and that the digging of the trench and erection of the barrier across the road constituted an act of nuisance on the part of the plaintiff. They say also that the plaintiff had no right over the road and that no-one had granted him the right to control traffic on the said road.

In further support of their plea of justification, the defendants say that the road in dispute was in existence long before the advent of Kagera Mines Ltd. to the area and was then being used by the people of Rwamuiiri village and other members of the public; and that at no time was any member of the public going from or returning to their village ever prevented by anyone from using the road.

The first defendant, who said that he was forty-seven years of age, swore that the road in dispute was originally opened up by the people of Rwamuiiri as owners of the soil in the area. That event took place during the time when Ruhara was the *saza* chief of Rwamuiiri. The road was then a passageway usually maintained by the people of Rwamuiiri village as it was and is still the only road in the area linking the village of Rwamuiiri with the main Kabale-Kikagati road and therefore the only road in that area linking the people of Rwamuiiri to the outside world and their markets.

The third defendant, a man of about forty-five years of age, swore that he was born in Rwamuiiri to see the path, and that since then, the general public and their people of Rwamuiiri have been using the said road.

In sum the case of the defendants is that the road was originally a path or passageway; that it was in existence long before Kagera Mines Ltd. came to the area; that the road was originally cut open by their people for public use; and that even when Kagera Mines Ltd. were occupying the area leased to them for mining operations, it took a long time before the company decided to and did widen the path, converting the same into a motorable road. That was after the company had been in the area for over twelve years, during which period they themselves were using the footpath; that in widening the path Kagera Mines Ltd. had recognised the right of the members of the public over it; and that Kagera Mines Ltd. did not raise any objection to the road being used by the public, although the said road ran through the area of land for which they then held a mining lease. The road as widened had followed the old pathway from Rwamuiiri village right onto the Kabale-Kikagati main trunk road.

The road was widened only in 1940 for the purpose of enabling motor lorries and other vehicles to make use of the same. Private lorries, they say, going to and returning from Rwamuiiri village used the road without any let or hindrance by the company.

Later in order to prevent thieves getting access at night to the location Kagera Mines Ltd. erected a barrier at a point on the road. The barrier consisted of two posts on either side of the road with a beam across the road, the two ends of which rested on the two posts on opposite sides of the road.

The barrier, the defendants say, was never in operation during the day and no person was employed especially as a gatekeeper to look after the barrier during the day.

It is the defendants' case that, in recognition of the right vested in them and other members of the public over the road, the askari employed by the company,

who was responsible for the barrier, was given definite instructions by Kagera Mines Ltd. not to interfere with the right of the public over the road. All vehicles whether belonging to the people of Rwamuiiri or to other people had free passage through the barrier to and from Rwamuiiri village.

The defendants also say that it was the duty of the head askari employed by the company to see that the cross-beam was removed during the day. The result of that practice was that during the day there was no barrier at all. The barrier was only in operation at night as a means of preventing not innocent pedestrians, but thieves, from entering the mining area with lorries; and that at night pedestrians in using the road across the barrier had to do so by a side road or footpath by the posts upon which the beam rested.

Kagera Mines Ltd. closed down in or about 1957 but in doing so merely removed the cross-beam while leaving the two posts still standing. Shortly thereafter the plaintiff acquired the right to carry on mining operations in the area and immediately replaced the cross-beam and employed an askari to take charge of the barrier.

On his instructions, the askari used to keep the barrier always shut both during the day and at night, thereby depriving the defendants and other members of the public of their right of free passage through the barrier with their vehicles into and from Rwamuiiri village.

The plaintiff then started a practice whereby vehicles conveying trade goods or foodstuffs from and into Rwamuiiri village must first obtain his permission before being allowed to cross the barrier. This practice was an innovation. It interfered with the right of free passage through the barrier to which they, the defendants, had been accustomed. They were then only allowed to pass over the barrier as pedestrians and cyclists but not with their cars or lorries. The practice thus introduced by the plaintiff was resented by the whole people of Rwamuiiri, who felt that they were being obstructed in the exercise of their right.

The plaintiff subsequently acquired a lease of part of the land through which they had to pass to and from their village and thereafter tightened his control of the public use of the road by means of the cross-beam or barrier. Consequently the defendants were prevented from carrying on their normal pursuits of conveying their cash crops and foodstuffs to and from markets.

As a result of the plaintiff's behaviour in this respect, the villagers complained to both their Chief and the District Commissioner of the area. No action was taken by either of them. The whole village was inflamed and thereafter decided to open another road from their village to connect with the old road, and did so.

When the plaintiff saw that they were cutting and clearing another road to connect with the road in dispute, he resorted to the expedient of digging a trench across the road with a view to preventing the defendants' lorries passing through the road. This further inflamed the whole people of the village, whereupon they invaded the area, closed up the trench and removed the cross-beam, which had constituted a barrier to their lorries passing on the road in dispute.

The defendants have denied having obstructed the tunnel or channel under the bridge. They say that the bridge was useful to them and that the evidence given by the plaintiff in this respect was untrue as the whole purpose of their removing what they considered an obstruction of or an impediment to a public road by the plaintiff was to keep the road open for use of the public and also to enable them to travel along the road from and to their village of Rwamuiiri. They say that it would not have been in their interests to have destroyed or caused any harm to the bridge of the channel or tunnel under the bridge.

It is the case of the defendants that the road does not and did not at any time belong to the plaintiff. It was not constructed by him nor did he maintain it.

He was therefore wrong to have treated it as his private road. The defendants complain that they had suffered damage by the plaintiff denying them the free use of the road to which they were entitled, in that they had been prevented by the plaintiff from taking their wares and cash crops, e.g. ground nuts and bananas and cotton, to their market. They therefore counterclaim a declaration, damages and an injunction against the plaintiff.

Since the institution of this action it is common ground that a new company of which the plaintiff is a member, known as East Africa Metro Company, has been formed. The new company has since acquired the plaintiff's interest in the location.

It is the case of the defendants that since the formation of the new company and in consequence of the steps which had been taken by them in keeping the road open for the use of the public, the road is now being jointly maintained by the new company and the defendants and their people of Rwamuri. The first defendant is now even employed by the new company. This new development, since it is not ante litem motam, is of some significance. It is relevant to the issues in dispute as it does throw some light on the attitude of the plaintiff subsequent to his institution of the present suit.

In his address counsel for the defence, Mr. Nabudere, submitted that the first issue to be determined by the court was as to whether the road is a private or public one over which the defendants as well as other members of the public have a right of way. He contended that the road is a public passageway as the plaintiff has not proved that, in acquiring the right to carry on his mining enterprise on locations Nos. 2385 and 2386, he had also acquired any right over the road and was therefore entitled to exclude other users of it.

Counsel then referred the court to s. 90 of the Mining Act, Cap. 248, and submitted that by digging the trench the plaintiff was interfering with the right of way vested in the public at large and the defendants and their people of Rwamuri. No permission was ever obtained by the plaintiff from the people of Rwamuri. The obstruction placed on the road and the opening of the trench by him, contended counsel, were in breach of the provisions of s. 90 of the said Act and amounted to a nuisance, which the defendants were entitled to abate.

It was also submitted that since the plaintiff had no right to erect the barrier across the road, he could not be heard to complain against the defendants in the exercise of their right to remove the obstruction placed on a public road.

Mr. Dalal, for the plaintiff, submitted that, as there is no Highway Act in Uganda, the court must determine the issue as to whether or not the road in dispute was a highway on the principles established under the English common law. He contended that a public highway could only be created by an Act of Parliament or by dedication.

On the evidence, contended counsel, the right of way was vested in the defendants and their people of Rwamuri. That being so, it could not be properly described as a public highway. Furthermore, there was no evidence before the court that the road was ever dedicated for the use of members of the public either by Kagera Mines Ltd. or by the plaintiff. When Kagera Mines Ltd. were in occupation of the area it was usual to shut the barrier at night at least although it was generally kept open during the day.

Counsel then referred the court to *Wood v. Veal* (1), *Hall v. The Corporation of Bootle* (2), *Poole v. Huskinson* (3), *Folkestone Corporation v. Brockman* (4) and submitted that on the basis of the above authorities there was no dedication and therefore the road must be regarded as a private road.

It was further maintained by counsel that any breach of a covenant in the lease would be a matter between the lessor and the lessee and that under s. 53 (1) (e) of the Mining Act Kagera Mines Ltd. were entitled, inter alia, to erect, construct and maintain such engines, machinery, buildings and workshops and other erections as might be necessary or convenient; and to lay water pipes and make watercourses, pumps, dams and reservoirs and to divert from a natural watercourse any water on or flowing entirely through the land.

Counsel then dealt with the question of damages and submitted that, whereas the plaintiff has given evidence as to the damages suffered by him, the defendants had failed to substantiate the allegation that they had suffered any damage by reason of the obstruction.

Before considering the evidence, I propose to deal with the issues of law to which the court has been referred by counsel. I do not however intend to examine all the authorities. I shall content myself with dealing with some of them.

Wood v. Veal (1), the decision in which was followed in *Hall v. The Corporation of Bootle* (2), was an action of trespass for breaking and entering a certain yard and close of the plaintiff therein the parish of St. John, Westminster, and pulling down the plaintiff's fence there erected. The defence was justification of the trespass under public right of way.

At the trial, it appeared that the locus in quo, which was called Little Abingdon Street, Westminster, was not a thoroughfare but as far back as human memory could go it had been used by all persons desirous of going there, and that in 11 Geo. III it had been enumerated among other streets in the Act of Parliament then passed for paving, cleaning and lighting the squares, streets, etc. of Westminster. The Commissioners had accordingly paved and lighted it and watchmen had been stationed there.

On the part of the plaintiff, it appeared that in the year 1719, a lease for ninety-nine years of the plaintiff's premises, including the yard in dispute, had been granted by the then owner of the fee; which having expired in 1818 the plaintiff in 1820 having twenty-four years previously lived in the neighbourhood erected the fence in question.

The Lord Chief Justice left to the jury to say whether they thought there had been any dedication to the public previous to 1719, telling them that in that case they ought to find for the defendant; but if not then he told them that there could be no dedication to the public except by the owner of the fee; that the permission by the tenant for ninety-nine years would not bind the landlord; and that the circumstances of the lease for ninety-nine years, which had been proved, explained in a great degree the use by the public as not being referable to a dedication by the landlord. Under that direction the jury found a verdict for the defendant.

In a motion for a new trial, Best, J., one of the four judges who had heard the application, said:

"I am quite satisfied with the verdict which the jury have found in this case, and with the manner in which the case was left to them.

If a road be for the accommodation of particular persons only, it is not a public road, and therefore I can see no reason why the inhabitants in a street which is not a thoroughfare should not put up a fence at the end of it and exclude the public. It is not, however, necessary to decide that question in this case, because independently of it, the plaintiff was entitled to the verdict."

The application was therefore refused, the court holding that in the circumstances of that case, the jury were well justified in finding that there was no public

right of way in as much as there could not be any dedication to the public by the tenants for ninety-nine years, nor by anyone except the owner of the fee.

But in *Poole v. Huskinson* (3) it was held that there might be a dedication of a way to the public for a limited purpose as for a footway, etc.; but there could not be a dedication to a limited part of the public; as to a parish; and that such a partial dedication was simply void and would not operate in law as a dedication to the whole public.

In order to constitute a dedication of a way to the public by the owner of the soil, it was stated that there must be an intention so to dedicate, of which the user by the public would be evidence, subject to be rebutted by contrary evidence of interruption.

In *Folkestone Corporation v. Brockman* (4) the appellant, pursuant to the Private Street Works Act, 1892 made a provisional apportionment of expenses to be incurred in execution of works in a portion of the Lower Sandgate Road lying between the eastern boundary fence of Cliff House and a point 170 yards east of St. Paul's Church School, Sandgate. The respondents who were owners and occupiers of premises situate there objected to the apportionment on the ground, inter alia, that that portion of the street was a highway repairable by the inhabitants at large. The justices disallowed the objections; but at the request of the respondents, stated a case for the opinion of the King's Bench Division.

The Divisional Court ordered that the matter be remitted to the justices to say whether they found that there was no dedication of the road in question as a highway for foot passengers before the year 1836, or whether they had only negatived dedication of a highway for horses and carriages; and that, if they found no dedication of highway for foot passengers their decision should be affirmed, but that if they found that there was such a dedication their decision should be reversed.

The justices stated that they had found that there was no dedication of the road in question as a highway for foot passengers before the year 1836, and their decision was accordingly affirmed.

The Court of Appeal reversed the decision of the Divisional Court and of the justices. The corporation appealed. It was held that whether or not land had been dedicated to the public as a highway was a question of fact for the jury or other tribunal of fact and not one of law for the court; and that the decision of the tribunal of fact could not be set aside by the court unless there was no evidence to support it.

The court held that to constitute a valid dedication an intention to dedicate by the owner of the soil must be proved. While user of the way by the public might be evidence tending to show dedication, it would have that effect only when it is exercised under such conditions as to imply the assertion of a right with the acquiescence of the owner of the fee.

The important points of law which have emerged from these decisions are:

1. That dedication could only be made by the owner of the soil or of the fee;
2. That a mere tenant cannot dedicate a public highway however long his tenancy may be, unless the owner had acquiesced in such dedication of which user by the public for a long period of time would be evidence of such dedication;
3. That to constitute a valid dedication an intention to dedicate must be positively proved;

4. That the question of dedication or no dedication is one of fact for a jury or any tribunal of fact; and
5. That there might be a dedication of a way to the public for a limited purpose only, e.g. for a footway.

Applying the principles enunciated in the above cases to the facts and circumstances of the instant case, I agree with Mr. Dalal, and it is quite clear that neither Kagera Mines Ltd. nor the plaintiff in the instant case could have dedicated the road in dispute as a public highway. They were both tenants and for limited periods.

The only person therefore competent to have dedicated the road as a public highway must be either the Crown (State) to the extent of its own interest as an absolute owner, or owner in fee, which had granted the leases to Kagera Mines Ltd. and to the plaintiff respectively; or the people of Rwamuiru village, as the owners of the soil outside the area covered by the lease, Exhibit B, granted to the plaintiff for residential purposes.

There is no evidence before the court as to the extent of the area of land originally demised to Kagera Mines Ltd., nor is there any evidence of the extent of Crown land in the area. There is also no evidence that the defendants and their people of Rwamuiru are tenants of the Crown. In those circumstances, the only reasonable presumption must be that the area of Crown land involved in this case is that portion verged red in Exhibit C, which had been demised to the plaintiff by the Crown, and that the rest of the land outside the portion belongs to the defendants, whose natural habitat it is.

The law relevant to the question of dedication has long ago been settled. In the language of Lord Kinnear in *Folkestone Corporation v. Brockman* (4):

“The law was stated more clearly by Lord Blackburn in *Mann v. Brodie* (5), who had begun his judgment by citing the doctrine laid down by Parke, B., in *Poole v. Huskinson* (3) in these words:

‘In order to constitute a valid dedication to the public of a highway by the owner of the soil it is clearly settled that there must be an intention to dedicate; there must be an *animus dedicandi*, of which the user of the public is evidence and no more’.

The noble Lord then added, more particularly with reference to the effect of user, that:

‘Where there has been evidence of a user by the public so long, and in such a manner that the owner of the fee, whoever he was, must have been aware that the public were acting in the belief that the way had been dedicated, and has taken no steps to disabuse them of that belief, it is not conclusive evidence, but evidence on which those who have to find that fact may find that there was a dedication by the owner, whoever he may be’.”

In *Mann v. Brodie* (5) – a Scottish case – it was held that according to the law of Scotland the constitution of a public right of way does not depend upon any local fiction but upon the fact of user by the public as a matter of right continuously and without interruption for forty years. And the amount of user must be such as might have been reasonably expected, if the road in dispute had been undoubtedly a public highway. Also the user must be a user of the whole road as a means of passage from one terminus to the other and must not be such a user as can be reasonably ascribed either to private servitude rights or to the licence of the proprietor. The continued exclusion of the use of the alleged public way for thirty-seven years would not per se destroy the pre-existent right of public way unless it is maintained for the prescribed period of forty years, but it is strong evidence that such public right existed.

In *George Napier Turner v. William Walsh* (6) it was held that from a long continued user of a way by the public, whether the land belongs to the Crown or to a private owner, dedication from the Crown or private owner, as the case may be, in the absence of anything to rebut the presumption, may and ought to be presumed. The same presumption from user could be made in the case of Crown lands in the Colony of New South Wales, apart from the Crown Lands Alienation Act, 1861, though the nature of the user and the weight to be given to it vary in each particular case.

In that case, the declaration had alleged that the respondent in the case broke and entered the appellant's land and cut down the fences on the land, which had been purchased from the Crown under the provisions of the Crown Lands Alienation Act, 1861, of New South Wales. The material plea was one which justified the trespass on the ground that there was a highway across the appellant's land and that the respondent passed along the highway and cut down the fence to remove the obstruction.

To that plea the appellant pleaded two replications, each of which stated that the alleged highway was a track across the plaintiff's land while the same was Crown land and that such track was used by persons travelling with stock for travelling and driving their stock on and along the same, but that such track was never proclaimed or dedicated as a highway and there was never a way otherwise than aforesaid.

Issues were joined on those replications and the action was tried by Hargrave, J., and a jury.

On the part of the appellant evidence was given of the alleged trespass by the respondent and a Crown grant to the appellant of the land dated February 1, 1879, was put in. The Crown grant did not contain any reservation or exception of the highway. On the part of the respondent "clear and distinct evidence of an uninterrupted and continuous user of the road in question was given". It was shown that, "for upwards of forty years the road fenced across by the plaintiff had been constantly used by the public, by the police, by mail coaches and by travellers in going up or down to Lachlan between Enabalong and Condobolin and to numerous places; and that there was such a road to the knowledge of the Crown was amply proved by the production in evidence of the county map which came out of the possession of the Crown in which the road, though only specified as a track, was marked out".

The question of law involved was whether user might be relied upon in the Colony of New South Wales in like manner as it might be in England for the purpose of establishing as against the Crown a presumption of a dedication of a road over Crown land, and whether or not the defendant had proved that such a highway existed.

Hargrave, J., directed the jury that user might be relied upon in New South Wales as it might in England for the purpose of presuming and establishing dedication of a road over Crown land as against the Crown, and that the user proved was sufficient to entitle the jury to presume dedication by the Crown of the road in question.

The jury found a verdict for the respondent. On appeal, it was held by the Privy Council that their Lordships had no difficulty in saying that the judge was right in directing the jury that from a user of twenty-one years before the Statute, continued since 1861 down to the time of the action without interruption or interference on the part of the Crown, they might presume a dedication prior to the Statute and a time when the Crown had power to dedicate. The appeal was dismissed.

In *Attorney General v. Esher Linoleum Co. Ltd.* (7) it was held that where there is a public footway and adjacent land along the same land as the footway but increasing the width is laid out by the owner of the soil as a way for carriage traffic, even for private traffic, the presumption of law, in the absence of evidence to the contrary, is that the owner has dedicated to the public user as a footway all the space that he has devoted to traffic.

In *R. v. Tything of Eastmark* (8) it was held that if a road had been used by the public for a great number of years a dedication by the owner of the soil may be presumed, whoever he may be, and that it is not material to enquire who the precise owner was or whether he intended to dedicate the road to the public.

Ngambo Estate and Saw Mills Ltd. v. Sikh Saw Mills Ltd. (9) was a suit against the respondents for general damages for obstructing a public right of way and for trespass and conversion of cut timber. The High Court found that the existence of a public right of way had not been established and that the claim for trespass and conversion was time barred. The substance of the appeal was that the evidence of unobstructed user of the road was sufficient to support an inference of dedication to the public, and that the lapse of a year between the trespass and the conversion justified their being regarded as separate causes of action, which would prevent the claim for conversion from being barred.

It was held, on the issue relevant to the present enquiry, that there was cogent evidence of long and uninterrupted user of the road of which the owner's agent was aware; and as the agent's knowledge must be imputed to the owner, the true inference was that the owner had dedicated the road to the public.

I now turn to consider the evidence in this case in the light of the principles enunciated in the various authorities dealt with above, and also to consider the effect of the provisions of s. 90 of the Mining Act (Cap. 248).

It is noteworthy that the plaintiff in para. 3 of his reply to the written statement of defence and counterclaim filed by the defendants averred as follows:

"3. The plaintiff denies that he put any barrier preventing the public from using the said access road."

The impression one is impelled to form on reading the above averment is that the plaintiff did not at any time put a barrier, which had prevented members of the public from using the road in dispute in this case. If that impression is correct, then it is contrary to the whole case put forward by the plaintiff. I shall however not place too much emphasis on this averment.

In clause 2 of the lease, Exhibit B, one of the covenants undertaken by the plaintiff is as follows:

"(b) To maintain existing buildings (hereinafter called the said buildings) in good and substantial repair to the satisfaction of the Governor and the District Commissioner, Ankole."

The inference to be drawn from this covenant seems to me quite clear. It is this, that at the time the plaintiff went into possession of the land verged red in the plan, Exhibit C, demised to him by the Crown, there were buildings already erected thereon. As there is no direct evidence on the point, it is probable and, I think, also reasonable to presume that the buildings referred to in the lease and which were occupied by the plaintiff on entering into possession of the land concerned were buildings already erected there by Kagera Mines Ltd.

In covenant (g) of the lease there is to be found also the following undertaking by the plaintiff, namely:

“(g) Not at any time during the said term to use, exercise or carry on or permit or suffer to be used, exercised or carried on in or upon the said land or buildings or any part thereof any noxious noisome or offensive art, trade, business, occupation or calling or to allow any act matter or thing whatsoever to be done at any time during the said term in or upon the said land or said buildings which shall or may be or grow to the annoyance nuisance grievance damage or disturbance of the occupiers or owners of the adjoining lands and properties.”

In the course of his submission, counsel for the defendants drew the attention of the court to this particular covenant in the lease, and submitted that the plaintiff had committed a breach of the above covenant in that by erecting the barrier and also digging a trench on the land even though outside the particular area covered by the lease, he had done so to the annoyance, nuisance, grievance, damage or disturbance of the occupiers or owners of adjoining lands and properties, which, in the instant case, are the defendants and their people of Rwamuiru.

In answer to that submission, counsel for the plaintiff, rightly, I think, contended that any breach of any of the covenants contained in the lease, Exhibit B, was a matter between only the lessor and the lessee, and that such a breach cannot be the foundation of a claim to damages by the defendants as a third party as there is no privity of contract between them and the plaintiff.

On the other hand, it cannot be doubted that the insertion of the provisions of covenant (g) in particular in the lease was designed to protect owners and occupiers of land adjoining the area demised to the plaintiff. That being so, the provisions of covenant (g) cannot be dismissed altogether as irrelevant to the defendants claim for damages for the disturbance caused them by the plaintiff.

In my view, the inclusion of the provisions of the covenant in the lease shows that the right conferred on and exercisable by the plaintiff under the lease on the land demised to him was restricted. Such restriction reinforces the claim of the defendants that the plaintiff could not exercise such right to the detriment or annoyance, nuisance, damage or disturbance of the owners of adjoining lands and properties.

It would appear, therefore, that the defendants are justified in their complaint, that the plaintiff had no right to have erected any obstruction on the road thereby depriving them and other users of the said road of their right to the free use thereof. It is evident that the insertion of the said provisions in the lease recognises the right of owners of adjoining properties.

At the hearing of this case, I was very favourably impressed by the evidence given by the defendants, and I formed the impression that the defendants were honest, simple-minded individuals. They gave their evidence in a straight-forward manner and so too did their witnesses. I observed with particular care their demeanour in the witness box. I am convinced that their cause is a righteous one.

On the facts therefore, I have no hesitation in accepting the evidence by the defendants and their witnesses that, prior to the advent of Kagera Mines Ltd. into the area, there was in existence a passageway or footpath starting from the village of Rwamuiru and running through the mining area into the piece or parcel of land demised to the plaintiff and thence onto the main Kabale-Kikagati road; that the said footpath or passageway was opened by the people of Rwamuiru for the use of the public and themselves at the time when Ruhara was the *saza* chief of the area; and that that footpath was effectively in use by them and other members of the public.

It is common ground that Kagera Mines Ltd. started operating the mines in the area of the road in dispute as far back as between 1927 and 1928 and that the road alleged to have been opened by them was not opened until 1940. It follows, I think, that from 1927 or 1928 to 1940 the road used by Kagera Mines Ltd. was the footpath or passageway.

I accept the evidence of the defendants that all that Kagera Mines Ltd. did in 1940 was to widen the old passageway or footpath and to render the same motorable. This seems to me the natural and reasonable thing for the company to have done since they themselves were already using the said passageway or pathway.

It is plain from the evidence, which I accept, that at the time when Kagera Mines Ltd. first started operations in the area there was no barrier across the old path or passageway, and that it only became necessary to erect one when they suffered losses of their property by thieves. I also accept the evidence of the defendants and their witnesses that even when the barrier was erected and the road widened by Kagera Mines Ltd. they and their people as well as other members of the public were entitled to and did exercise their right over the road without let or hindrance; and that the barrier was never shut during the day.

That the road was always kept open during the day and that the defendants and their people and other members of the public were never obstructed in the use thereof has been amply corroborated by the evidence given by Amani Wengi and the Commissioner for Mines, Arthur Leslie Job, whose evidence was exhibited in and formed part of these proceedings by consent of both counsel, as the witness has since retired from the services of the Government of Uganda.

The evidence given by Mr. Job was to the effect that on the various occasions he visited the mines during the time of Kagera Mines Ltd. he did observe a gate but that such gate was never closed. It was always left open, and that on all the occasions of his visits to the mines during the time of Kagera Mines Ltd., he was never at any time stopped by anyone nor was there anyone stationed at the gate as a gatekeeper. The evidence given by Mr. Job on this point is to be preferred to the evidence of the plaintiff, that during the time when Kagera Mines Ltd. were in possession of the area it was the practice to lock the gate both during the day and at night. I therefore reject the evidence given by the plaintiff on this point as well as his evidence that he it was who had to reconstruct the gate when he acquired a mining right in locations Nos. 2385 and 2386. I am satisfied that all that the plaintiff did was to replace the crossbeam on the two posts which were left standing by Kagera Mines Ltd. on abandoning their concessions.

I hold that the custom of barricading the gate both during the day and at night was introduced by the plaintiff, thereby preventing the defendants from making use of the road in dispute. The action of the plaintiff in placing an obstruction on the road was wrongful. It was an attempt by him to assert a right to which he was not entitled and which was in violation of the provisions of s. 90 of the Mining Act (Cap. 248) the terms of which are as follows:

“90(1) No holder of an exclusive prospecting licence or mining right and no applicant having permission to mine on the area covered by such application shall at any time, in the exercise of the rights granted under this Act, interfere with or perform any act which may tend to interfere with the exercise of any right of passageway on the area of such prospecting licence or mining right or on the area the subject of an application and over which he has permission to mine, nor shall he perform any act which may damage or tend to damage any passageway without first obtaining the consent in writing of the holder of the right of passageway; Provided that in the case

of a customary public right of passageway or where the holder of the right of passageway cannot be found by the person requiring his consent, the consent of the District Commissioner shall be deemed sufficient consent.”

It is not certain on the evidence as to the nature of the right over the mining area or locations granted to the plaintiff. No licence or permit of any kind was produced before the court. On the assumption that what was granted to the plaintiff was a mere permission to mine in the area in dispute, there is also no evidence that the plaintiff had at any time sought and obtained the permission of the people of Rwamuiiri or of the District Commissioner before placing the obstruction on the road in dispute. Indeed the case of the plaintiff is to the contrary. He claims the passageway to be his private property.

Having regard to the view which I have expressed on the evidence, I am satisfied and hold that the defendants and their people were justifiably enraged by the conduct of the plaintiff. I also find as a fact that the trench dug by the plaintiff was to prevent the defendants and their people from passing through the road with their cars and lorries, and that the defendants were equally justified both in closing the trench and in removing the barrier from the road.

It has not been disputed that, since the incident, the subject-matter of this suit, a new company has been formed of which the plaintiff is a member; and that the said company has since taken over the interest held by the plaintiff in the mining area, and that since then both the new company and the people of Rwamuiiri village now jointly maintain the road in dispute. Surely such a development is hardly consistent with the claim of the plaintiff that the road was his private property.

On a further consideration of the evidence, I am minded to and do so find for the defendants that the activities of the plaintiff on the road in dispute amounted to unlawful obstruction of rights over a public road which had been dedicated by them to the use of members of the public.

On the principle enunciated in *Ngambo Estate and Saw Mills Ltd. v. Sikh Saw Mills Ltd.* (9) and in the absence of any evidence to the contrary, and having regard to the fact that Mr. Job was until his retirement a Commissioner for Mines and therefore an agent of the Government of Uganda, I am entitled to and I do so presume that the Crown knew about the existence of this particular road since the same runs across the land demised by the Crown to the plaintiff, and is shown on the plan attached to the lease, Exhibit B; and that the Crown had acquiesced in the dedication of the said road to the use of members of the public.

For the reasons given above, in my judgment the plaintiff has failed to establish to my satisfaction his claim for special and general damages and an injunction. His suit is therefore dismissed with costs to the defendants. I would enter judgment for the defendants in their counterclaim for the declaration and injunction sought with half their costs against the plaintiff as the damages claimed by the defendants have not been proved to my satisfaction. I would therefore dismiss their counterclaim in that respect with no order as to costs. Order accordingly.

Declaratory order and injunction in favour of defendants, with half costs.

For the plaintiff:

Dalal and Singh, Kampala

S. H. Dalal

For the defendants:

McConnell and another v Kimani
[1967] 1 EA 702 (CAN)

Division: Court of Appeal at Nairobi
Date of judgment: 4 August 1967
Case Number: 22/1967 (150)
Before: Sir Charles Newbold P, Duffus and Spry JJA
Sourced by: LawAfrica
Appeal from: The High Court of Kenya at Nairobi – Rudd, J.

[1] *Advocate – Agency of, to sell farm on behalf of client – Extent of.*

[2] *Agency – Apparent authority of agent restricted by letter of instruction by principal – No communication of limitation to third party – Principal bound by agent’s apparent authority.*

[3] *Agency – Authority granted under general power of attorney – Power registered under Registration of Documents Act (K.) – Restriction of authority by subsequent letter effective.*

[4] *Deed – Variation of authority given by – Whether such variation must also be by deed.*

[5] *Power of Attorney – Alteration of authority under – Whether authority given by a power of attorney under seal can be altered otherwise than by a document under seal.*

[6] *Registration of Documents – Effect of registration of power of attorney under Registration of Documents Act (K.) – Whether amounts to notice to anyone.*

Editor’s Summary

The appellants were owners of a farm which they agreed, on December 1, 1964 to sell to the respondent for £5,000 plus a sum to be agreed as the price of furniture; the agreement was subject to the respondent obtaining a loan from the Land Bank. The appellants, at the time of the agreement, were preparing to leave Kenya and they executed a power of attorney in favour of Mr. Place, a Nairobi advocate; this power was duly executed and registered under the Registration of Documents Act, and there was evidence that the respondent was told of its existence. The respondent was let into possession of the farm on December 1, 1964; and a few days later the appellants left for South Africa. On December 11, 1964 Mr. Place received information from the respondent’s advocates that the loan had been refused on the basis of a purchase price of £5,000, but was available on the basis of a price of £4,000. Mr. Place communicated this information to the appellants and asked for instructions. A reply by the appellants to Mr. Place’s letter and communicated to the respondent on January 14, 1965 contained negotiating terms and a proviso to the effect that the appellants would be prepared to accept an offer from the respondent according to those terms but subject to confirmation by the appellants. The concluding sentence in the appellants’ letter to Mr. Place was “On hearing from you, I will telegraph instructions”. On February 8,

Mr. Place made a firm offer in different terms to the respondent which was accepted by the respondent on February 10. The appellants refused to execute the formal agreement and the respondent was awarded a decree of specific performance on March 13, 1967. It is against that decree that the appeal was brought.

Held – (per Newbold, P. and Duffus, J.A.; Spry, J.A. dissenting on the facts):

- (i) although Mr. Place had no actual authority to conclude a binding agreement without confirmation from his principal, the respondent was entitled to rely on the apparent authority granted Mr. Place by the power of attorney;

- (ii) this power, although granted by deed was gratuitous and therefore could be validly revoked or altered orally or by letter;
- (iii) such alteration would not affect a third party dealing with the agent and aware of the power of attorney unless it was specifically brought to his notice; this had not been done;
- (iv) the appellants were therefore bound by the agreement concluded between Mr. Place acting under his apparent authority and the respondent.
- (v) registration of the document, being optional, did not of itself amount to notice to anyone.

Appeal dismissed with costs.

Cases referred to in judgment:

- (1) *Day v. Waller* (1899), 81 L.T. 107.
- (2) *Trickett v. Tomlinson* (1863), 13 C.B.N.S. 663; 143 E.R. 263.
- (3) *Berry v. Berry*, [1929] 2 K.B. 316.
- (4) *West v. Blakeway* (1841), 10 L.J. (C.P.) 173.
- (5) *Nash v. Armstrong* (1861), 10 C.B.N.S. 259.
- (6) *R. v. Wait* (1823), 1 Bing 121; 130 E.R. 50.
- (7) *Smart v. Sandars* (1848), 5 C.B. 895; 136 E.R. 1132.
- (8) *Bryant v. Quebec Bank*, [1893] A.C. 170.
- (9) *Hambro v. Burnand*, [1904] 2 K.B. 10.

C.A.V.

The following judgments were read:

Judgment

Duffus JA: The appellants in this suit are the registered owners of a piece or parcel of land in the Nairobi area under the Government Land Act (Cap. 280) formerly known as the Crown Lands Ordinance. This action was brought by the respondent against both appellants seeking an order for the specific performance of a contract for the sale of this land. The action was filed in May, 1965 and judgment was delivered on March 13, 1967 granting the orders sought by the purchaser, the plaintiff/respondent.

The appellants appeared in person both at the trial and on this appeal. The second appellant with the consent of her husband the first appellant argued the appeal. They were legally represented during the negotiations for the sale of the land and also at the start of these proceedings but afterwards appeared in person. The facts have been fully stated by the learned trial judge in his judgment and shortly these facts showed that the appellants were the owners under a crown lease of a small farm including some acres of coffee with a dwelling house built thereon. An arrangement was made between the appellants and the respondent whereby the appellants agreed to sell their interest in the land to the respondent for £5,000 plus an extra amount for the furniture and subject to a furnished letting of the dwelling house but the trial

judge found that this was subject to the respondent obtaining a portion of the purchase price by a loan from the Land Bank. The appellants were around this time, December 1, 1964 leaving Kenya for South Africa, and before they left executed a power of attorney appointing their advocate, Mr. J.B. Place of the firm of Messrs. Archer & Wilcock, attorney with full powers over this land. It is agreed that this power was duly executed and registered under the Registration of Documents Act (Cap. 285). The power was not included in the record of appeal but this court was referred to the copy put in at the hearing, and unquestionably Mr. Place was given very wide powers including that of entering into an agreement for the sale of the land and further for the execution of a conveyance or assignment of the appellants' interest in the land.

The appellants duly left for South Africa a few days after December 1, 1964 and the respondent was let into possession of the farm on December 1, 1964. A formal agreement was drawn up. There is a dispute as to whether this was signed by the respondent. On this point the learned trial judge accepted the respondent's case that he did not sign, but it is however clear that at this stage there was a definite agreement between the parties for the sale of the land, but it was subject to the respondent obtaining the loan from the Land Bank. This loan, however, was not forthcoming and on this point the learned judge found:

"However on December 11, 1964, Mr. Place received information from the plaintiff's advocates that the loan had been refused on the basis of a price of £5,000 but was available on the basis of a price of £4,000. Mr. Place communicated this to the defendants and asked for instructions".

At this stage there can be no doubt that all the parties regarded this first agreement as at an end. The appellants at the appeal referred to certain aspects of this first agreement but any matters affecting this agreement are only relevant to this case in so far as they can assist in determining whether a second agreement was arrived at.

The plaintiff/respondent's action is based on the second agreement. The second agreement was arrived at by correspondence between the advocates of both parties and the learned trial judge has in his judgment quoted fully from the relevant parts of this correspondence and also from letters that passed between the appellants and Mr. Place writing as Archer & Wilcock. The plaintiff/respondent's case is that a concluded agreement was arrived at in the correspondence between Messrs. Archer & Wilcock acting as advocates and agents for the appellants and Messrs. Makhecha & Waruhiu as advocates for the respondent. In the plaint the respondent did not aver that the appellants' advocate, Mr. Place, had acted or been appointed as attorney for both the appellants but he did rely on the fact that the agreement had been made with Messrs. Archer & Wilcock acting as advocates and agents of the appellants, but then after further proceedings took place including the entering and subsequent setting aside of the judgment given in default of a defence and the taking of the evidence of Mr. Place, the appellants obtained leave and filed an amended defence and the respondent then filed a reply and in that reply relied on Mr. Place's appointment under the power of attorney. He averred as follows:

"The plaintiff states that he was told and led to believe that both Archer & Wilcock and Mr. Place, a partner in the firm of Archer & Wilcock, had full authority from the defendants to conclude a sale of the farm. He states further that Mr. Place had at all material times a general power of attorney from the defendants to sell this farm and he was so informed by Mr. Place of this".

The trial judge considered the issue under two main heads, that is: – (a) Had Mr. Place and/or Messrs. Archer & Wilcock the necessary authority to conclude the agreement for sale; and (b) Was there in fact a concluded agreement?

I will consider the first question, which is really the substantial issue on this appeal. There was considerable correspondence between Mr. Place, writing as Archer & Wilcock, and the first appellant, Col. McConnell, and a lot depends on the effect of a letter written by Col. McConnell on February 2, 1965, to Mr. Place. I would quote this letter as it appears in the judgment in full:

"Thank you for your letter of January 25. I note what you say but do not remember any mention in my letter of tools, equipment, etc.

We would accept (subject to confirmation on hearing from you) £4,000 for the farm including tools, equipment, coffee crop and furniture Shs. 2,635/-. These amounts to be paid in sterling – I should not pay

Kimani the £100 suggested on account of cows, and the rent must be paid to me until December 31, 1965.

On hearing from you I will telegraph acceptance or otherwise.”

The learned trial judge considered Mr. Place’s dual position, that is, acting as an advocate for the appellants and acting as their agent under the power of attorney. He found that Mr. Place had no power to bind the appellants acting as their attorney and I quote from his judgment on this issue:

“There is however a question as to whether a binding agreement for sale was made later on February 10, by acceptance of the subsequent offer made on February 8.

If Mr. Place’s authority were merely that of an advocate instructed to negotiate, I think that he would have had no authority to bind the defendants to a sale at Shs. 82,635/-.

Quite clearly Col. McConnell’s letter of February 2, 1965 did not authorise him to close the deal without reference back. The earlier letter of January 7, 1965, might perhaps possibly have been construed as such authority but Mr. Place did not act upon that earlier letter as authority to sell at Shs. 82,635/-.

Further Mr. Place took no steps to ensure that the purchase price was payable in sterling. That might not have appeared important at the time but now with the exchange control it is significant.

For these reasons I think that the defence would have been successful if Mr. Place’s position had been merely that of an advocate acting under instructions.”

The judge then went on to consider Mr. Place’s position under the power of attorney, and as this part of his judgment is vital to this appeal I would also set it out in full:

“However the fact is that at all material times Mr. Place held a general power of attorney for both defendants authorising him to sell on their behalf on such terms as he might think fit. In the correspondence Mr. Place wrote to the McConnells as J.B. Place; he wrote to the plaintiff’s advocates as Archer & Wilcock, a firm of advocates of which he was then a partner, and Col. McConnell wrote to him letters addressed to Archer & Wilcock and starting Dear Mr. Place.

It is suggested that Mr. Place did nothing in his capacity as attorney under the power of attorney, that his letters to the plaintiff’s advocates only purported to be letters written as an advocate and that in fact he did not use his power of attorney. I doubt that this argument is sound.

If Mr. Place can be held to have made a firm offer by his letter of February 8, to the plaintiff’s advocates and if the reply of those advocates by their letter of February 10, constitutes a final acceptance of that offer then I think that there would be a binding contract. It would be the case that Mr. Place had gone beyond his specific instructions yet under his power of attorney he had power to sell on such terms as he thought fit and the fact that he had made a firm offer which was accepted instead of a conditional offer as instructed would not affect the validity of his action which he was competent to effect under his power of attorney. See *Day v. Waller* (1) and *Trickett v. Tomlinson* (2).”

Two points arise for consideration on this part of the judgment. The first question is whether the authority given by a power of attorney under seal can

be altered otherwise than by another document also under seal. If the authority can be so altered then the further question arises, was the agreement in this case entered into within the apparent scope of Mr. Place's authority, and if so would the purchaser be bound by instructions not contained in the power of attorney and of which he had no notice? The further instructions in this case would be those contained in Col. McConnell's letter of February 2, 1965, which I have already set out in full.

On the first issue the power of attorney in this case was only a bare naked authority not given for valuable consideration and not given for the purpose of securing some benefit to the donee of the authority. A deed is not needed to appoint an agent to sell land and in this case it is probable that a deed was executed in order to give Place power to execute the assignment if this became necessary.

Counsel for the respondent submitted that a power of attorney given by deed as in this case could only be revoked by a deed. It was the old common law rule that a document under seal could only be altered by another instrument under seal but this was not the rule in equity. The legal position is clearly explained by Swift, J., in his judgment in *Berry v. Berry* (3) when he said ([1929] 2 K.B. at p. 319):

"It is clear as was said by Bosanquet, J., in *West v. Blakeway* (4) that 'no rule of law is better established than that a covenant cannot be varied or dispensed with, but by some contract of equal value; and this covenant, therefore, cannot be varied but by some instrument under seal.' But, although that was the rule of law, the courts of equity have always held themselves at liberty to allow the rescission or variation by a simple contract of a contract under seal by preventing the party who has agreed to the rescission or variation suing under the deed. In *Nash v. Armstrong* (5) it was held that a parol agreement not to enforce performance of a deed and to substitute other terms for some of its covenants was a good consideration for a promise to perform the substituted contract even although the deed be not thereby released."

The authority to sell in this case did not require a deed, and it is, in my view, clear that a revocation or alteration of this authority could also be effected in any manner whatsoever, whether by parol instructions or by a letter or by a deed or impliedly by a course of conduct. I would in this respect further refer to the case of *R. v. Wait* (6) and to *Smart v. Sandars* (7). In the latter case Wilde, C.J., delivering the judgment of the court fully dealt with the question of an irrevocable power, which this power clearly is not.

I am therefore of the view that Col. McConnell's letter of February 2, 1965, did in fact alter and restrict Place's authority to sell under the power of attorney. There has been no suggestion in this case that the plaintiff/respondent ever became aware of this letter and the crux of this appeal is whether the plaintiff/respondent knew that Place was acting not only as the defendants' advocate but as his agent with full authority to sell. It was only in his reply to the defence that the respondent first pleaded that Place acted under the power of attorney although he did plead in the plaint that Archer & Wilcock acted not only as the appellant's advocate but also as their agent.

This issue was however, fully raised by the time that the case came on for trial and the plaintiff gave evidence to this effect. He was then giving evidence of a meeting of December 1, 1964, at the offices of Archer & Wilcock, a meeting apparently to finalise the agreement before the appellants left Kenya and he said:

“First defendant said it would be all right because he had given Place his power of attorney. Place also came from his office and confirmed this.”

This witness was not cross-examined as to this statement but then the appellants at that stage appeared in person and did not have the benefit of an advocate. On the other hand Place had already given evidence and he was called by the respondent and it was never put to him that the respondent had any knowledge of the power of attorney.

When the first defendant gave evidence he specifically denied telling anyone that he had given Place the power of attorney. He said:

“I never told anyone that I had given my power of attorney to Place and again I did not tell the plaintiff that I had given power of attorney to Place and he could do whatever was necessary. I was not given opportunity to cross-examine Place.”

He also gave reasons for giving Place power of attorney. He said:

“I was going to South Africa and I gave Mr. Place a general power of attorney. My wife joined in the power of attorney.”

and again:

“I expected Place to negotiate for the sale of the farm. I gave him a power of attorney. He asked for one and we gave him one. The object was to enable him to continue negotiations. I never authorised him to come to any determination at all. He asked for a power of attorney – He did not use it anyhow.”

Nowhere in his judgment has the learned judge made a clear and direct finding as to whether or not the plaintiff knew that Place held the power of attorney with full authority to act whilst the negotiations were proceeding. It is, in my view, necessary to arrive at a decision on this point as if in fact Place was held out as the appellants’ agent with authority to conduct and conclude the agreement for sale then the respondent would not be bound by any further private or secret instructions given by the appellants to Place restricting his authority unless the respondent knew of these instructions.

Counsel for the respondent has submitted that the judge accepted the plaintiffs’ case in its entirety and that it must be implied from his judgment that he in fact accepted that the respondent knew of the existence of the power of attorney giving Place full authority to act and conclude the sale.

I have considered the fact that Archer & Wilcock in their letter of January 25, 1965 to the respondent’s advocate stated that they were referring the proposed amendment to their clients, and again in their letter of February 8 they stated:

“We have now heard from our clients who state as follows”

and then they set out the basis of the terms actually arrived at. On the other hand there is the fact that undoubtedly the appellants did appoint Place as their attorney with full authority to negotiate and complete the sale when they left Kenya and it would have been in the natural course of events for the purchaser to be told of this appointment as he would be most anxious to know what would be the position when the vendors left Kenya. It was also a fact that the appellants did not at this material time revoke or specifically amend the power of attorney nor did they notify the respondent that Place no longer had authority to act as their agent.

Counsel also submitted that the registration of this document under the Registration of Documents Act would of itself amount to notice to the respondent. With respect, I cannot agree. This was not compulsory registration and in my view registration here was only as a safeguard or record of the document in case of its loss and did not amount to notice to anyone without actual notice of the document's existence.

I would refer again to that portion of the judgment which I have set out in full dealing with Place's position under the power of attorney. After full consideration I am of the opinion that the learned trial judge in arriving at his decision must have come to the definite conclusion that the respondent knew that Place had been appointed to act as the appellants' agent under the power of attorney with full authority to conclude the sale. This view is borne out by the fact that both the cases referred to by the learned judge in his judgment, the cases of *Day v. Walker* (1) and *Trickett v. Tomlinson* (2) refer to the principle that private instructions given to an agent would not bind a person negotiating with an agent who has been held out as having the necessary authority to conclude an agreement. The following extract from the judgment of *Trickett v. Tomlinson* (2) explains the legal position which, in my view, the learned trial judge correctly applied in coming to his decision:

"In pursuance of that very general authority, Evans went down to Merthyr Tydfil and arranged with the defendants that they should have the stone for £50. The plaintiff now claims to repudiate the act of Evans, on the ground that he had given him secret instructions not to take less than £100. As, however, those instructions were never communicated to the defendants, they were perfectly justified in treating Evans as a person duly authorised to make such agreement with them as he might think proper. Having held out Evans to the defendants as a person having authority to settle the matter in dispute with them at his discretion, it is not competent to the plaintiff now to turn round and repudiate that authority."

I am therefore of the opinion that the trial judge was justified in his conclusion that Place was apparently duly authorised by the appellants to conclude the agreement for sale and that the agreement he entered into with the respondent was a binding and legal contract.

The evidence shows that Place through Archer & Wilcock agreed to all the terms of the contract with the respondent acting through his advocates. These terms were fully set out in the agreement prepared and forwarded by Archer & Wilcock to the respondent's advocates and was agreed to by the respondent who actually signed the document. Mr. Place may no doubt have exceeded the instructions of his principal and he might be liable for any damages that they have suffered, but he was held out as having the necessary authority to act on the appellants' behalf and the appellants are bound by the contract that he entered into on their behalf. I would therefore dismiss this appeal with costs to the respondent.

Sir Charles Newbold P: I have had the advantage of reading in draft the judgment of Duffus, J.A., in which the facts relevant to this appeal are set out, and I agree with his conclusion that the appeal should be dismissed.

Where a person enters in good faith into a contract with an agent purporting to act as such and the agent is in fact authorised to enter into the contract, then the contract is binding on the principal whether or not the agent abused his authority and whether or not the other contracting party was aware of the authority (see *Bryant v. Quebec Bank* (8) and *Hambro v. Burnand* (9)). As Mr. Place had a power of attorney from the appellants which clearly authorised him to enter into the contract of sale and as there is no evidence which would

support any suggestion that the purchaser did not act in good faith it would appear that the appellants are bound by the contract. It is, however, urged that the appellants are not so bound for the combination of two reasons; the first being that the purchaser was unaware of the power of attorney, and thus could not claim that he was unaffected by any secret variation or cancellation of the authority; and the second being that the power of attorney had in fact been varied or cancelled at the relevant time, with the result that Mr. Place no longer had authority to enter into the contract of sale.

As regards the first reason, I entirely agree with Duffus, J.A., in his conclusion that the purchaser was aware of the power of attorney. This being so, Mr. Place, so far as the purchaser was concerned, had not only actual but also apparent authority. If the actual authority was varied or revoked then Mr. Place still continued to have apparent authority until the fact of the variation or cancellation was brought to the attention of the purchaser. This was never done. Thus even if the letter of February 2, 1965, had the effect of varying or cancelling the power of attorney, nevertheless, as the letter was not brought to the attention of the purchaser the appellants are bound by the contract entered into by their agent within the apparent scope of his authority.

As far as the second reason is concerned, a gratuitous power of attorney may be varied or cancelled by the donor by conduct or oral statement intended to effect that end. The position in relation to a power given for valuable consideration is different and variation or cancellation would normally require mutual consent. It is by no means clear that the power given to Mr. Place was not given for valuable consideration as Mr. Place presumably would charge for his work. The charge would, in all probability, have related to his work as an advocate; thus even though it is difficult to regard the power granted as divorced from the work for which Mr. Place would receive remuneration, I shall assume that the power was a gratuitous one. It was therefore possible for the appellants by letter to vary or cancel the power given by deed. I am, however, by no means sure that a power given by deed by two persons can be varied or cancelled informally by one, even though that one may be the spouse of the other. Suppose, for example, that the power given by the two had authorised sale at not less than £5,000, could that power be effectively varied by a letter from one reducing the figure to £4,000? It is, however, unnecessary to consider this matter further as, even if the power had been varied or cancelled, for the reasons I have given I agree with Duffus, J.A., that the appeal should be dismissed. There will be an order in the terms proposed by Duffus, J.A.

Spry JA: The facts which gave rise to this appeal are set out in the judgment of Duffus, J.A., which I have had the advantage of reading in draft, and I shall not repeat them in detail.

Briefly, the appellants appear to have concluded an agreement with the respondent for the sale of their farm and, as they were leaving Kenya, left a general power of attorney with an advocate, a Mr. Place, so that he could complete the matter. For reasons outside the control of the parties, the proposed transaction could not be completed and negotiations began anew. In the course of these, the first appellant wrote a letter to Mr. Place setting out certain suggestions. These were passed on by Mr. Place to the respondent's advocates on January 14, 1965, and they replied, on January 16, 1965, saying that the respondent agreed and asked that the proposals be embodied in a draft agreement. Mr. Place purported to do this, but in fact included terms less favourable to the respondent than those proposed by the first appellant. The draft agreement was accordingly rejected and Mr. Place then said that he would have to seek further instructions. He did so, but by this time the first appellant seems

to have become less sure that he wanted to sell and his reply was clearly a direction to negotiate and refer back. Notwithstanding this, Mr. Place wrote on February 8, 1965, to the respondent's advocate a letter which amounted to an unconditional offer, and this was accepted by letter on February 10, 1965. A formal contract was prepared, but the appellants refused to sign. The respondent then sued for specific performance.

The appellants adopted three main lines of defence. One was an allegation of fraud and of this it is only necessary to say that there was clearly no sufficient evidence to establish an allegation of such gravity.

The second was that Mr. Place had acted in excess of his authority in making an unconditional offer. I think that the letter of February 8, 1965, was undoubtedly an unconditional offer; I shall consider later whether the reply of February 10, 1965, was unconditional but for the present purpose I shall assume that it was.

The learned trial judge began by considering Mr. Place's authority as an advocate, or rather that of Messrs. Archer & Wilcock in whose name he wrote, and concluded that if he was writing as an advocate merely instructed to negotiate, the appellants would not have been bound. There was no cross-appeal against this decision, with which I respectfully agree, and counsel for the respondent conceded that in non-contentious business an advocate has no authority to commit his client except on express instructions. I think, therefore, that Mr. Place had no implied authority to contract.

The learned judge then considered the authority of Mr. Place personally, as the holder of a power of attorney from the respondents. He rejected a suggestion that Mr. Place had acted and purported to act as an advocate and had not made use of the power of attorney and held that as, under his power of attorney, Mr. Place had power to conclude a contract, the contract he made was binding on the appellants, notwithstanding that he was acting contrary to specific instructions given him. He cited in support the cases of *Davy v. Waller* (1) and *Trickett v. Tomlinson* (2), although, with respect, I do not think either of those cases is of great assistance in dealing with the facts of this case. It is this question that has given me the greatest difficulty.

I am satisfied that if an agent has actual authority to bind his principal, then any contract he makes on behalf of his principal will be binding on the principal, whether or not he purports to act in exercise of that authority and whether or not the person with whom he deals knows of the authority. I am satisfied also that where an agent has apparent authority, a contract he makes will be binding on his principal, although the exercise of the authority may be in excess of specific instructions, if the existence of those instructions is unknown to the person with whom the contract is made.

Applying these principles to the present case, I am satisfied that Mr. Place did not have actual authority to make an unconditional offer. He held a general power of attorney, which conferred very wide powers, but he had received specific instructions by letter which, directing him to negotiate and refer back, purported to limit his general authority. I respectfully agree with Duffus, J.A., that the authority conferred by a power of attorney under seal (not being a power given for valuable consideration) may, as between principal and agent, be revoked or limited by spoken words or informal writing. The authority clearly was so limited in this case.

The more difficult question is whether Mr. Place had apparent authority to contract. If the appellants held out Mr. Place as their agent with authority to contract on their behalf, they are undoubtedly bound by the contract he made and if the respondent, or his advocates, were aware of the authority conferred

by the power of attorney, he would not be affected by the subsequent instructions of which, it is conceded, he had no knowledge. This is a question of fact, on which, unfortunately, the learned judge did not consider it necessary to make any finding.

The evidence on which the respondent mainly relies is his own statement in examination in chief, when he said:

“Everyone assumed the deal would go through and everything would be all right. Mr. Place refused to meet me in his office because I had not my lawyer present. First defendant said it would be all right because he had given Place his power of attorney. Place also came from his office and confirmed this.”

The first appellant in his evidence denied having told the respondent, or anyone else, that he had given a power of attorney to Mr. Place. Mr. Place, whose evidence in interlocutory proceedings was by consent made evidence at the trial, was apparently not asked whether he had told the respondent that he had been given a power of attorney. There is no finding by the learned judge whether the evidence of the respondent or that of the first appellant is to be preferred as regards these alleged statements but I shall assume that the respondent’s evidence is the truth and on that assumption try to analyse its significance.

It is clear from the respondent’s evidence that at the time of the alleged conversation, the parties believed that the terms of a contract for sale had been agreed, and although the contract was conditional on the Land Bank providing a loan and on the Divisional Board giving approval, everyone assumed that these would be forthcoming. Agreement had been reached regarding possession. All that was thought to remain was formal completion. It was in that context that the first appellant is alleged to have told the respondent that he had given a power of attorney to Mr. Place. That remark, if it was made, undoubtedly amounted to a holding out of Mr. Place as having authority to complete the transaction. The question is, whether it could properly be interpreted as anything more. It will be noted that the first appellant is not said to have referred to a general power of attorney; the remark attributed to him could equally well have applied to a special power. Nor is it suggested that the parties at that time contemplated the possibility of any hitch: as the respondent said, “Everyone assumed that the deal would go through.” The respondent went on to say in his evidence:

“When the Land Bank refused my application, negotiations started for a new deal because this one had failed.”

I am unable to find anything in the evidence to suggest that when those fresh negotiations began, the respondent believed that Mr. Place had authority to conclude a new bargain nor can I find anything on which such a belief could reasonably have been founded. It is not suggested that the respondent or his advocates ever inspected the power of attorney. There was apparently no mention of it in any of the correspondence and it is, I think, significant that shortly before the letter of February 8, 1965, was written, Mr. Place had written to the respondent’s advocates, writing as Messrs. Archer & Wilcock, refusing to accept their amendments to the draft contract and stating that they, that was the firm of Archer & Wilcock, were writing to their client for instructions and would write again as soon as they had a reply. This was followed by the letter of offer, which began “We have now heard from our clients who state as follows”. These facts seem to me strongly to suggest that the respondent and his advocates must have thought at all material times that they were dealing

with Messrs. Archer & Wilcock, acting as advocates for the appellants. Furthermore, the allegation in the plaint is that the appellants “through their advocates and agents Messrs. Archer & Wilcock” made the offer which was accepted. One would have expected a reference to the appellants acting through their attorney, Mr. Place, if the respondent thought he was dealing with an expressly authorized agent as opposed to a firm of advocates.

Counsel argued, however, that distinction must be drawn between power and authority and submitted that if Mr. Place had power to make a contract on behalf of the appellants, his act would be binding on them even though he lacked authority. Counsel cited no authority for this proposition and I have been unable to discover any. Almost all the leading cases to which I have referred deal with actual authority or with implied authority or with apparent or ostensible authority: even where the word “power” is used, it seems to be used in a sense synonymous with authority – no-where have I found them used in contradistinction. Perhaps the correct way to express it is to say that the power of an agent to bind his principal must spring from authority, be it actual, apparent or implied.

I should perhaps add a few words regarding one case; that of *Hambro v. Burnand* (9). That case is authority for saying that a person who deals with an agent who has a written authority and does not ask to see that authority is no worse off than if he had examined it. It might be suggested, therefore, that the respondent should be treated on the same footing as if he had actually seen Mr. Place’s power of attorney. I think this would be a fallacious argument: certainly the respondent should not be any worse off than if he had been aware of Mr. Place’s actual authority, but that means the authority conferred by the power of attorney as qualified by the letter of instructions.

Counsel also argued that the registration of the power of attorney under the Registration of Documents Act (Cap. 285) gave notice of it to the world at large. I respectfully agree with Duffus, J.A., that registration of a document the registration of which is optional cannot of itself operate to give notice of that document.

The third ground of appeal that was argued was whether the agreement was a conditional one, subject to the preparation of a formal contract. I do not propose to deal with this at any length, as it was not fully argued before us. It appears to me that whether or not the agreement effected by the letters of February 8 and 10, 1965, was subject to contract, that condition was satisfied when the terms of the formal contract were agreed. I do not think that, on the facts of this case, it is material that the formal contract was not signed by the appellants. If Mr. Place had authority to contract, and, as I have said, I do not think he had, then he must have had authority to settle the terms of the contract and I think that once those terms were settled, the agreement became unconditional.

To sum up: in my view, the respondent must succeed if Mr. Place had actual or implied or apparent authority to bind the appellants. I do not think he had actual authority, because the authority conferred by the power of attorney was restricted by the subsequent letter of instructions; I do not think he had implied authority, because there is no such implied authority in an advocate; I do not think he had apparent authority, because there is no evidence that the respondent had any knowledge of the extent of the authority conferred by the power of attorney, which was referred to, if at all, in circumstances which raised no presumption that it gave authority to conclude a new contract if the contract which the parties believed they had reached were frustrated and no evidence

that the appellants held out Mr. Place as their agent with authority to conclude any such new contract. If Mr. Place had no such actual, implied or apparent authority, the appellants are not bound by the agreement he reached. I would therefore allow the appeal.

Appeal dismissed.

Both appellants appeared in person.

For the respondent:

Satish Gautama, Nairobi

Satish Gautama

Kilee v Republic
[1967] 1 EA 713 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	27 May 1967
Case Number:	324/1967 (156)
Before:	Sir John Ainley CJ and Chanan Singh J
Sourced by:	LawAfrica

[1] *Criminal Law – Uttering a false document – Meaning of false – Document must “lie about itself” not about its maker – Penal Code, s. 353. (K.).*

[2] *Drugs – Unlawful possession of Part I poison – Meaning of “duly qualified veterinary surgeon” – Veterinary Surgeons Act, ss. 4 and 12; Pharmacy and Poisons Act, ss. 2, 26 (2) and 29.*

[3] *Veterinary surgeon – Drugs, possession of by – Who is a duly qualified or licensed veterinary surgeon – Possession of Part I poisons – Pharmacy and Poisons Act, ss. 2, 26 (1) and (2) and 29 and Veterinary Surgeons Act, ss. 4 and 12 (K.).*

Editor’s Summary

The appellant joined the Kenya veterinary service in 1962, and shortly thereafter was licensed to practise veterinary surgery under s. 12 of the Veterinary Surgeons Act, which licence would expire by s. 12 (4) when the appellant ceased to hold office as a veterinary officer. He later obtained a degree which would have entitled him to registration under s. 4 (c) of the same Act; but he never in fact registered. In 1964 he was appointed as veterinary officer at Kiambu. In 1965 he was interdicted from duty (and he was subsequently dismissed the service by a letter which failed to reach him). In 1966 he obtained from various licensed sellers in Nairobi “Part I poisons” by issuing written orders in his own handwriting in the form:

“

Vet. Department,
Box 138,
Kiambu.
9/7/66.

Grayson & Co.
Nairobi.

For Dr. Kilee.

Tabs Sulphathiazole 2 x 500 x 5 gm.
Procane Penicillin Only 20 doz. x 3 mega Units
Sig. to be used by a Vet. Surgeon.

(Signed) Paul M. Kilee B. V. Sc. D. V. Sc.”

He was convicted of uttering false documents and of unlawfully possessing Part I poisons, and appealed.

Held –

- (i) the orders did not purport to be orders from the veterinary department and were not “false” (though they lied about the appellant);

- (ii) the appellant was not a “duly qualified veterinary surgeon” when the Part I poisons were sold to him, the sale to him was therefore unlawful, and he was unlawfully in possession of the poisons.

Convictions of uttering false documents quashed.

Conviction of unlawful possession of Part I poisons upheld.

No cases referred to in judgment.

Judgment

Sir John Ainley CJ, read the following judgment of the Court: In this case the appellant was convicted upon five counts of uttering a false document contrary to s. 353 of the Penal Code and of unlawfully possessing what is known as a “Part I poison” contrary to s. 26 (2) of the Pharmacy and Poisons Act.

He was fined a very reasonable sum in respect of each conviction, but as he is unable or unwilling to pay any of the fines he faces a period of imprisonment extending to twenty-two months.

The appellant joined the Kenya veterinary service in 1962. He then held a diploma in veterinary science, which may be abbreviated to D. V. Sc. He was appointed to the post of assistant veterinary officer. In 1964 he gained the degree of Bachelor of Veterinary Science (East Africa) at Makerere and later in the same year he was appointed as veterinary officer at Kiambu.

In March, 1966, he was convicted of driving a motor vehicle while under the influence of drink and was heavily fined. He was unable or unwilling to pay the fine, and went to prison. He was released from prison, so his petition of appeal reveals, on June 4, 1966. Upon June 25, 1966, a letter, addressed to the appellant, was written by the Permanent Secretary of the Ministry of Agriculture and Animal Husbandry, containing the information that the appellant was dismissed with effect from February 11, 1966. It is quite clear that the appellant was dismissed, but it is equally clear that this letter of dismissal never reached the appellant. This is made perfectly clear by the sixth prosecution witness, Victor Fernandes Delrio, and it does not appear that any formal or official intimation of dismissal ever did reach the appellant. It can be argued that the matter has some significance as will appear later, but it must be noted here that the appellant knew perfectly well that he had been interdicted from duty as from December 24, 1965, that he received no pay from January, 1966 onwards, that the interdict was never removed, and the appellant throughout the whole of 1966 must have been perfectly well aware that he could not work for the veterinary department for the simple reason that he had been forbidden to do so by interdict.

Now during 1966 the appellant, on July 9, September 12, October 1, October 4 and December 21, uttered to various druggists in Nairobi, orders for what the Pharmacy and Poisons Act calls Part I poisons. These orders, the State said, were false documents, forged documents, for they purported to be what in fact they were not. Each order purported to be, so the particulars of each charge alleged, “an order from the Veterinary Department, Kiambu”.

On December 21, 1966, the appellant was admittedly in possession of a considerable quantity of Part I poisons and this fact forms the basis of the charge under s. 26 (2) of the Pharmacy and Poisons Act. The relevance of this recital of facts can now be explained.

We will first set out the relevance of the recital to the last charge mentioned.

Section 26 (1) of the Pharmacy and Poisons Act sets out a variety of persons who can in certain circumstances lawfully possess Part I poisons but we are concerned only with para. (d) of that subsection. It is provided by that paragraph that any person, institution or department to whom a Part I poison has been lawfully sold in accordance with the provisions of s. 29 of the Act is himself lawfully in possession of the poison.

Section 29 of the Pharmacy and Poisons Act provides that duly licensed sellers of Part I poisons may lawfully sell them to, inter alia, duly qualified veterinary surgeons for the purpose of veterinary treatment. The Part I poisons, which form the subject of the charge we are discussing, were sold to the appellant on December 21, 1966, by a seller duly licensed under the Act. Accordingly, if the appellant had been at the time of the sale a duly qualified veterinary surgeon, then the sale would have been lawful and the appellant's possession would have been lawful. But the case for the State was that the appellant was not at that time a duly qualified veterinary surgeon, and if the State made out that case in the lower court then the conviction under this count was correct.

By virtue of the definition contained in s. 2 of the Pharmacy and Poisons Act "duly qualified" in relation to a veterinary surgeon means permitted by law to practise the profession of a veterinary surgeon. To discover who is permitted by law to practise veterinary surgery we must turn to the Veterinary Surgeons Act. That Act provides that only those registered or licensed under the Act can practise veterinary surgery. A body known as the Veterinary Board controls matters of registration and licensing. The Act also creates the office of Veterinary Registrar. The Director of Veterinary Services is ex officio the Veterinary Registrar, and he is also ex officio the chairman of the Board. Registration is the normal basis of practice. Section 4 of the Act as amended by Act No. 15 of 1962 (which came into force in 1963) lays down the qualifications for registration. That part of the section which is relevant to this case reads as follows:

"No person shall be qualified to be registered under the Act unless:

- (c) he holds such degree in veterinary science granted after examination, of any university in East Africa, as the Board may by notice in the Gazette approve;"

The degree which the appellant obtained in 1964 is approved by the Board or so we have been told by learned counsel for the respondent who could not refer us to the Gazette Notice and we ourselves, in the limited time at our command, have not been able to trace it. It appears probable however that the appellant could successfully have applied for registration at any time subsequent to the award of this degree, but he has never done so and never has been registered under the Act.

Shortly after he joined the service, however, and before he gained this degree which entitled him to registration, he was granted a licence to practise veterinary surgery under the provisions of s. 12 of the Veterinary Surgeons Act. Section 12, so far as it is relevant, reads:

"12(1) Whenever the Board is satisfied that it is in the public interest that:

- (a) any person in the service of the Government or of the Organization or of the Makerere Veterinary School as a veterinary officer or assistant veterinary officer: or . . . who is not entitled to be registered under this Act should be granted the rights, privileges and obligations of a person registered under this Act, the Board may, on payment of the

prescribed fee, if any, grant to such person a licence to practise as a veterinary surgeon.”

The Director of Veterinary Services swore that these licences bear on the face of them conditions which limit their validity to the service of the licensee. We do not doubt this, though neither a specimen licence nor a copy of the appellant’s licence was exhibited. However sub-s. (4) of s. 12 puts matters beyond all cavil. That subsection reads:

“12(4) A licence granted to any person mentioned in para. (a) of sub-s. (1) of this section shall expire on the date upon which the person to whom it is granted ceases to hold office as a veterinary officer or assistant veterinary officer notwithstanding that the period for which it was granted may not have expired.”

The Board simply has no power to issue a licence to a veterinary officer which will survive his employment, and it is most abundantly clear that when the appellant bought those drugs he was not licensed under the Act. He is disposed to assert that he did not know that: that he thought he was entitled under the licence to buy those poisons for his own use, but the magistrate does not believe him and neither do we. Whether he thought that his degree entitled him to possess the poisons is a more difficult question, but it does not affect the propriety of the conviction. The appellant was properly convicted of an offence contrary to s. 26 (2) of the Pharmacy and Poisons Act, and his appeal from that conviction is dismissed.

We turn now to the convictions for uttering false documents. These, as we have already indicated, are orders for Part I poisons. One example of those documents will suffice. We take the document which forms the subject of the first charge. This document, which is written entirely in the appellant’s handwriting, is as follows:

“
Vet. Department,
Box 138,
Kiambu.
9/7/66.

Grayson & Co.
Nairobi.

For Dr. Kilee.

Tabs Sulphathiazole 2 x 500 x 5 gm.
Procane Penicillin Only 20 doz. x 3 mega Units
Sig. to be used by a Vet. Surgeon.

Paul M. Kilee B. V. Sc. D. V. Sc.”

By that order the appellant obtained the Part I poisons mentioned, and he paid for them. What is false about this document? The words “to be used by a veterinary surgeon” were untrue in so far as they implied, as we think they did, that the appellant was either registered or licensed. But in isolation those words do not, quite clearly, make the document a false document within the meaning of s. 347 of the Penal Code. The address at the top of the order may very well have been placed there to give the impression that the appellant was a veterinary officer still employed about the business of the veterinary services but though the point is perhaps a fine one we are both of the opinion that this address, which was not admittedly the appellant’s true address, whether taken by itself or in conjunction with the words “to be used by a veterinary surgeon” does no more than tell a lie about the appellant. It does not in the time

honoured phrase tell a lie about the document. We do not think that in

the words of the particulars this document purports to be an order from Veterinary Department, Kiambu. The document, to our minds, is no more a forgery than if the appellant had written “Dear Sirs, My name is Dr. Kilee, a duly qualified veterinary surgeon in the employ of the Government of Kenya at Kiambu. Kindly supply me with the following drugs.” That is the very most that this document says; but if it says that, then though it contains more than one lie about the appellant, no lie is told about the document itself. The document does not purport to be an order by the veterinary department. It purports to be what it is, an order by Dr. Kilee who has, at the worst, exaggerated his qualifications and lied about his employment. We respect the learned magistrate’s views. They were clearly and forcibly expressed. The point is one upon which lawyers can clearly differ, but our opinion must in this case prevail.

We do not think that this document or the other documents relied upon by the learned magistrate when convicting on the other charges of uttering were false documents within the meaning of s. 347 of the Penal Code, and for that reason the convictions cannot be sustained.

The convictions, other than the conviction on the seventh count, that of unlawful possession, are quashed and the sentences set aside.

This leaves the sentence in respect of the seventh count to be considered. The sentence was one of a fine of Shs. 500/-. In default of payment the appellant was ordered to serve two months’ imprisonment. That seems to us a proper sentence. We dismiss the appeal from sentence also. As the appellant has now served two months in prison we order his immediate release, if he is not imprisoned on some other charge.

Order accordingly.

The appellant appeared in person.

For the respondent:

Attorney General, Kenya

S. Sangale (State Counsel, Kenya)

Ochola v Uganda [1967] 1 EA 718 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	22 September 1967
Case Number:	322/1967 (161)
Before:	Sir Udo Udoma CJ
Sourced by:	LawAfrica

[1] *Criminal Law – Practice – Witness failing to attend trial after summons – Procedure to be followed before convicting witness under Criminal Procedure Code, s. 147 (1) (U.).*

[2] Witness – Failing to answer summons – Procedure for conviction of, under Criminal Procedure Code, s. 147 (1) (U.).

Editor's Summary

The applicant, a policeman, had been ordered to pay a fine of Shs. 100/- for failing to attend court in answer to a summons under s. 147 (1) of the Criminal Procedure Code. His "trial" for this offence was sandwiched into the trial in which he was supposed to attend as a witness, and the record did not show that a summons had in fact been served upon him nor that he had been called upon to show cause why he should not be punished.

Held – The procedure was defective.

Order set aside.

No cases referred to in judgment.

Judgment

Sir Udo Udoma CJ: This application is by Lawrence Gell Ochola for an order of this court setting aside the order of the Magistrate Grade I in the Magistrate's Court, Mbale, which had imposed on him a fine of Shs. 100/- by virtue of the powers conferred on the magistrate under s. 147 of the Criminal Procedure Code.

The application raises a very important question of procedure. In his petition, the applicant set out details of the circumstances surrounding the order made by the magistrate and the direct consequences which had flowed therefrom.

Before this court only one ground was argued by counsel for the applicant. The ground is contained in para. 3 of the petition and reads as follows:

"The learned magistrate erred in convicting the petitioner as the petitioner was not served with a summons to give evidence in Criminal Case No. MM. 1310 of 1966. In fact the petitioner had gone to court to give evidence in Criminal Case No. MM. 1187 of 1966."

The circumstances under which the magistrate made the order may be summarised briefly as follows:

On January 9, 1967, at the conclusion of the evidence of one witness called by the prosecution in Criminal Case No. MM. 1310/66 the prosecutor, Mr. Odongo, said to the magistrate:

"My next witness is D/Cpl. Ochola. I warned him this morning to be present. He came to court, then he disappeared. I have made several attempts to find him. I do not know where he is."

Whereupon the magistrate adjourned the trial to January 10, 1967. On January 10, 1967, the following minutes appeared in the record of proceedings:

“Odongo: Today I have been informed that D/Cpl. Ochola went to Kenya yesterday on three days’ leave. I understand he has gone to attend a funeral.”

“Court: This is shocking. He was aware yesterday that he would be required to give evidence. If he wanted to go to Kenya he should have obtained the permission of the court to do so. I adjourn the case to January 16, 1967.”

In passing, it may be observed that there are two points worthy of note in the proceedings of the court so far and up to January 10, 1967, when the case was finally adjourned to January 16, 1967.

In the first place it is nowhere recorded that the applicant was ever served with any summons to appear and give evidence in the case which was then being tried by the magistrate. In the second place there is nothing on the record to show that the magistrate had himself at any time prior to or even on January 9, 1967, seen, let alone warned the applicant to appear in court as a witness for the trial of the case concerned. The notes made by the magistrate on January 10, 1967, merely said “He was aware yesterday that he would be required to give evidence”.

Then on January 16, 1967 the applicant appeared in court, but it is nowhere recorded why he did. Before continuing with the trial of the criminal case on hand it is recorded that the applicant offered an explanation to the magistrate for his absence in court on January 9, 1967, during the trial of the case, indicating that he had been away on leave in Kenya and that he was never warned that his evidence would be required by the court.

There and then Mr. Odongo, the prosecutor, intervened and said:

“Odongo: In fact I told him his evidence was necessary. I did so in the presence of Cpl. Binduku.”

There then followed the remarks by the magistrate set out hereunder and the order imposing the fine, the subject – matter of this application.

“Court: I am satisfied that on January 9, 1967 the witness came to the court fully aware that in this case he had obtained a charge and caution statement. He says he was informed by the prosecutor that his evidence would not be required, yet he himself earlier said that he had not asked the prosecutor whether he would be required as a witness or not. He left the court without permission of the court. Under s. 147 of the Criminal Procedure Code I fine him Shs. 100/-. I direct that a copy of the record be sent to the SSP/CID Eastern Region for his information and any necessary action. Ochola given up to January 31, 1967 to pay the fine.”

Thereafter the trial of the original criminal case continued. The applicant gave evidence for the prosecution.

It is common ground that the statement made by the applicant and the interjection by Mr. Odongo were not made on oath. It is not recorded whether the statement made by the applicant was made from the well of the court or from the witness box. And what is more it is nowhere recorded how it came about that the applicant had to offer the explanation which he did.

Now the order of the magistrate imposing a fine on the applicant has been severely attacked by counsel for the applicant on the ground that the magistrate was not justified in fining the applicant the sum of Shs. 100/- as the requirements of s. 147 (1) of the Criminal Procedure Code had not been complied with.

The application was opposed by Mr. Masika, Deputy Director of Public Prosecutions, who sought to maintain the order of the magistrate.

The Deputy Director of Public Prosecutions submitted that there are three conditions laid down in the section each of which would entitle a court to impose a fine on a defaulter. The first is failure to attend court without a lawful excuse after having been summoned to do so by a court. The second condition occurs where a person, who having attended court, departs therefrom without the permission of the court. The third arises where the person having attended the court fails to turn up again after an adjournment and after having been ordered by the court to do so.

This construction of the provisions of s. 147 (1) of the Criminal Procedure Code cannot be faulted, provided it is appreciated that the governing words in all the three cases are “summoned to attend”, that is to say, that the defaulter must in fact have been in the first place summoned by the court to attend as a witness. That was not the case in this matter.

The relevant provisions of the section are in the following terms:

- “147 (1) Any person summoned to attend as a witness who, without lawful excuse, fails to attend as required by the summons, or who, having attended, departs without having obtained the permission of the court, or fails to attend after adjournment of the court after being ordered to attend, shall be liable by order of the court to a fine not exceeding Shs. 400/-.”

It was contended by the Deputy Director of Public Prosecutions that since the applicant is recorded as having explained his absence this court must presume that he must have been asked by the magistrate to explain his absence in court on January 9, 1967.

This submission appears sound at first sight. The unfortunate thing is that there is nothing on the face of the record as to how the applicant came to offer his explanation, nor is there any evidence that the applicant was ever summoned by the magistrate to attend the court as a witness in the case which was then being tried; nor is there any evidence that the applicant was ever ordered by the magistrate to attend the court as a witness, which order had been put into contempt by the applicant.

There can be no doubt whatsoever that the procedure adopted by the learned magistrate in this matter was faulty for two reasons, namely, it is not recorded that the magistrate at any time called on the applicant to show cause why he should not be punished for his failure to attend or remain in court on January 9, 1967, in connection with the case which was being tried then; and secondly the proceeding, if proceeding it may be called, was sandwiched between the evidence of the first witness for the prosecution in the criminal trial in which the applicant was to give evidence and the conclusion of the said trial. The applicant gave his evidence for the prosecution after he had been fined by the magistrate and before the conclusion of the criminal trial.

Section 147 (1) of the Criminal Procedure Code certainly confers on a court the power to deal summarily with a witness where the conduct of such witness amounts to a contempt of court. It provides the court with a sharp and swift means of compelling a witness to purge his contempt.

It is clear that the procedure adopted by the magistrate in the present case was defective. There was no evidence before the court that the applicant was ever summoned by the court to attend as a witness. On the face of the record it is not clear the manner by which the applicant came before the court. There is also nothing on the face of the record that the applicant was ever asked to

show cause why he should not be punished for his contempt, if contempt it was.

The proper procedure which ought to have been followed in this matter, assuming that a witness summons was ever served on the applicant to appear in court to testify in the case concerned, which is not the case, the applicant having absented himself, it was the duty of the court to issue a summons to be served on him or where as in the instant case the applicant was already in court, to call upon him to show cause why he should not suffer the penalty prescribed in s. 147 (1) of the Criminal Procedure Code.

The fact of such a summons having been issued by the court and served on the applicant or of the applicant having been called upon to show cause should have been recorded in the proceedings.

The offence purported to have been committed by the applicant ought to have been clearly set down in the record of proceedings. That done, evidence should have been given on oath that the applicant was in fact served with a witness summons in the first instance; or that having attended the court in answer to such a summons, the applicant had departed therefrom without obtaining the permission of the court; or that in obedience to such a summons the case having been adjourned to some future date, the applicant had failed to attend court on the resumption of the trial in defiance of an order of the court commanding him to attend.

Thereafter the applicant should have been called upon to show cause, in which case the applicant would have given evidence on oath as to why he should not be visited with the penalty prescribed in s. 147 (1) of the Criminal Procedure Code.

On the face of the record there was no evidence upon which the magistrate could justify the imposition of the fine of Shs. 100/- on the applicant. The order of the magistrate imposing the fine was wrong in law. It cannot in any way be sustained since the applicant was not informed of the offence which had been committed by him, nor was he informed that absenting himself from the court was an offence punishable summarily.

Furthermore, it seems quite plain that in the circumstances disclosed by the proceedings, the explanation given by the applicant, although not on oath, to the effect that he was on leave in Kenya, granted to him by his department, not unknown to Mr. Odongo, in view of his report to the magistrate on January 10, 1967, would appear to a reasonable court a good cause to exculpate him from punishment. It should be borne in mind that the applicant was never summoned as a witness in the particular case which was being tried by the court.

In the circumstances I am satisfied that this is an appropriate case in which to exercise the power vested in this court under sub-s. (4) of s. 471 of the Criminal Procedure Code. The order of the learned magistrate made on January 16, 1967 imposing a fine of Shs. 100/- on the applicant must be set aside. The order is accordingly set aside. It is further ordered that, if the fine has been paid, the same be forthwith refunded to the applicant.

Order accordingly.

For the appellant:

M. C. Patel, Kampala

For the respondent:

Attorney General, Uganda

Chila and another v Republic
[1967] 1 EA 722 (CAN)

Division: Court of Appeal at Nairobi
Date of judgment: 6 September 1967
Case Number: 80/1967 (164)
Before: Sir Charles Newbold P, Sir Clement de Lestang VP and Law JA
Sourced by: LawAfrica
Appeal from: The High Court of Kenya – Miller, J.

[1] Criminal Law – Rape – Corroboration – Necessity for judge to warn himself and assessors on desirability of – Effect of failure Penal Code, s. 140 (K.).

[2] Criminal Law – Corroboration in sexual cases – Necessity for judge to warn himself and assessors of desirability of.

Editor’s Summary

The appellants were convicted of rape on the uncorroborated evidence of the complainant without the trial judge in his summing up or his judgment making any mention of the desirability of corroboration.

Held – The judge should warn the assessors and himself of the danger of acting on the uncorroborated testimony of the complainant but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given, then the conviction will normally be set aside unless the appellate court is satisfied that there has been no failure of justice.

Appeals allowed.

Case referred to in judgment:

(1) *Terrah Mukindia v. Republic*, [1966] E.A. 425.

C.A.V.

Judgment

Law JA, delivered the following judgment of the court: The appellants were convicted in the High Court of Kenya at Kisumu (Miller, J.) on an information charging them jointly with the offence of rape. On August 29, 1967, we allowed the appeals of both appellants, quashed the convictions and set aside the sentences of four years’ imprisonment and eighteen strokes passed on each of them; and we now give our reasons. The charge was worded as follows:

“

Statement of Offence

Rape, contrary to s. 140 of the Penal Code.

Particulars of Offence

Chila Akama and Owiyo Jacob Nyabula, on the 30th day of October, 1966, at Nyang’oma Sub-Location, Sakwa Location in the Central Nyanza District in the Nyanza Province, Kenya had unlawful carnal knowledge of Jael Odipo Eliakim Obondo.”

This charge was defective in that it failed to specify the essential ingredient in a charge of rape, that the carnal knowledge was had without the complainant’s consent, see form four in Sched. 2 to the Criminal Procedure Code. As the information stands, the particulars of offence are defective in that they disclose

no offence in law. On a parity of reasoning with the decision in *Terrah Mukindia v. Republic* (1), had we not decided to allow the appeals on another ground, we would have had to consider whether the defect in the charge in the present case would not likewise have been fatal to the convictions.

Another serious defect in the proceedings was that at no stage in his summing up to the assessors, nor anywhere in his lengthy judgment, did the learned judge mention the desirability in a trial on a charge of rape for corroboration of the complainant's evidence in a material particular implicating the accused. The law of East Africa on corroboration in sexual cases is as follows:

The judge should warn the assessors and himself of the danger of acting on the uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given, then the conviction will normally be set aside unless the appellate court is satisfied that there has been no failure of justice.

In this case the learned judge convicted the appellants because he believed the complainant to be a truthful witness. So obviously did the assessors, who advised that both appellants had carnal knowledge of the complainant without her consent. But it is by no means certain that they would have given this advice, or that the judge would have convicted either appellant, had there been a proper direction as to the desirability for corroboration. Learned state counsel conceded that there was no corroboration whatsoever of the allegations against the second appellant. As regards the first appellant, it would seem from the evidence that the complainant went freely with him, knowing what he wanted, and that he escorted her back to the school where she was staying, after the intercourse had taken place. Had corroboration been sought as to the lack of consent on her part, it would not have been easy to find. Her subsequent complaint to the headmaster, which does not in itself constitute corroboration, may have been due to remorse, or fear of the consequences of her conduct, or to some other reason.

We were not satisfied that, upon an adequate direction as to desirability for corroboration of the complainant's evidence implicating both appellants, either would have been convicted.

Appeals allowed.

The first appellant appeared in person.

The second appellant did not appear and was not represented.

For the respondent:

Attorney General, Kenya

S. Sangale (State Counsel, Kenya)

Hirji v Modessa
[1967] 1 EA 724 (CAD)

Division:	Court of Appeal at Dar-es-Salaam
Date of judgment:	9 September 1967
Case Number:	25/1967 (165)

Before: Sir Clement de Lestang VP, Duffus and Law JJA
Sourced by: LawAfrica
Appeal from: The High Court of Tanzania – Otto, J.

[1] Damages – Fatal accident – Hindu joint family – Deceased working in and managing family business – Assessment.

[2] Damages – Interest – Injury cases – Interest to be awarded on special but not on general damages from filing of suit to date of judgment.

[3] Evidence – Witness – Compellability of party in civil proceedings to give evidence for opponent – Civil Procedure Code, O. 16, rr. 1 and 7 (T.).

[4] Fatal Accident – Damages – Hindu joint family – Deceased working in and managing family business – No evidence of drop in profits of business since death – No separate income – Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance (T.).

[5] Witness – Party – Whether a party in civil proceedings can compel opposing party to give evidence – Whether judge should allow this at trial – Civil Procedure Code, O. 16, rr. 1 and 7 (T.).

Editor’s Summary

The appellant sued for damages for the death of her son. The only issues were whether the persons named as dependents were in fact dependents of the deceased; and quantum. The deceased at his death was thirty-two and was working in and managing the family business founded by his father without receiving any fixed salary. He used to pay the takings of the business into his father’s bank account after deducting about Shs. 400/- or Shs. 500/- per month for himself and after giving his sisters about Shs. 2,500/- per month to meet the expenses of running the home of the family, which was a typical joint Hindu family. There was no evidence of any drop in the profits of the business following his death. At the trial the judge refused to allow the appellant’s advocate to call the respondent (who was in court and whom his advocate had indicated that he did not intend to call) as a witness. The judge awarded Shs. 20,000/- and Shs. 500/- funeral expenses as damages and said nothing about interest, although the decree purported to award interest on the total Shs. 20,500/- from the date of filing suit until the date of payment.

Held –

- (i) although the respondent was a competent and compellable witness he had not been summoned, and the judge therefore had a discretion whether or not to require him to give evidence, which discretion he should in the circumstances have exercised by allowing him to be called; but there had been no failure of justice;
- (ii) there being no evidence to show any financial loss by the dependents the award of Shs. 20,000/- was if anything generous;
- (iii) in the case of general (but not special) damages awarded in personal injury cases interest should not be awarded for the period between the filing of the suit and the date of judgment (*Lata v. Mbiyu* (3) followed).

Appeal dismissed. Decree altered to exclude interest to judgment on general damages.

Cases referred to in judgment:

- (1) *Nizam Din v. Devonshire Stores*, [1958] E.A. 729.
- (2) *Taff Vale Railway Co. Ltd. v. Jenkins*, [1913] A.C. 1.
- (3) *Prem Lata v. Peter Musya Mbiyu*, [1965] E.A. 592.

C.A.V.

Judgment

Law JA: This is an appeal from a judgment and decree of the High Court of Tanzania (Otto, J.,) awarding the plaintiff (now the appellant) general damages of Shs. 20,000/- and special damages of Shs. 500/- under the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act (Cap. 360) in respect of the death of her son Gangadhar (hereinafter referred to as the deceased) who died in a road accident caused by the admitted negligence of the defendant (hereinafter referred to as the respondent). The only issues in the court below were, firstly, whether the persons named in the plaint as dependents were in fact dependents of the deceased, and secondly, to what compensation (if any) the appellant and these dependents were entitled for the death of the deceased.

At the date of his death, July 12, 1964, the deceased, who was thirty-two years old, was working as a mechanic in, and managing, a mechanical engineering business which was the property of this father Chaku Hirji who, by reason of physical infirmity due to age, took no part in the running of the business. The takings of the business were paid into Chaku Hirji's bank account by the deceased, who deducted from these takings about Shs. 400/- or Shs. 500/- a month for his personal needs, and about Shs. 2,500/- a month which he gave to his sisters to meet the expenses of running the family home, in which incidentally the deceased, who was unmarried, lived. In fact, this was a typical joint Hindu family, in which the deceased, according to the plaint, was "the sole breadwinner and support". The learned trial judge had difficulty in deciding precisely to what extent the family was dependent on the deceased. The money supplied by the deceased for the family's support could not be said to be part of his salary, because he had no fixed salary; it was part of the money earned by the father's business. On the other hand, as the learned judge remarked:

"The deceased was, by his labour and management, devoting most of the financial benefits of that labour to the family";

but he found it difficult to assess those benefits in terms of money. I share the same difficulty. The business is still being carried on, and there is no evidence that its takings, or net profit, have fallen as a result of the death of the deceased. For all I know, the appellant and her family may not have suffered any financial loss as the result of the death of the deceased. As the judge remarked, there are a great number of imponderables in this case, and it is impossible to arrive at a mathematical calculation. He said "We have to take into account that although Gangadhar was perhaps to a great extent maintaining his father and mother, brothers and sisters, yet this was not a legal but a moral obligation and undoubtedly when and if he did marry, his contribution would most probably cease completely. Taking all this into account, I therefore come to the conclusion that the plaintiffs have proved a certain degree of dependency." He awarded the sum of Shs. 20,000/- as general damages, and Shs. 500/- as special damages for the deceased's funeral expenses. He said nothing about interest, although the decree purports

to award interest on the total of Shs. 20,500/- from the date of filing suit to the date of payment.

Another matter which must be mentioned before turning to the grounds of appeal is that, before closing his case in the court below, counsel for the appellant applied to call as a witness the respondent, who was then present in court. The learned judge refused to accede to this application, on the grounds apparently that in his opinion it was wrong for one party to civil proceedings to call the opposing party as a witness, when the advocate for that opposing party had indicated that he was not calling him as a witness. Ground two of appeal was directed at this refusal by the judge to allow the defendant to be called as a plaintiff's witness. It was conceded by counsel for the respondent, that the respondent was both a competent and compellable witness, but he submitted that as the appellant had taken no steps to summons him, under O. 16, r. 1 of the Civil Procedure Code, the judge had a discretion under O. 16, r. 7 whether or not to require him to give evidence. I agree that this is so, but with respect to the learned judge I do not consider that in this regard he exercised his discretion judicially. His reason for not requiring the respondent to give evidence for the other side was, apparently, that there was something improper or irregular in one party calling the other party as a witness in civil proceedings. I think the learned judge erred in this respect. Although it may be unusual, there is nothing wrong in a plaintiff calling the defendant as a witness, especially (as in this case) when counsel for the defendant has indicated that he will not be calling his client. I am of opinion that the learned judge erred in not allowing the respondent to be called as a witness for the appellant, in the circumstances of this case; but this is not by itself a sufficient ground for allowing the appeal, or ordering a new trial (*Nizam Din v. Devonshire Stores Ltd.* (1)). The appellant must also satisfy this court, under r. 76 (2) of the Rules of this court, that the exclusion of the proposed witness' evidence has occasioned some substantial wrong or miscarriage of justice. Counsel for the appellant has informed us that he wished to call the respondent to depose to the following facts: that the deceased was healthy, that he was an energetic worker, and that he had no intention of getting married. There was ample evidence to this effect on the record from other witnesses, evidence which was not challenged, except as to the deceased's matrimonial intentions. As to this, I can see no reason to differ from the learned judge's conclusion that although the deceased had no immediate intention of marrying, there was every likelihood that as a young, healthy and energetic man, he would probably do so in the not too distant future. To sum up on this ground of appeal, I am of opinion that the judge was wrong in not requiring the respondent, who was available in court, and who was a competent and compellable witness, to give evidence on the application of the appellant's advocate, but at the same time I am satisfied that this error on the judge's part has not led to any substantial wrong or failure of justice. In my view this ground of appeal fails.

Most of the other grounds of appeal were directed at the main argument addressed to us by counsel for the appellant, that the award of Shs. 20,000/- as general damages was so low that it should be increased. I think this argument can be briefly disposed of. In my view, it is based on a complete misapprehension of the facts. The monthly payment of Shs. 2,500/- made by the deceased for the support of his dependents was not contributed by him out of his personal earnings. It was part of the takings or profits of the family business, which the deceased was managing. No doubt the deceased, by his labours, was responsible to some extent for the prosperous state of the business, but there is not a scintilla of evidence to indicate that since his death, which occurred more than two years before the trial, the business has been less prosperous. In fact, the absence of any such evidence leads me to believe that the appellant may well not have suffered any financial loss as the result of her son's death. Counsel also submitted that regard should have been had to the deceased's

potential earning capacity in the open market, and he pointed to unchallenged evidence that the deceased had been offered employment at high salaries by third parties. The fact is that he turned down these offers, and preferred to remain with his father's business. This is a very different position from that obtaining in cases relied on by counsel for the appellant, such as *Taff Vale Railway Co. Ltd. v. Jenkins* (2) where the deceased was an apprentice who was not yet earning but would, had she not died, have been earning very soon afterwards and contributing to her parents' maintenance. In such a case prospective earnings must be considered, but in the instant case they are not relevant, as the deceased was clearly satisfied to remain as a mechanic and manager in the family business. There was, as I have said, no evidence to show that the deceased's dependents suffered any financial loss as a result of his death, and in my view the learned judge's award of Shs. 20,000/- was, if anything, on the generous side. I would dismiss the appeal against the quantum of damages awarded.

The only ground of appeal which remains to be dealt with relates to interest. The judgment is silent on this point. Counsel for the appellant submits that the judge should have awarded interest on all the damages from the date of the suit. I do not agree. The position is covered by the decision of this court in *Prem Lata v. Peter Musa Mbiyu* (3). In the case of general damages awarded in personal injury cases, interest should not be awarded for the period between the filing of the suit and the date of judgment. The position is different in the case of special damages, where the amount claimed has been actually expended or incurred at the date of filing the suit. Had the learned judge properly directed himself on the question of interest, which he did not deal with at all in the judgment, he must in my opinion have directed that there be judgment for the plaintiff for Shs. 20,000/- general damages with interest at court rates from the date of judgment until payment, and for Shs. 500/- special damages interest at seven per cent from the date of filing suit until judgment, and at court rates thereafter until payment. I would alter the judgment and decree accordingly.

In my view, this appeal fails and should be dismissed, with costs to the respondent.

Sir Clement De Lestang VP: I agree that this appeal fails and must be dismissed. I only wish to add a few words. I will not repeat the facts which are sufficiently stated in the judgment of Law, J.A. They show that it was the business and not the deceased who supported the whole family including the deceased himself and I have grave doubts whether the appellant suffered any loss by reason of the deceased's death, except in regard to the funeral expenses (Shs. 500/-). I say this because no loss was actually proved and the learned judge's estimate of it is, with respect, pure guesswork, unsupported by any evidence. Assuming however, that they sustained some loss I am quite sure that if the learned judge at all in the quantum, it was on the side of generosity.

As regards the question of interest it is odd that as the judgment is silent on this point the decree which is the formal expression of the courts' decision should order the respondent to pay interest on the decretal amount from the date of the filing of the plaint. As a decree is invariably drawn up in the form agreed upon by the parties it is still odder that the plaintiff should appeal on the matter of interest unless to have the judgment amended to conform to the decree. It should however, be the other way about. Nevertheless as Law, J.A., has pointed out interest between the filing of the suit and delivery of the judgment is awarded only on special damages in injury cases and it would be wrong for this court to allow interest on the general damages awarded. The

judgment should accordingly be amended as suggested by Law, J.A., and, as Duffus, J.A. also agrees, the appeal, subject to this amendment, is dismissed with costs to the respondent.

Duffus JA.: I also agree.

Appeal dismissed (subject to amendment as ordered to judgment and decree).

For the appellant:

Natubhai Patel, Desai and Co., Dar-es-Salaam

N. P. Patel

For the respondent:

Fraser Murray, Roden and Co., Dar-es-Salaam

Grimble

East African Power & Lighting Co Ltd v Dandora Black Trap Quarries [1967] 1 EA 728 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	13 July 1967
Case Number:	962/1966 (146)
Before:	Chanan Singh J
Sourced by:	LawAfrica

[1] *Contract – Consideration – Whether party to contract estopped from denying consideration – Recital of consideration in written agreement.*

[2] *Electricity – Minimum consumption agreement – Legality of – Electric Power Act, ss. 25 (1) and 27.*

[3] *Electricity – Licence to supply not pleaded or proved – Effect.*

[4] *Estoppel – Recital in deed – Consideration recited in written agreement – Whether party estopped from denying consideration.*

[5] *Evidence – Admissibility – Secondary evidence on terms of written contract – Recital – Evidence Act, ss. 97 and 120 (K.).*

[6] *Evidence – Omnia praesumuntur rite esse acta – Presumption that licence to supply electricity duly renewed – Evidence Act, s. 119 (K.).*

[7] *Practice – Pleading – Licence to supply electricity not pleaded in plaint claiming charges for supply – Effect.*

Editor's Summary

The plaintiff company sued the defendant on a minimum consumption agreement for the supply of electricity in terms of which the defendant undertook to pay the minimum annual charge of Shs. 12,840/- per annum for a period of forty-six months from January 1, 1965. The defendant paid Shs. 7,195/60 for electricity consumed during 1965 and the plaintiff claimed the balance of the minimum due under the minimum consumption agreement viz. Shs. 5,644/40. The defendant admitted the agreement but claimed that it was void and unenforceable (i) because it was without consideration and (ii) it was illegal as not in accordance with the charging provisions laid down in s. 25 (1) of the Electric Power Act. Lastly, the defendant claimed that the plaint disclosed no cause of action as the plaintiff company had at the relevant time no licence under the Electric Power Act. The plaintiff argued on the first point that the defendant was estopped from denying the consideration which was stated in the agreement as being a request by the defendant that the plaintiff company should carry out certain works towards the installation of an electrical energy supply, in

return for which the defendant agreed to sign the minimum consumption agreement. The plaintiff did not deny the defence that the charges made for the supply under the agreement were not in accordance with the provisions of s. 25 (1) of the Electric Power Act but contended that s. 25 (1) only applied to premises situated within two hundred yards from the street and the defendant's premises did not fall within the section. The defendant challenged the evidence put forward by the plaintiff in regard to a current licence to generate or supply electricity. The plaintiff did not produce its original licence nor did it produce all the renewals of its original licence up to date.

Held –

- (i) there was no estoppel operating to prevent the defendant from challenging the consideration stated in the recitals to the agreement, but on the evidence the plaintiff had shown that there was good consideration;
- (ii) the basis of charging under s. 25 (1) of the Electric Power Act did not apply to the defendant's premises and charges were therefore to be by negotiation between the parties, which had been done;
- (iii) there was no evidence to rebut the maxim "omnia praesumuntur rite esse acta". The presumption was the licence granted to the company had been renewed at the proper time and by the proper procedure.

Judgment for the plaintiff with interest and costs.

Cases referred to in judgment:

- (1) *Baz Bahadur v. Raghubir* (1927), I.L.R. 49 All. 707.
- (2) *Shiwala v. Lackhman* (1925), 96 I.C. 440; 27 P.L.R. 581.
- (3) *Sah Lalchand v. Indarjit* (1900), 27 I.A. 93.
- (4) *Robertson v. French* (1803), 4 East 102; 170 E.R. 707.
- (5) *Baumwoll Manufactur von Scheibler v. Furness*, [1893] A.C. 8.
- (6) *Glynn v. Margetson*, [1893] A.C. 351.

Judgment

Chanan Singh J: The plaintiff company has sued the defendant on a minimum consumption agreement dated October 21, 1965, under which the defendant undertook to take supply of electricity to the minimum annual value of shs. 12,840/- for a period of forty-six months with effect from January 1, 1965. The value of electricity purchased by the defendant during 1965 was Shs. 7,195/60. The plaintiff company now claims the difference of Shs. 5,644/40.

The written statement of defence denies liability and pleads three defences, namely:

- (1) The "agreement was without consideration as the plaintiff had already constructed an electric supply line to the premises and in law they were obliged to supply as much electricity as the Defendant could consume on the premises and charge for the same".
- (2) The agreement "is illegal, void and unenforceable as its provisions are inconsistent with the provisions

of the Electric Power Act, Cap. 314”.

- (3) The “plaint is bad in law as it discloses no cause of action. It does not aver that the plaintiffs are licensees under the Electric Power Act to supply electric energy to the defendant. The plaintiffs are not authorized by the Electric Power Act or Rules made thereunder or by the conditions of any licence that may have been issued to the plaintiffs under the Act (which is denied) to enter into the type of agreement that it purported to enter with the defendant”.

Counsel for the plaintiff offers two answers to the defendant's argument on the subject of consideration. He says, first, that the defendant is bound by his written contract (Exhibit No. 5) and that he is estopped from denying the consideration which is mentioned in it. The paragraph in the contract to which reference is made is a recital reading as follows:

"Whereas the consumer has requested the company to undertake certain works including the construction of an electric supply line to enable a supply of electrical energy to his premises and the company has agreed to undertake the said works."

Section 97 (1) of the Evidence Act prohibits the giving of secondary evidence of the "terms" of a written contract. A recital – especially one reciting merely the history of negotiations or the reason for entering into the agreement – is not a term of the contract, although in cases of ambiguity of the operative part a recital may be looked at to resolve the ambiguity. I think the defendant was entitled to re-open the matter of consideration. The recital in the agreement was not conclusive on this issue. Again, the recital in this case describes a request by the defendant for the construction of certain works and an undertaking by the plaintiff company to carry out such works. The wording of the recital suggests the works were to be carried out in the future. It would be against common sense to stop the defendant from producing evidence to show that no works were in fact carried out. There would be more force in counsel for the plaintiff's argument if the recital had stated that the defendant had made a request and that the plaintiff company had in compliance with that request already carried out the works in question. But even if the recital had mentioned an executed consideration, there would have been no estoppel. It is well known that a recital of receipt of consideration in a document does not operate as an estoppel. See *Baz Bahadur v. Raghubir* (1) (I.L.R. 49 All. at pp. 708 and 710). Nor is the executant of a document necessarily estopped from denying the facts stated therein, but the burden of proving the non-existence of such facts is on him: *Shiwala v. Lackhman* (2) quoted in Sarkar on Evidence (10th Edn.) at p. 982.

In *Sah Lalchand v. Indarjit* (3) their Lordships of the Privy Council stated as follows (27 I.A. at p. 97):

"Their Lordships, agreeing with the High Court, regard it as settled law that, notwithstanding an admission in a sale deed that the consideration has been received, it is open to the vendor to prove that no consideration has been actually paid. If it was not so, facilities would be afforded for the grossest frauds. The Evidence Act does not say that no statement of fact in a written instrument may be contradicted by oral evidence but that the terms of the contract may not be varied etc."

It is quite clear on these authorities that there is no estoppel here and that the defendant was entitled to adduce evidence as to absence of consideration. This would be so if the agreement had been specially prepared for the occasion. In fact, the parties here signed a printed agreement form with blanks filled in. Slightly different considerations apply to printed forms. As Lord Ellenborough said in *Robertson v. French* (4) (4 East at p. 136):

"[The written words are entitled] to have a greater effect attributed to them than to the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, and the printed words are a general formula adapted equally to their case and that of all other contracting parties upon similar occasions and subjects."

In *Baumwoll Manufactur von Scheibler v. Furness* (5) ([1893] A.C. at p. 15) it was held that a clause unintentionally left in a printed form of charter party must be disregarded. *Glynn v. Margetson* (6) was concerned with the effect of a wide deviation clause in a printed bill of lading. A cargo of oranges was damaged by delay caused by deviation of the ship. The House of Lords held that the printed clause must not be construed to defeat the main object and intent of the contract, which was to carry oranges from Malaga to Liverpool and that therefore the liberty to deviate must be restricted to ports which were in the course of that voyage.

This reinforces the conclusion at which I have already arrived, namely that neither s. 97 nor s. 120 of the Evidence Act prohibits evidence contradicting the recital mentioned above. That evidence has been given and is as follows:

On September 3, 1960, an agreement (Exhibit B) was signed between the plaintiff company and Mr. Kanji Ramji as sole proprietor of Kanji Ramji Patel & Co. Mr. Kanji Ramji is the defendant in the present case in his capacity as proprietor of Dandora Blacktrap Quarries. Exhibit B contains the same recital as Exhibit 5. Both agreements are printed and are in the same terms.

It is common ground that the recital in Exhibit B was literally true, the defendant having made a request for a supply line and the plaintiff company having constructed such line. So that, ignoring for the moment the other criticisms of counsel for the defendant, there was good consideration for the agreement of 1960.

Counsel for the defendant contends, however, that the supply line had been constructed in pursuance of the agreement of 1960. The recital in the 1965 agreement which speaks of a “request” by the defendant and of an “undertaking” by the plaintiff to construct a supply line is thus, counsel contends, shown to be false. The supply line was already there; it did not have to be constructed; it had already formed the consideration for an agreement five years earlier.

For this reason, counsel says that there was no consideration for the 1965 agreement.

As I have already stated, counsel for the plaintiff’s reply to counsel for the defendant on the subject of consideration is twofold. I have dealt with his first submission, namely, that the defendant cannot tender evidence in variation of his written contract and that he is estopped from denying the consideration mentioned in the written contract. His second reply, as an alternative to the first, is that there was in fact good consideration in this case. There is evidence that in September, 1964, the plaintiff company sued the defendant (C.C. 807/64) for a sum of Shs. 10,728/46 being the balance due under the minimum consumption clause of the 1960 agreement. There were negotiations for a settlement and the plaintiff company agreed to, and did, waive its claim on the condition that the defendant signed a new agreement. The agreement of 1965 (Exhibit 5) is the result of this compromise.

These events are capable of another interpretation also. The 1960 agreement (Exhibit B) was for a term of seven years. When the 1964 compromise was made, forty-six months of this term still remained unexpired. The new agreement (Exhibit 5) was, for this reason, made for forty-six months only. I think it can be fairly argued that the consideration mentioned in the 1960 agreement had not been exhausted and that the fullest consideration required to support the second agreement was no more than the unexhausted consideration of the first agreement. This argument finds support not only in the fact that the duration of the second agreement was exactly the unexpired duration of the first but also in the fact that the rate of minimum consumption provided for in both agreements was the same.

I find therefore that there was good consideration for the agreement of 1965 (Exhibit 5).

To come now to the defendant's argument that the agreement is illegal because it is inconsistent with the provisions of the Electric Power Act. The provisions contravened were not specified in the written statement of defence, but, during the hearing, Mr. Bhandari was more explicit. His complaint was that the charges quoted to his client and accepted by him in 1960 did not comply with the proviso to s. 25 (1). There is no dispute about this. The plaintiff company agrees that the charges made against the defendant were not calculated in accordance with the schedule in this proviso, but counsel for the plaintiff's answer to the complaint is that the schedule in the proviso applies only to consumers whose premises fall within the limits mentioned in the relevant sections. These limits are 200 yards "from the street" in the case of a requisition "to erect or lay down a distributing main . . . for the purposes of general supply throughout any street or part of a street" made under s. 24. Section 25 (which contains the scale in question) refers to "such" requisition and "such" owner or occupier meaning the requisition made by an owner or occupier under the preceding section.

Whereas ss. 24 and 25 are thus concerned with the erection or laying down of distributing mains s. 27 deals with the "supply of electrical energy". Here, again, the limits of area are specified as "two hundred yards from any distributed main" or as "two hundred yards from the nearer boundary of any street or road reserve". The defendant's premises are not, it seems agreed, situated within these limits.

But Mr. Bhandari argues that in the case of s. 27, the limits are specified only in sub-s. (1), not in sub-s. (2). Now, sub-s. (1) describes what "the authorized distributor shall" do on receipt of a requisition from the owner or occupier. On the other hand, sub-s. (2) says what the "owner or occupier of premises requiring a supply of electrical energy shall" do. I think the two subsections are complementary.

In short, the basis of charging which counsel for the defendant claims for his client cannot, in my opinion, apply to him because his premises are not situate within the 200 yards mentioned. The Act gives the prospective consumers within the distance mentioned certain rights which are not extended to consumers beyond that distance. A cursory glance at the history of this particular Act makes the point clear. Up to 1952 all consumers irrespective of the distance of their premises had a right to make a requisition "to erect or lay down a distributing main". In that year, however, a proviso was added to s. 24 (1) restricting the right to consumers within 200 yards – see Ordinance 27 of 1952.

The intention of the legislature seems to have been that, in the case of consumers whose premises are situate beyond 200 yards, the charges to be made by the company should be subject to negotiation. This is exactly what happened in the present case. I find, therefore, that the agreement in question does not contravene any provision of the Electric Power Act. It can be challenged only on the basis on which ordinary contracts can be challenged but no such basis is pleaded. Counsel for the defendant's criticism of the agreement that it was unreasonable and harsh and that it involved undue preference is not supported either by his pleadings or by evidence.

The defendant also contends that the plaintiff company has or had at the relevant time, no licence under the Electric Power Act and that therefore it is prohibited by s. 4 (1) from generating or supplying electricity. This means, according to counsel for the defendant, that the company cannot sue for money due under a contract for the supply of electrical energy. The defendant included this point in his written statement of defence. Counsel cross-examined the

plaintiff's witness Mr. R. D. J. Carvalho. Nevertheless, all that the plaintiff company did was to place before me an unsigned typed copy of a licence issued to it in 1922 and a cyclostyled copy of a renewal licence granted to it by the Minister in 1962 (Exhibit 7). These copies were put in without objection. But counsel for the defendant argues that since the original licence expired in 1947 and since the renewal licence states that an application for a renewal was not made until December, 1961, the renewal is of no effect because under s. 18 once there is a hiatus uncovered by a licence, a new licence must be obtained, there being no licence which can be renewed. If the state of affairs is as supposed by counsel for the defendant then it follows that contracts between the company and its customers after 1947 are all illegal and unenforceable.

I find it difficult to believe the only electric power company of this country and the Government of Kenya would allow such a state of affairs to develop and to continue for such a long time. On the other hand I cannot understand why the plaintiff company did not produce the original licences, if it had them, in spite of being repeatedly challenged by counsel for the defendant.

Counsel for the plaintiff's argument that the licence is a matter between the company and the Government and that the absence of it does not give customers the right to get out of solemn agreements does not convince me. A licence in a case like this is intended for the protection of the public. The analogy with the traders' licences (when they existed) does not hold. Traders' licences were a revenue measure, not something intended to safeguard public interest. Here, we have a clear prohibition accompanied by a penalty clause.

Another aspect of the matter remains to be considered. Counsel for the defendant wants me to say in effect that in renewing the licence in 1962 the Minister for Commerce and Industry did not follow the proper procedure and ignored very specific provisions of law. There is a well known maxim *omnia praesumuntur rite esse acta* which requires me to presume that all acts, especially judicial and official acts, are rightly and regularly done. The substance of this maxim is incorporated in s. 119 of the Evidence Act. There is no evidence to rebut the presumption. I presume therefore the 1922 licence was renewed in proper time and that the 1962 renewal was also made in accordance with the procedure laid down by law.

In the result I give the plaintiff company Judgment for Shs. 5,644/40 with interest and costs as prayed for in the plaint.

Judgment for plaintiff.

For the plaintiff:

Hamilton Harrison and Mathews, Nairobi

Sir William O'Brien Lindsay

For the defendant:

Bhandari and Bhandari, Nairobi

M. K. Bhandari

Division: Court of Appeal at Dar-Es-Salaam
Date of judgment: 20 July 1967
Case Number: 11/1967 (151)
Before: Sir Charles Newbold P, Georges CJ and Duffus JA
Sourced by: LawAfrica
Appeal from: The High Court of Tanzania – Biron, J.

[1] Income Tax – Deductible expense – Severance allowance – Whether accrued liability for severance allowance under the Severance Allowance Act 1962, on sale of business to second employer is a deductible expense by first employer in liquidation – E.A. Income Tax (Management) Act 1958, s. 14 (1).

Editor’s Summary

Under the Severance Allowance Act 1962 an employer is required to pay a severance allowance to an employee at the termination of his service based on wages and period of service at date of termination. Under s. 8A of the Act where a business is transferred from one employer to another and the employee continues his employment with the second employer the employee is not entitled to any severance allowance until his service finally terminates. Under the Act on transfer of the business the first employer ceases to be liable to pay the allowance and the second employer takes over the liability. The appellant liquidator sold an estate and in the agreement for sale there was a provision that the vendor would pay to the purchaser £12,500 (being the accrued liability to the date of sale) in settlement of all claims for severance allowance by any African employee. The appellant claimed to deduct the sum of £12,500 as “expenditure wholly and exclusively incurred in the production of income” under s. 14 (1) of the East African Income Tax (Management) Act 1958, in arriving at the total taxable income immediately preceding the completion date. The respondent refused to allow the sum of £12,500 to be deducted as expenditure incurred in the production of income and on appeal to the High Court the refusal was upheld. On further appeal to the East African Court of Appeal:

Held – the sum was not a deductible expense under s. 14 (1) of the East African Income Tax (Management) Act 1958 because, although the expenditure was of a revenue nature, it was not: (a) expenditure imposed on the appellant (on behalf of the vendor) by statute in the operation of the business. The statutory obligation is imposed on the purchaser (or second employer) under the Severance Allowance Act; nor (b) expenditure incurred by the appellant in production of income, because the vendor went into liquidation immediately after incurring the expenditure and the expenditure was not therefore incurred for the production of income.

Appeal dismissed.

No cases referred to in judgment.

[**Editorial Note:** This upholds the decision of the High Court reported at [1967] E.A. 250.]

C.A.V.

The following judgments were read:

Judgment

Sir Charles Newbold P: The appellant is the liquidator of a company (hereinafter referred to as the vendor) which had, prior to the liquidation, sold certain estates to Ralli Estates Limited (hereinafter referred to as the purchaser). On those estates was employed a large labour force in respect of which, up to the date of the sale, the vendor had incurred obligations under the Severance Allowance Act, 1962 (Ch. 487) (hereinafter referred to as the Act). In the agreement for sale it was provided that the purchase price should be £850,000 and there was also a provision in cl. 8 as follows:

- “8. The vendor will pay to the purchaser the sum of £12,500 in consideration of which the purchaser will accept full and complete liability in respect of all claims arising upon or after the completion date in respect of severance allowance or any other allowance or claim made by any African employee under or by virtue of any Ordinance or Regulation or otherwise and shall fully indemnify the vendor in respect thereof.”

In ascertaining its total income in respect of the income tax year immediately prior to the completion date the vendor claimed to deduct the sum of £12,500 paid by it under cl. 8 to the purchaser as “expenditure wholly and exclusively incurred by (it) in the production of (its) income” within the meaning of s. 14 (1) of the East African Income Tax (Management) Act, 1958, (hereinafter referred to as the Income Tax Act). The Commissioner of Income Tax refused to allow this sum to be deducted as expenditure incurred in the production of the income of the vendor and the vendor appealed to the High Court. The High Court held, first, that under the Act any liability for the payment of severance allowance to employees who had continued in the service of the purchaser was placed on the purchaser and not on the vendor; secondly, that the vendor could contractually place the liability for the payment of such severance allowance upon itself and that in this case it had done so by cl. 8 of the agreement for sale; thirdly, that any expenditure which the vendor so incurred under cl. 8 was expenditure deductible under s. 14 of the Income Tax Act as expenditure incurred in the production of the income of the vendor and fourthly, that the vendor had not satisfied the onus placed upon it under s. 113 (c) of the Income Tax Act of showing that the figure of £12,500 truly represented the accrued liability of the vendor for severance allowance.

From this decision the vendor appealed and the Commissioner of Income Tax cross-appealed. The main issue of the appeal was whether the judge was correct in holding that the vendor had failed to establish that the figure of £12,500 represented expenditure of a nature which the judge had held was deductible in ascertaining the total income of the vendor. The main issue on the cross-appeal was whether the judge was right in holding that any sum paid under cl. 8 of the agreement for sale by the vendor to the purchaser was deductible in ascertaining the total income of the vendor. It is, I think, more logical to consider first the issue raised on the cross-appeal, as if no sum payable under cl. 8 of the agreement for sale is deductible in ascertaining the total income of the vendor then it is immaterial whether or not the vendor had discharged the onus of showing that the figure of £12,500 represented the accrued liability of the vendor for severance allowance.

The Act broadly provides that on the termination of the employment of an employee the employer shall, except in certain circumstances which are irrelevant, pay to the employee a sum described as severance allowance, which sum is measured by a reference to the employee’s wages and period of service with the employer. Having set out this general principle, s. 8A of the Act then deals with the particular circumstances which arise where an employee continues in what is, for all practical purposes as far as he is concerned, continuous

employment but the employer changes. The provisions of s. 8A which are relevant to this case are as follows:

“Continuous employment by more than one employer.

8A.(1) Notwithstanding the foregoing provisions of this Act, an employee shall not be entitled to a severance allowance where, after this section comes into operation;

...

- (d) he is employed in the business of his employer and his employment by that employer ceases on the disposal by that employer . . . of the whole . . . of that business . . . in which he is employed if . . . he enters the employment of the person who acquires the same forthwith after such disposal

...

nor shall the employer first named in the relevant paragraph be liable to pay the allowance in any such circumstances.

...

- (3) Where an employee ceases to be in the employment of one employer and enters or is deemed to enter the employment of another in any of the circumstances described in sub-ss. (1) and (2):

- (a) the employment of the employee by such first named employer and such second named employer . . . shall be deemed to be continuous employment by one employer; and

- (b) if such continuous employment ceases thereafter in circumstances in which the severance allowance is payable under the provisions of this Act, the employer in whose service the employee was employed immediately before such cessation shall be deemed to be the employer during the whole of the period which is, in accordance with para. (a) of this subsection, deemed to be a period of continuous employment by one employer, and shall be liable to pay the severance allowance accordingly:

Provided that:

...

- (ii) any employer who is liable to pay the severance allowance in the circumstances described in this subsection, shall be entitled to deduct any period, and to make any reduction, which any previous employer in that continuum would have been entitled to deduct or to make had such previous employer become liable to pay the severance allowance . . .”

The trial judge held that under this section “the Act fairly and squarely lays the liability on the second employer” for the payment of any severance allowance to any employee who has continuous service under two employers. I have no doubt whatsoever that he is correct. It was submitted that sub-s. (1) of the section should be read as if there were inserted immediately after the word “entitled” in the first part of the subsection and the word “liable” in the last part of the subsection some word or words such as “immediately” or “at that time”, on the ground that it was quite clear from the scheme of the Act

as a whole that the subsection should not be construed as taking away any right of an employee to severance allowance in respect of a period of service under the first employer. I do not think it is necessary to construe the subsection as if there were inserted therein any such words, as I do not consider that the subsection, when construed in the light of the remaining subsections of s. 8A, takes away any right of the employee on the ultimate termination of his employment to severance allowance measured by reference to the whole of his continuous employment under both the first and second employer. Even if those words were notionally inserted I do not see how, having regard to the clear words of sub-s. (3), their insertion would place any liability upon the first employer for the payment of the severance allowance in respect of the period of employment under that first employer. It was submitted that the insertion of those words would have the effect of suspending that liability until the ultimate termination of the employee's service and on such ultimate termination both the first employer and the second employer would be liable, presumably jointly and severally, for the severance allowance payable in respect of the period of service under the first employer. It would need considerable argument to convince me that the law places on two separate employers a liability in respect of the same period of employment and the difficulty of so convincing me would be greatly increased by the fact that this joint liability could only be arrived at by inserting in a clause words which were not there. In any event the provisions of sub-s. (3) make it perfectly clear that on the ultimate termination of the service of an employee the statutory liability for the payment of severance allowance in respect of the continuous periods of employment, both under the first employer and the second employer, are placed upon the shoulders of the second employer and are taken off the shoulders of the first employer.

The trial judge, having arrived at the conclusion that the statutory liability for the payment of severance allowance rested upon the purchaser, nevertheless went on to hold that this liability could, by contract between the vendor and the purchaser, be placed on the shoulders of the vendor and that the agreement for sale in this case had placed the liability on the vendor. If by that he meant as between the vendor and the purchaser ultimate liability could be contract fall upon the vendor, then of course I agree. If, however, he meant by that, either that as between the employee on the one side and the vendor and the purchaser on the other side, the purchaser could relieve itself of statutory liability or that as between the vendor and the Commissioner of Income Tax the vendor could by contract undertake the liability of the purchaser in respect of the payment of severance allowance so as to permit the vendor to deduct that expenditure as expenditure incurred by the vendor in the production of its income, I regret that I disagree completely.

It was submitted for the Commissioner of Income Tax that the liability imposed upon an employer under the Act to pay to its employees an amount of severance allowance was not revenue expenditure deductible under s. 14 of the Income Tax Act. It was submitted, first, that it was capital expenditure; and, secondly, that if it was revenue expenditure it was not incurred in the production of the income of the vendor. I reject the first of these submissions without hesitation. The expenditure is clearly of a revenue and not of a capital nature. It does not bring into existence any enduring asset of the structure of the business but is clearly an operating cost in the output of the business. It is, in effect, nothing other than an increase in the bill for labour employed in the production of the income. The fact, however, that because a statute imposes expenditure of a revenue nature on one employer does not necessarily mean that where another employer chooses of its own volition contractually to undertake the liability which is imposed upon another, therefore that other employer can deduct that voluntary contractual expenditure as an expenditure

incurred in the production of its income. Broadly, expenditure which is deductible under s. 14 (1) of the Income Tax Act may be said to fall within three categories. First, it may be revenue expenditure imposed on a taxpayer by statute in the operation of the business; secondly, it may be revenue expenditure incurred by the taxpayer by contract between the taxpayer and the supplier of the service or the goods in respect of which the expenditure is incurred when the service or goods are needed for the operation of the business; and, thirdly, it may be revenue expenditure incurred by the taxpayer in other circumstances where such expenditure might reasonably be designed to foster the production of the income of the taxpayer. I do not wish, by setting out these three categories, to suggest that they provide any rule either for the inclusion or the exclusion of any expenditure as expenditure incurred in the production of the income – to attempt to set out any such rule, would, I consider, be most hazardous. I have, however, set out these broad categories as a guide for the purpose of determining whether this particular expenditure could be said to be expenditure incurred in the production of the income of the vendor. As I have already said, it does not fall within the first category as the statute places no liability on the vendor. Nor does it fall within the second category as the contractual liability was not undertaken with the person who supplied the service or the goods but was undertaken with a purchaser of the business in order, as between the vendor and the purchaser, to relieve that purchaser of a statutory liability. As regards the third category, inasmuch as the vendor went into liquidation immediately after the incurring of this expenditure, the expenditure could not possibly be said to have been incurred in relation to the future production of any income of the vendor. It was, however, urged that it should be related to the past production of the vendor. This, of course, would be reasonable if the expenditure arose under any statutory or contractual liability which related to that past production. But it does not. A taxpayer cannot voluntarily incur an expenditure which it is under no liability to incur in respect of any past income and which can have no effect on future income, as no future income will be earned, and claim that expenditure is deductible in the production of any income.

In my view, therefore, this expenditure, though it was of a revenue nature which would, in other circumstances, have been deductible in ascertaining the income of a taxpayer, in these circumstances was not expenditure which the vendor could claim as expenditure “wholly and exclusively incurred by (it) in the production of (its) income”.

Having arrived at this conclusion it is strictly unnecessary to examine the main issue which arose on the appeal, that is, whether the trial judge was correct in saying that the vendor had failed to discharge the onus on it of establishing that the particular figure represented expenditure which was deductible under s. 14 (1) of the Act in ascertaining the income of the vendor. As the matter was fully argued I should, however, briefly say this. I agree with the advocate for the appellant that the judge was wrong in stating that there was not a shred of evidence to indicate how this figure was arrived at or what it represented. In the balance sheet of the vendor for the year prior to the sale there is a note to the effect that the contingent liability of the vendor in respect of severance allowance is £12,000 and there was evidence that this contingent liability would increase from year to year. The amount of this increase was more than the figure of £12,500 agreed between the purchaser and the vendor in respect of the following year. It may be that this figure of £12,500 was not sufficiently proved as representing an accurate assessment of the contingent liability at that date for severance allowance. There were a number of factors to be considered, for example the discounted value of an immediate payment, and the trial judge might not have been satisfied that the onus placed upon the taxpayer had been discharged. I would have thought that in normal circumstances a figure arrived

at in the circumstances in which this figure was arrived at, even though those circumstances were little known, would be acceptable as being a correct evaluation of the contingent liability. But the circumstances in this case were not normal. The purchase price paid by a purchaser for a capital asset which is to be used for commercial purposes must be related to the commercial value which that asset would have to the purchaser; and ultimately this means the yield in terms of money which that asset would give to the purchaser. In arriving at the purchase price a number of factors have to be taken into consideration. Some of those factors increase the value of the asset and others reduce it. Ultimately on a balance of those factors the purchaser arrives at the price which he is prepared to pay. This may be described as the true purchase price and this price is, normally, a capital expenditure by the purchaser and, unless the vendor is dealing in the business of selling assets of that nature, a capital receipt by the vendor. This capital transaction cannot, in part, be transformed into, as far as the vendor is concerned, a capital receipt and a revenue expenditure by an adjustment of the true purchase price so as artificially to increase the capital receipt and at the same time reduce that increased figure by a revenue payment with the result that in the final analysis it is only the true purchase price which is paid. This may well be what happened in this case. It may well be that this is what the trial judge meant when he said he was not satisfied that the purchaser had discharged the onus of showing that this sum of £12,500 truly represents an amount which was deductible under s. 14 of the Income Tax Act. If this is what he meant, I entirely agree with him.

For these reasons in my view the appeal should be dismissed with costs and the cross-appeal allowed with costs. As the other members of the court agree it is so ordered.

Georges CJ: I have had the advantage of reading the judgment of my Lord the President in draft. I agree with his conclusion and the reasoning on which it is based. I have nothing to add.

Duffus JA: The facts of this case have been fully set out in the judgment of my Lord the President, which I have had the advantage of reading in draft form.

The question that arose was whether the payment of £12,500 made by the Mazinde Sisal Estate (1961) Ltd., on the sale of three of its estates to the purchasers, the Ralli Estate Ltd., in consideration of the purchaser accepting full and complete liability in respect of all payments arising upon or after the completion of the purchase in respect of the payment of severance allowance, was a deduction from income properly allowable under s. 14 (1) of the East African Income Tax (Management) Act 1958.

Severance allowance is payable in Tanzania under the Severance Allowance Act 1962 (Cap. 487) to employees on the termination of their employment in certain circumstances. This particular case depends on the interpretation of s. 8A as to the liability of an employer to pay the allowance when he sells the whole or any part of a business which has employees. If the employment ceases as a result of the sale the employee, provided he otherwise qualifies under the Act, is entitled to compensation from his employer, the vendor of the business, but if on the sale the employee forthwith enters the employment of the purchasers, then it is his new employer, the purchaser, who becomes liable under the Act.

The payment of the £12,500 covered any liability that arose upon the sale as well as after the sale. I, however, understood counsel for the appellant to agree that all employees were taken on by the purchasers when the estate was sold and that no question arises as to any liability to employees who may have lost their jobs by reason of the sale. The question that arose was whether the

vendor was under any continued liability to those of his employees whose employment was taken over by the purchaser.

The learned advocate for the appellant submitted that the vendor, in a situation such as arose in this case, still remained liable for the payment of any severance allowance that was earned whilst the employee was with him, even though the purchasers had taken over his employment. With respect, I can find no merit in this argument and I agree with the learned trial judge and with my Lord President, that by virtue of the express provisions of s. 8A the liability to the employee in these circumstances ceases. It cannot therefore, in my view, be said that any payment made by him in respect of such a non-existing liability could possibly be said to have been an expenditure incurred in the production of income within the provisions of s. 14 (1) of the East African Income Tax (Management) Act, 1958.

I agree with the learned judge that the vendor might no doubt be able to contract out of his non-liability to pay the severance allowance, in that he could contract to pay any liability, or any proportion thereof, which the purchaser might incur under the agreement of sale but I cannot agree with the learned judge when he states that this liability could rank as an expenditure incurred in the production of income for the purposes of income tax. I agree with the submissions of counsel for the respondent, made in support of ground three of the cross-appeal, to the effect that this sum of £12,500 was a capital expenditure incurred as part of the arrangement to sell the three estates. The vendor, by law, ceased to be liable to pay severance allowance to those of his employees who “went” with the business and who then became the employees of the purchaser. The purchaser then became liable and this liability was his alone. It was a liability that arose from the contract of sale, and while the fact that the purchaser was taking over a going concern with trained employees was a factor that would enhance the purchase price, so too would the fact that the purchaser took over the liability to pay severance allowance be a factor which would detract from the value.

I agree therefore with the judgment of my Lord President, and with his order that this appeal be dismissed with costs and the cross-appeal be allowed with costs.

Appeal dismissed. Cross-appeal allowed.

For the appellant:

Archer and Wilcock, Nairobi
Morrison

For the respondent:

Legal Secretary, E.A.C.S.O.
R. J. Denney (Assistant Legal Secretary, E.A.C.S.O.)

Birsingh v Khetia and another
[1967] 1 EA 741 (HCT)

Division: High Court of Tanzania at Arusha

Date of judgment: 5 August 1967

Case Number: 6/1967 (168)

Before: Platt J

Sourced by: LawAfrica

[1] *Landlord and Tenant – Tenancy at will – Seller remaining in possession – Intention of parties – Determination of – Whether notice to quit necessary.*

[2] *Rent Restriction – Notice to quit – Tenancy at will – Whether notice necessary – Rent Restriction Ordinance, s. 19 (1) (e) (T.).*

[3] *Rent Restriction – Possession – Joint owners – Tenants in common – “Required for occupation” – Whether need must be joint need – Rent Restriction Ordinance, s. 19 (1) (e) and (4) (T.).*

Editor’s Summary

The respondent landlords were brothers and tenants in common of residential premises in Arusha which they had purchased from the appellant tenant and of which they had allowed him to retain possession until they needed the premises for their own use. When the landlords gave the tenant notice to quit he did not leave and the landlords then made an application to the Rent Restriction Board of Arusha for possession of the premises on the grounds that they required the premises themselves for their occupation and that of their mother. The application succeeded and the Board on January 1, 1966 ordered the tenant to give up possession within fifty days. The tenant appealed to the High Court and argued firstly that there was no proof of the determination of the contractual tenancy, if one existed at all; secondly that it had not been shown that suitable alternative accommodation was available; thirdly that in all the circumstances it was not reasonable to make the order; and fourthly that the landlords as joint owners should have applied jointly for possession and have proved that their need for it was a joint need.

Held –

- (i) on the evidence it was the intention of the parties to create the relationship of landlord and tenant in the form of a tenancy at will on payment of rent, so that no notice to quit was necessary;
- (ii) there was no reason to doubt the Board’s finding that a genuine case of need had been made out;
- (iii) the Board having taken cognisance of the fact that the tenant owned other premises which he had disposed of but of which he could gain possession the question of alternative accommodation need not be gone into;
- (iv) s. 19 (4) of the Rent Restriction Ordinance must be interpreted as meaning that nothing in para. (e) or para. (h) of sub-s. (1) shall be deemed to permit joint landlords to recover possession of a dwelling house if by such recovery they or their wives and minor children would be in occupation of more than one dwelling house at a time (*Shaer Sharif Ahmed v. Sharifa Fatoom A. Aziz and Others* (6) applied);
- (v) the record did not show clearly how the Board had dealt with this last point, and there should be a retrial.

Appeal allowed. Retrial ordered.

Cases referred to in judgment:

- (1) *Fazal Valji Virani v. Kehar Singh and Ajit Singh* (1946), 13 E.A.C.A. 3.
- (2) *Francis Jackson Developments, Ltd. v. Stemp*, [1943] 2 All E.R. 601.
- (3) *R. v. Fillongley* (1786), 1 Term Rep. 458; 99 E.R. 1195.
- (4) *Morrison v. Jacobs*, [1945] 2 All E.R. 431.

- (5) *Shrimpton v. Rabbits*, [1924] L.T. 478; [1924] All E.R. Rep. 694.
- (6) *Shaer Shaif Ahmed v. Sharifa Fatoom A. Aziz and Another*, [1960] E.A. 17.
- (7) *Manmohandas Daverchand v. A.J. Kalyanji and Others* (1950), 17 E.A.C.A. 63.
- (8) *McIntyre v. Hardcastle*, [1948] 2 K.B. 82; [1948] 1 All E.R. 696.

Judgment

Platt J: This is an appeal from the order of the erst-while Rent Restriction Board at Arusha granting to the applicant landlords before it, possession of a dwelling house under s. 19 (1) (e) of the Rent Restriction Ordinance, Cap. 479 of the Revised Laws. The applicants Ramnik J. Khetia and Ratilal J. Khetia had purchased the suit premises as tenants in common in 1965 from the then respondent Birsingh. One or both of the applicants then allowed the respondent to remain in possession of the suit premises on the payment of a monthly rental of Shs. 650/-, – there being no argument as to this rent. The Board held on the evidence that the agreement was for the respondent to continue in possession of the premises until the applicants needed the premises for their own use. The respondent continued in possession for something like fourteen months by the time the said application was heard; but in January 1966, the applicants asked the respondent for possession of the premises and on January 31, 1966, they served notice to quit. The respondent did not give up possession with the result that this application was brought. The Board came to the conclusion that the applicants genuinely needed the premises and that as the respondent owned other premises he should give up possession of the suit premises within fifty days of the date of the order. The respondent now appeals against that order and for the sake of clarity, I shall refer to the appellant/respondent as Birsingh and the original applicants, now respondents in this appeal, as Messrs. Khetia.

The Board having made its decision on January 1, 1966, it applied the provisions of the Rent Restriction Ordinance of 1962 as it stood before it was amended by the Amending Act No. 57 of 1966. No dispute arises out of this matter and it will be as well to set out the section involved:

“19(1) No order for the recovery or possession of any premises to which this Act applies or for the ejectment of a tenant therefrom shall be made by the court or any board, and no permission to bring proceedings therefore shall be granted by any Board unless – (e) the premises are reasonably required by the landlord for occupation as a residence for himself or for his wife or children, or for any person bona fide residing, or to reside with him, or some person in his whole time employment, or in the whole time employment of some tenant from him or for the occupation of the person who is entitled to the enjoyment of the premises under a will or settlement, and (except as otherwise provided by this section) a Board or the court, as the case may be, is satisfied that alternative accommodation, reasonably equivalent, is available or will be available at the time that the order takes effect, or that the tenant has built or owns premises suitable for his own accommodation which is available to him or would be so available but for his own act in disposing of the same.”

At the conclusion of sub-s. (1), there then follows sub-s. (2), which is material to this case:

“(2) In any case arising under sub-s. (1) no order for the recovery or possession of premises or for permission to bring proceedings therefore shall be made unless the Board or the court, as the case may be, considers it reasonable to make such order.”

Subsection (3) is not applicable to this case, but reliance is placed upon sub-s. (4), which is as follows:

- “(4) Nothing in para. (e) or para. (h) of sub-s. (1) shall be deemed to permit the landlord to recover possession of a dwelling house if by such recovery he or his wife and minor children would be in occupation of more than one dwelling house at the same time.”

Three grounds of appeal were put forward and it will be convenient to deal with the first ground before considering grounds two and three. The first ground of appeal urged that the Board erred in law in making an order for possession of the premises in the absence of any proof of the determination of the contractual tenancy. On this ground, counsel for the appellant argued three points: (a) whether there was a tenancy at all; (b) if so, what type of contractual tenancy had been created, and (c) whether a valid notice to quit had been served, so determining the contractual tenancy. As to the first of these issues, learned counsel for the respondents naturally pointed out that as the first ground of appeal did not allege the absence of a contractual tenancy, it was not a matter which counsel for the appellant could take; but as the argument went to the jurisdiction of the Board, it is necessary for me to consider the point.

No objection seems to have been taken to the Board's findings of fact. There was indeed a dispute as to the nature of the agreement but there was evidence which the Board was entitled to accept that the agreement was that Birsingh was to continue in possession of the premises on the payment of rent until it was needed by Messrs. Khetia. Now it is not always easy to ascertain, in circumstances where a vendor of premises has remained in possession after completion of the sale, on what basis he so remains. It is a matter of ascertaining from all the circumstances whether the true intention of the parties was to create a tenancy or not. So in *Fazal Valji Virani v. Kehar Singh* (1) the Court of Appeal for Eastern Africa held that in the circumstances of that case, although the vendor remained in possession and had agreed to pay what was called “rent”, nevertheless, the true construction of the transaction was that the parties had not created the relationship of landlord and tenant, but had provided for the payment of liquidated damages, in the event of the vendor being unable to give the purchaser possession of the premises. Therefore, it was held that the trial court was in error in holding that a tenancy at will had been created to which the Kenya Rent Restriction Ordinance applied. In coming to this conclusion the Court of Appeal distinguished the decision in *Francis Jackson Developments Ltd. v. Stemp* (2), where the Court of Appeal in England held that a tenancy had been created, although the sums to be paid by the vendor were agreed to be paid for occupation and use equivalent to interest on the purchase money of the premises. These two cases merely go to show that despite the terminology of the agreement between the parties, nevertheless, it is the duty of the court to ascertain the true intention of the parties.

Bearing this in mind, I have no doubt that in this case it was the intention of these parties to create the relationship of landlord and tenant. The purchase price had been paid and a monthly rental agreed upon, which I think was to be a proper rental and not any other sort of transaction as considered in *Virani's* case (1) above. By virtue of s. 1 (2) of the Rent Restriction Act of 1962, all dwelling houses were controlled which were subject to a tenancy and therefore, the Act applied and the Board was properly seised of the matter.

That being so, the next question is to ascertain what type of tenancy had been created; here counsel for the appellant argued that a periodic tenancy from month to month had been created and not a tenancy at will. Counsel for the respondents went along with him on this point but in my view there

can be no doubt that it was a tenancy at will. Counsel for the appellant referred me to the definition of a “tenant at will” in Stroud’s Judicial Dictionary, where authority is quoted for the proposition that where there is a clog upon a lessor exercising his will, there cannot be a tenancy at will. However, it will be noted that the clog there referred to was the right of the tenant in equity to demand a lease for a term of years. No such difficulty presented itself in this case and indeed it will be seen that in *Francis Jackson’s case* (2) referred to above, the arrangement there was held to amount to tenancy at will. So in an old English case, *R. v. Fillongley* (3), conveniently set out in Woodfall on Landlord and Tenant (26th Edn.) at p. 307, the words “I give you a close to enjoy as long as I please, and to take it again when I please, and you shall pay nothing for it”, were held to create a tenancy at will. The fact that Mr. Khetia stated that Birsingh could have the premises until they were needed, did not deprive Messrs. Khetia of exercising their will to regain the premises. In my view, therefore, a tenancy at will on payment of rent had been created.

This conclusion as to the type of tenancy created has an important bearing on the question of the determination of the contractual tenancy by the notice to quit. Supposing for the sake of argument that the notice given by Messrs. Khetia on January 31, 1966, was not a proper notice to quit, nevertheless no notice was required to terminate the tenancy at will. All that was required was a demand for possession, of which, of course, the notice provided ample evidence. Counsel for the respondents indeed argued that even if a monthly tenancy had been created no notice to quit was necessary in the case of the present application under s. 19 (1) (e) of the Act. Certainly there is a comment to this effect in the judgment of Scott, L.J., in *Morrison v. Jacobs* (4), where he was dealing with a similar type of application. It also seems that in other applications for possession under s. 19, notice to quit is specifically required (see s. 19 (1) (c) and (h)). In any event no notice to quit was necessary as this was a tenancy at will. Accordingly the first ground of appeal fails.

Grounds two and three are as follows:

- “(2) The Board erred in not giving any consideration to the fact that premises suitable for the accommodation of the appellant were not shown to be available to the appellant within the time laid down by the Board;
- (3) The Board erred in law in not considering the principle laid down in the case of *Shrimpton v. Rabbits* (5).”

It was conceded, I think that the ruling in *Shrimpton’s case* (5) applied to the instant case by virtue of s. 19 (2) of the Act which I have set out above. It was necessary for the Board to consider over and above the provisions of s. 19 (1) (e) that in all the circumstances it was reasonable to make the order. But of course, the Board had to be satisfied first that the landlord had brought himself within the requirements of s. 19 (1) (e).

As will be seen from that provision, the Board had to be satisfied that the premises were reasonably required for the landlords for their occupation as their residence or for any person bona fide residing with them. Messrs. Khetia based their application on the ground that the premises were needed by them for their occupation and for that of their mother who lived with them or one of them owing to her ill health. It was accepted by the Board that this woman was of advancing age and suffered from serious ailments which required her to live at ground level where she could easily take walking exercise. The suit premises certainly were ground level premises and so differed from premises in which she lived on the first floor of another building. The Board accepted the strong medical evidence that these latter premises were not suitable and this was not really disputed. There was also no dispute that this woman lived with

her son (who gave evidence) after her husband's death. There is no reason to doubt the Board's finding that a genuine case of need had been made out.

The next requirement of s. 19 (1) (e) was that the Board had to be satisfied that alternative accommodation reasonably equivalent was available or would be available at the time that the order took effect. There was no evidence that suitable alternative accommodation was in fact available. But the Board proceeded upon the provisions of the last clause of the section, and held that it was satisfied that the tenant had built or owned premises suitable for his own occupation which were available to him or would have been so available but for his own act in disposing of his premises. On this point there was Birsingh's admission that he owned two properties which he had leased, and that if his tenants removed from them he would be quite willing to vacate the suit premises and occupy his own. The Board held that he had taken no reasonably firm steps to get possession of his premises. The evidence was that Birsingh had only given his tenants verbal notice to quit, but had taken no steps to recover possession. The Board was not satisfied either as to the reasons why he had leased his premises. I cannot say that I find the view taken by the Board unreasonable. As I read the provisions of s. 19 (1) (e), it seems to me that alternative accommodation is not a condition precedent where the Board finds that the tenant owns other accommodation himself. The section seems to me to imply that it would be unjust to prevent a landlord from obtaining possession of premises which he genuinely needs, because there is no alternative accommodation other than what the tenant himself owns which he had disposed of (as in this case, by his leasing them). In taking this view I am mindful of the fact that as far as I am aware this particular part of s. 19 (1) (e) has not been the subject of a reported decision. Nor is such a provision to be found in English legislation. For these reasons I need not, I think, dwell on the authorities quoted to me on the question of reasonably equivalent alternative accommodation. The section seems to me to be plain, and the Board having taken cognisance of the fact that Birsingh owned other premises which he had disposed of, but of which he could gain possession if he took proper steps, was acting within its rights, in holding that the application had been properly made under the section.

It is at this point that counsel for the appellant's argument that the application was affected by the tenancy in common by which the landlords Messrs. Khetia held the premises is of some importance. His argument was that the evidence did not disclose that the landlords both wanted the premises for their own use. In the case of tenants in common, he argued, they must both apply and show that their need was a joint need. Now this argument was not contained in his petition of appeal as it should have been. Counsel for the respondents, although taken by surprise, argued that the point had never been taken before the Board, and that in any event, counsel for the appellant's point was not well founded as one joint landlord could apply for possession. In the general law of landlord and tenant, counsel for the respondents' statement would no doubt hold good, and I must confess it seemed attractive at first sight. But on further consideration from the authority of *Shaer Shaif Ahmed v. Sharifa Fatoom A. Aziz and Another* (6) it became clear that in the interpretation of Rent Restriction legislation, joint owners have narrower powers than otherwise. So in that case the suit premises owned by joint landlords having been leased, were required by the landlords for the joint occupation of the son of one landlord and the brother of the other landlord. Under the legislation then being construed, the son of the first landlord came within the degree of relationship specified in the relevant section, but the brother of the second landlord did not. The application for possession failed because it could not be said that both joint landlords required the premises, but only one of them. The Court

of Appeal for Eastern Africa in coming to this decision with some hesitation, felt bound by its earlier decision in *Manmohandas Daverchand v. A.J. Kalyanji and Others* (7), the latter case following *McIntyre v. Hardcastle* (8). In this English case the decision very clearly pointed out that joint landlords must all require possession within the terms of the statute. This being so, counsel for the appellant's argument, therefore, had considerable force and the parties were given the further opportunity of expressing their opinions to this court. As will appear this matter had of necessity to be considered by this court even *ex proprio motu*.

Counsel for the respondents contended that *Shaer Shaif Ahmed's* case (6) could be distinguished from the present in that, in the present case the reason for requiring the premises was that the mother of both Messrs. Khetia was sick and, therefore, they both required the premises. Furthermore, he repeated that the evidence did not disclose that only one of the joint owners needed possession for himself but both of them. True the order of the Board had lapsed into an order against one of the landlords but that was not to preclude the presumption that both landlords had appeared and had asked for possession. Against this, there was counsel for the appellant's argument that on the evidence, s. 19 (4) of the Act would come into play and debar an order for possession because the landlords would be in occupation of more than one dwelling, only one landlord having been awarded possession.

What then were the facts? It must be said at once that the record is somewhat thin, and the Board's order unfortunately worded.

The application of Messrs. Khetia stated in para. 10 (2) that "the applicants' mother, an old lady who is their dependent and lives with them now suffers from high blood pressure and has been advised to live on a ground floor premises. The applicants presently live in rented premises on the first floor". At the end of para. 10 (1) they asked for possession and para. 10 (3) was to the effect that they had requested Birsingh to give them vacant possession. It is not clear who appeared in court to speak for the application, but one of the Messrs, "R. J. Khetia" gave evidence. In his evidence he mentioned his "brother" – presumably the other Mr. R. J. Khetia – as being a tenant in common. No further mention is made of him except in the occasional use of "we" when the witness was testifying as to the original agreement made between the parties. Concerning the dispute with Birsingh, it all seems to have stemmed from action taken by the witness. Concerning his mother's residence he said – "my mother is a widow and lives with me". The witness stated that "he" lived on first floor premises which he had rented and had occupied for seven years. So he said "I ask the Board to order eviction". Concerning the provision of alternative accommodation, the witness observed – "my present premises would be available if I moved to my house, but not the whole as one of my brothers would look after the shop downstairs". As counsel for the appellant pointed out, which brother this was is not clear, but could be the other Mr. R. J. Khetia.

From these excerpts it will be apparent that the witness R. J. Khetia was speaking largely for himself and several matters were not made clear. It is not known whether the R. J. Khetia who gave no evidence lived with his brother who did give evidence, or whether the old lady their mother lived only with the witness or both of them. At least one interpretation would be that both Messrs. Khetia had joined in the application, but that their mother lived with one of them, and it was that one of them only, who wished to have possession of the suit premises. Whether the other joint owner was to stay in the old premises and look after the shop or whether that was to be done by yet another brother is not clear. The evidence of the witness did not appear necessarily to bear out the allegations made by the applicants in their application. It was ambiguous evidence.

On the other hand the evidence of Birsingh afforded no clarification for he simply noted that he was not able to say whether he was prepared to move into the applicant's part premises as there were "so many families there". This takes the matter no further. His evidence seems to concern only the R. J. Khetia who gave evidence.

In its judgment the Board commenced by saying that Ramnik and Ratilal Khetia asked for possession from Birsingh. Then it acknowledges that R. J. Khetia and his brother were tenants in common. After that reference is only made to the R. J. Khetia who gave evidence and treats that witness as the applicant. The contest emerged between "Mr. Khetia" and "Mr. Singh" and finally the Board drew the attention of "both parties" to the proviso in s. 19 (1) (e) "whereby within ninety days after the fifty days ordered by the Board the applicant must himself occupy the premises. Otherwise he must give Mr. Singh the first option to lease and take possession of the premises, failing which Mr. Khetia will render himself liable to a fine", etc. It seems that the Board may have understood the evidence as being an application by the witness R. J. Khetia for an order granting him possession, and as pointed out the evidence was of a nature which may have understandably misled the Board. It is difficult to know in that case what the Board understood when it stated that both brothers as tenants in common asked for possession.

In these circumstances counsel for the appellant pushed home his argument that there was no evidence that both brothers, Messrs. Khetia, actually wanted possession. Counsel for the respondent was left in the embarrassing position of observing from the Bar that in fact both brothers lived together in their present premises with their mother and wished to move into the suit premises; while yet another brother was to stay in the old premises and look after the shop. With some sympathy for counsel, as it may be that the Board misunderstood the real situation, I am bound to say that there was no evidence on these matters, and I am unable to accept his statements as facts upon which I can rely.

This leads me now to a consideration of s. 19 (4) of the Act. If it be said that the use of the word "landlord" in the singular must include the plural to cover joint ownership in s. 19 (1) (e) it is difficult to see why the same construction should not be applied to the word "landlord" in s. 19 (4). The reasoning of *McIntyre's* case (8) referred to above is express in favour of such a construction and was adopted by the Court of Appeal in the *Manmohandas* case (7), and the *Shaer Shaif Ahmed* case (6). While I am not bound by the *McIntyre* case, I am bound by the decisions of the Court of Appeal for Eastern Africa. The decision in the *Manmohandas* case was reluctantly taken because in the Interpretation and General Clauses Ordinance (Cap. 74 of the Laws of Kenya) it was provided that "words in the singular include the plural". At present in Tanzania no exactly similar provision is to be found in the Interpretation and General Clauses Ordinance, Cap. 1, but s. 2 (7) provides:

"When any word or expression is defined in this or any other Ordinance, such definition shall unless the context otherwise requires, extend, mutatis mutandis, to the grammatical variations and cognate expressions of such word or expression."

I take it to be a grammatical variation of the singular to the plural of such a word. Accordingly I must apply the approved reasoning in *McIntyre's* case (8) and so interpret s. 19 (4) as meaning that nothing in para. (e) or para. (h) of sub-s. (1) shall be deemed to permit the joint landlords to recover possession of a dwelling house if by such recovery they or their wives and minor children would be in occupation of more than one dwelling house at the same time.

If that be so, then had the Board found that both Messrs. Khetia were asking for possession of the suit premises, no difficulty would have arisen. They would both occupy one dwelling house with their mother. Again it would seem to be satisfactory if neither of the Messrs. Khetia were to move from their joint premises but only their mother.

But it would seem that s. 19 (4) would operate if only one Mr. Khetia moved to the suit premises with his mother while the other Mr. Khetia resided elsewhere. This I apprehend would still be the position under the new Rent Restriction Act of 1966. I must own that this seems to be a very artificial result, hardly to be compensated for by such arguments as were put forward in the cases referred to above, that joint owners could avoid these difficulties by arranging that one of them should become the sole owner. And perhaps this criticism is not untoward having in mind the diffidence with which the courts have felt driven to these conclusions. It may be perhaps a matter which should receive attention elsewhere.

It remains to decide what should be done now. It seems clear that though the Board knew the application before it had been made by joint owners, it may have treated the application as being made substantially by one of such owners, and in fact made an observation that one of them must occupy the premises within the statutory period or face the consequences. It may well not have been aware of the difficulties presented by a case of joint ownership. Had it been so aware, it is apparent that it could not have made the order and observations it did. Yet it is clear that the application was made by both joint owners. In these circumstances, in my opinion, the only fair course for me to take is to order a retrial before the court under s. 11, of Act 1966, the Board's successor in office. I take this course because it seems to me that the parties ought to be allowed to have all the issues tried on their application which in my view they were not.

Accordingly, I allow this appeal and set aside the order of the Board, and order a retrial. Costs to abide the event.

Order accordingly.

For the appellant:

Reid and Edmonds, Arusha

J. C. Taylor

For the respondent:

V. Dev Vohora, Arusha

Re an Application by Jiwa and others [1967] 1 EA 749 (HCT)

Division:	High Court of Tanzania at Arusha
Date of judgment:	17 July 1967
Case Number:	3/1967 (169)
Before:	Platt J

[1] *Land – Trust of – Variation – Whether Tanzania Court can vary a trust.*

[2] *Trust and Trustee – Variation of Trust – Beneficiaries all sui juris and consenting – Whether Tanzania Court can order variation – Whether English Variation of Trusts Act 1958 applies – Land (Law of Property) Ordinance, ss. 2 (1) and 10 (T.).*

Editor's Summary

This was an application by trustees for the court's approval of a variation of a trust of land, the beneficiaries being all sui juris and consenting. The trust deed required the land to be sold; the parties wished it transferred direct to the beneficiaries.

Held –

- (i) there is no power in Tanzania for a court to vary a trust but “the court has no power to insist upon execution of the trusts if the cancellation of the settlement is desired by all the parties if they are sui juris” (statement of law in *Chapman v. Chapman* (3) adopted);
- (ii) in the present case the application should be granted.

Application allowed.

Cases referred to in judgment:

- (1) *Elfie Heinrichsdorff-Gies and Another v. Henry George Dodd and Another*, [1960] E.A. 327.
- (2) *Parry v. Carson*, [1963] E.A. 91.
- (3) *Chapman v. Chapman*, [1954] A.C. 429.

Judgment

Platt J: This is an application by the trustees holding certain properties on behalf of the widow and children of the settlor, one Haji Chirag Din Ramzan now deceased. The application seeks to obtain the court's approval for variation of the terms of the trust in order that the properties may be conveyed to the beneficiaries and the trust wound up.

The settlor directed the trustees to hold the land and buildings thereon under certain rights of occupancy upon three trusts, the first of which is now no longer in point since the settlor has died. The second and third are as follows:

- “(b) And from and after my death upon trust to pay out of the net income thereof after payment of all rents, rates, taxes, expenses of management and such outgoings as in the opinion of the trustees are properly chargeable, to my wife Ayesha Bint Ramzan and my four children, i.e. son Mohamed Afzal, daughters Kulsum, Zehra and Zubeda or whoever shall be alive at the time of my death such sums as may be necessary and reasonable for their maintenance, education and advancements as the trustees may think proper.
- (c) Upon further trust that the trustees shall immediately after all my said children or the survivors of them have attained majority, sell properties and distribute the sale proceeds thereof to my wife the said

Ayesha Bint Ramzan and my son Mohamed Afzal and daughters Kulsum, Zehra and Zubeda, or the survivors of them according to Sunni Muslim Law.”

It is not disputed that the trustees have properly carried out the terms of the second trust from the date of the testator's death to the present date and further that the time has come for the trustees to act under the third trust, since the youngest child Zubeda is now twenty years of age.

By virtue of s. 2 of the Age of Majority Ordinance, Cap. 431, of the Laws, every person domiciled in Tanzania shall attain full age and cease to be under any disability of minority at the beginning of the eighteenth anniversary of the day on which he was born. Accordingly all the beneficiaries are sui juris.

Although the trust instrument directs the trustees to sell the properties and distribute the sale proceeds, the trustees applied to this court to be excused from the sale of the property, but to transfer the properties to the beneficiaries in the proportions that the proceeds of the sale would have been transferred to them according to the Sunni Muslim Law.

The application is based on the grounds, stated by the Trustees in their affidavit, that they are of the opinion that it would not be in the best interest of the beneficiaries for the properties to be sold, since the sale of the properties is not likely at the present to fetch a satisfactory price, and that as the properties stand they are more valuable to the beneficiaries. The settlor's family, that is to say, his widow and four children all live together as a joint family in a part of the building on Plot No. 21, Block A, Area F, in the township of Arusha, the commercial part of that building being leased. The second building standing on Plot No. 4, Block A, Area F, in the township of Arusha, is leased as a hotel on a substantial rental. The two parts thus rented bring in an income of Shs. 1550/-. A certain amount of money has been saved from the rental income, and it is proposed to distribute this money according to the trust. The difficulty is that the properties are now somewhat old and their value is to be found more in their use than in their sale.

A further difficulty has arisen, in that one of the trustees has now left Tanzania and resides in India, the second resides in Mombasa, the third has now died, and the remaining trustee in Arusha is of advanced age. These matters clearly indicate the necessity for the trust to be wound up. But the beneficiaries are all of the opinion that they would prefer the trust properties to be transferred to them rather than that they should be sold since they fear that they would make a loss thereby. It seems clear to me that their best interests lie in the preservation of the properties rather than their sale, and perhaps I should say here that the matters have been put before the Registrar of Titles, and he is on record as stating that he has no objection to the proposed transfer, if the court should see fit to allow the application.

The law applicable to this matter is as provided by s. 2 of the Land (Law of Property and Conveyancing) Ordinance Cap. 114 of the Laws. Subsection 1, is as follows:

"The law relating to real and personal property, mortgagor and mortgagee, landlord and tenant, and trust and trustees in force in England on January 1, 1922, shall apply to real or personal property, mortgages, leases and tenancies, and trust and trustees in the territory in like manner as it applies to real and personal property, mortgages, leases and tenancies, and trusts and trustees in England, and the English laws and practice of conveyancing in force in England on the day aforesaid shall be in force in the territory."

Subsections 2, 3 and 4, further indicate the scope of the English law and practice but are not of importance in this case. Then by s. 10 of the above Ordinance, power was given to declare in the Gazette whether any English Act of Parliament or part of the Act is or is not by virtue of this Ordinance,

in force in the territory. A declaration was made and such cases as *Elfie Heinrichsdorff-Gies and Another v. Henry George Dodd and Another* (1), and *Parry v. Carson* (2) illustrate that the Trustee Act 1893 (England) still applies and that later legislation after 1922 does not. Accordingly, the English Variations of Trusts Act 1958 is not applicable.

I am therefore bound to examine the English authorities concerning the court's jurisdiction to vary a trust as it stood on the material day, January 1, 1922. The general rule was that the Chancery Division of the High Court of England in the exercise of its jurisdiction in the administration of a trust generally speaking required the trustees to carry out the terms of the trust as the settlor wished and did not arrogate to itself any inherent overriding power to disregard or re-write the trusts, but where the beneficiaries, all being sui juris, and acting under no incapacity or undue influence but being fully informed of the circumstances, consented or concurred in a breach of trust, the court could relieve the trustees from liability. In *Chapman v. Chapman* (3) Lord Oaksey, in a very short judgment made the following comment:

"The general rule is said to be that the court must see that the trusts are executed, but it is conceded that the court has no power to insist upon execution of the trusts if the cancellation of the settlement is desired by all the parties if they are sui juris, and the property then can be resettled upon altered trusts. Yet, where infants are concerned the court cannot, it appears, sanction any alterations of the trusts under the general rule although the interests of the infants appear to demand the alteration."

The difficulty concerning infants does not arise in this case, and with respect, I accept that the statement as to the law concerning the case of beneficiaries all being sui juris.

As far as I am aware there are no East African authorities dealing with the point. In the present case the proportion of the beneficiaries interests will not be altered and I am satisfied that it is in the interest of the beneficiaries that they should hold the properties jointly in the proportion of their interests as provided by the settlor, rather than the proceeds of the sale. Accordingly the application is granted and the trustees are authorised to transfer the properties comprised in the certificates of occupancy Nos. N.P. 317 and 6866, now renumbered 055017/17 and 055017/14 respectively to Ayesha Bint Ramzan, Mohamed Afzal, Kulsum, Zehra and Zubeda, the beneficiaries of the trust in proportions of 1/8th, 7/20th, 7/40th, 7/40th and 7/40th respectively. The cost of this application shall be borne by the estate.

Order accordingly.

For the applicants:

Mustafa and Zaffer Ali, Moshi

Opoya v Uganda
[1967] 1 EA 752 (CAK)

Division: Court of Appeal at Kampala

Date of judgment: 27 September 1967

Case Number: 94/196 (170)

Before: Sir Charles Newbold P, Sir Clement de Lestang VP and Duffus JA
Sourced by: LawAfrica
Appeal from: The High Court of Uganda – Fuad, J.

[1] *Criminal Law – Charge – Particulars – Robbery (with aggravation) – Whether “robbed” sufficient – Penal Code, s. 272 (U.).*

[2] *Criminal Law – Robbery with aggravation – Elements of – Whether paras. (a), (b) and (c) of s. 273 (2) of Penal Code (U.) to be read conjunctively or disjunctively.*

[3] *Criminal Law – Robbery with aggravation – Sentence – Whether sentence of death mandatory or discretionary – Penal Code, ss. 272 and 273 (U.) – Whether only the robber himself and not his companions liable to death penalty.*

[4] *Criminal Law – Sentence – “Shall be liable to suffer death” – Whether sentence of death mandatory or discretionary – Penal Code, ss. 118 and 273 (2) (U.); Criminal Procedure Code, s. 300 (2).*

[5] *Stare Decisis – Previous decision of Court of Appeal in criminal case explained and not followed – General principles.*

[6] *Statute – Construction – Whether there is a distinction in the construction of penal and other laws – General observations – “Shall be liable to”.*

Editor’s Summary

The two appellants were jointly tried and convicted of robbery with aggravation (committed with a common design) (ss. 272 and 273 (2), Penal Code) and were sentenced to death, the trial judge feeling himself bound by the *Kichanjele* case (1) that a sentence of death is mandatory under s. 273 (2), Penal Code.

Held –

- (i) the words “shall be liable on conviction to suffer death” in s. 273 (2). Penal Code provide a maximum sentence only; and the courts have a discretion to impose sentences of death or of imprisonment (*Kichanjele*’s case (1) explained);
- (ii) paragraphs (a), (b) and (c) of s. 273 (2), Penal Code should be read conjunctively;
- (iii) to be liable to the death penalty under s. 273 (2), Penal Code the offender may be not only the robber who is actually armed, etc. but may be an offender by reason of ss. 21 and 22, Penal Code which relate to aiding and abetting and common design;
- (iv) the use of the word “robbed” in the particulars of the charge was sufficient under s. 272, Penal Code.

Appeals against conviction dismissed. Death sentences quashed. Sentences of imprisonment and corporal punishment substituted.

Cases referred to in judgment:

(1) *Kichanjele s/o Ndamungu v. R.* (1941), 8 E.A.C.A. 64.

(2) *James v. Young* (1884), 27 Ch.D. 652.

C.A.V.

Judgment

Sir Clement De Lestang VP delivered the following judgment of the Court: The two appellants were jointly tried and convicted of robbery with aggravation contrary to ss. 272 and 273 (2) of the Penal Code and sentenced to death. Sections 272 and 273 read as follows:

- | | |
|---------------------------|--|
| “Definition
of robbery | 272. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery. |
| Punishment
for robbery | <p>273.(1) Any person who,</p> <ul style="list-style-type: none">(a) commits the felony of robbery on any public highway, shall be liable on conviction to imprisonment for a term not exceeding fourteen years and not being less than ten years,(b) commits the felony of robbery at any place, other than on a public highway, shall be liable to imprisonment for a term not exceeding fourteen years. <p>(2) Notwithstanding the provisions of the preceding subsection, where at the time of the commission of the felony of robbery the offender,</p> <ul style="list-style-type: none">(a) is armed with any dangerous or offensive weapon or instrument,(b) is in company with one or more persons,(c) wounds, beats, strikes any person, at, immediately before or immediately after the time of the robbery, <p>he shall be liable on conviction to suffer death.”</p> |

Briefly stated the facts which the learned trial judge found proved were that the appellants broke into the complainant’s house during the night and stole therefrom a box belonging to the complainant and containing various articles of clothing and money. The first appellant carried a “wire kiboko” and a torch and the second appellant a panga. Before removing the box from the house the second appellant cut the complainant with a panga on the right thigh and struck him on his knuckles and neck while the first appellant shone his torch on him.

Both appellants appeal on points of law and the second appellant on the merits as well. They were both represented on the appeal by different advocates. We will first deal in turn with the three points of law which are common to both of them.

The first is whether or not the penalty of death prescribed by s. 273 (2) is mandatory. We propose to examine this question independently of the case of *Kichanjele s/o Ndamungu v. R.* (1) and then consider that decision. It is useful to begin with some observations on the construction of penal laws. It was the rule in former times for penal laws to be construed strictly. That rule which was rigorously applied in *favorem vitae* when so many trifling offences were punishable with death has lost much of its force in recent times and, subject to the general proposition that where an equivocal word or an ambiguous sentence leaves a reasonable doubt as to the meaning of the law which the canons of interpretation fail to solve the benefit of the doubt should be

given to the subject, there is now no distinction in the construction of penal and other laws. The duty of the court is in a nutshell to put upon the language of the legislature honestly and faithfully its plain and rational meaning according to its express or manifest intention.

Bearing in mind these observations we proceed to examine s. 273 (2), which we have already quoted, with a view to deciding whether the penalty of death which it prescribes is mandatory. The material words are “shall be liable on conviction to suffer death”. It seems to us beyond argument that the words “shall be liable to” do not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed the court might not see fit to impose it. It is sufficient to refer to the dictionary definition of the word “liable” to be convinced of this. The Shorter Oxford English Dictionary gives many meanings to the word “liable” of which the following are the only appropriate ones for our purpose, namely, “legally subject or amenable to, exposed or subject to or likely to suffer from (something prejudicial)”; In *James v. Young* (2) North, J. said (27 Ch. D. at p. 655):

“But when the words are not ‘shall be forfeited’ but ‘shall be liable to be forfeited’ it seems to me that what was intended was not that there should be an absolute forfeiture, but a liability to forfeiture, which might or might not be enforced.”

We consider such to be the correct approach to the construction of the words “shall be liable on conviction to suffer death” especially when contrasted with the words of s. 184 which are “shall be sentenced to death.”

Consequently construing s. 273 (2) in the ordinary meaning of the words used therein free from authority we would have no hesitation in holding that the sentence of death which it prescribes is discretionary and not mandatory. To hold otherwise would be to give an unnatural meaning to the words of the section and we can see no compelling reason to do so. It was, however, decided by this court in *Kichanjele’s* case (1) that the words “shall be liable to” in the Kenya Penal Code are mandatory. This court, is, as a general rule, bound by its previous decisions but in a criminal case where the liberty and indeed the life of the subject is at stake, it will not follow a previous decision which it considers to be wrong. *Kichanjele’s* case (1) must, therefore, be closely examined. It is a case which does not appear to have been fully argued. The appellant was not represented by counsel and the decision, with respect, appears to be somewhat superficial. It was a case of treason under s. 36 of the then Penal Code of Kenya which provided that a person convicted of treason “shall be liable to suffer death”. Having regard to the maxim “nulla poena sine lege”, to the absence of an express alternative sentence to that of death in s. 36 of Kenya Penal Code and to the fact that both at common law and by statute treason in the United Kingdom has always been punished by death it may well be that the expression used in that section implies a mandatory sentence. In holding however that the sentence of death was mandatory the court said (8 E.A.C.A. at p. 65):

“A consideration of the various sections shows, in our judgment, that the use of the words ‘shall be liable to’ does not import that the sentence mentioned in any particular section in which these words occur is merely a maximum and that the court may impose any lesser sentence below the limit indicated.”

The “various sections” which led it to this view are not identified but it would appear from the passage in the judgment immediately following that

quoted that it is based on two matters, namely, the existence of a general provision in s. 26 (2) of the Penal Code of Kenya, that a person “liable to imprisonment for life or any other period may be sentenced for any shorter term”, which would be unnecessary if the words “shall be liable to” of themselves indicated merely the maximum limit of sentence and of a provision in s. 123 of the then Penal Code of Kenya that a person convicted of rape “shall be liable to be punished with death or with imprisonment for life”, which indicated to the court that if the section had ended at the word “death” no lesser sentence could legally have been imposed. Sections 26 and 123 of the then Kenya Penal Code have their identical counterparts in s. 300 (2) of the Uganda Criminal Procedure Code and s. 118 of the Uganda Penal Code respectively, except that at the time of the decision in *Kichanjele’s* case (1) s. 118 of the Uganda Penal Code (which was then s. 127) differed from s. 123 in that it did not provide for the death penalty. Now of course the offence of rape does not carry the death penalty either in Uganda or in Kenya.

With respect, we do not think that these two matters are necessarily conclusive nor do they compel a construction which the words in their ordinary meaning do not bear. Moreover it seems to us that s. 26 of the Kenya Penal Code like s. 300 (2) of the Uganda Criminal Procedure Code is merely declaratory of the law and may have been put in for good measure in order to remove any doubt as to the power of the courts, unless otherwise expressly forbidden, to impose a lesser penalty than the one prescribed. Furthermore in addition to the provision in s. 26 of the Kenya Penal Code and s. 300 of the Criminal Procedure Code of Uganda already referred to on which the court in *Kichanjele’s* case (1) partly relied, those sections also contain the important provision that a person liable to imprisonment may be sentenced to pay a fine in addition to or instead of imprisonment, without which there might have existed some doubt as to whether or not the court had such power. The power to impose a fine is certainly not obvious where the penalty prescribed is only imprisonment. Again if the words “shall be liable” are mandatory then their use in the rape section of the Kenya Penal Code – a section which clearly provided for alternative sentences – was inappropriate and rendered the section self contradictory. As those words were not mandatory in the rape section it is difficult to see why they should be so in the other sections. Also if the words are mandatory, why is it that a different expression, namely, “shall be sentenced to death” is used in the case of murder where it is well-known that death is the only penalty (s. 184 Uganda Penal Code)? The court in *Kichanjele’s* case (1) did notice this difference but appears not to have attached any importance to it. Finally in s. 274 (A) which, be it noted, was enacted at the same time and in the same Act as s. 273 (2), we find the legislature using different but clear language, namely, “shall be sentenced to” to impose the mandatory sentence of corporal punishment. This latter change of language is particularly significant.

Generally speaking the penalties fixed by law for an offence are, unless otherwise provided, maxima. This rule is enshrined in s. 40 of the Interpretation Act which provides that “where in an Act of Parliament a fine or penalty is prescribed for an offence against that Act, such provision shall indicate that the offence shall be punishable upon conviction by a fine or penalty not exceeding the fine or penalty prescribed”. If the legislature intended the penalty in s. 273 (2) to be mandatory it has, in our view, signally failed to use the appropriate language to achieve its object. The fact that there has been a divergence of views on the meaning of the section and that until *Kichanjele’s* case (1) was discovered the view generally held was that the penalty was not mandatory is an indication of this. Moreover s. 273 (2) has been the subject of repeated

criticisms by the judges of the High Court, and justifiably so we think. It is not happily worded and is likely to raise other problems in the future. We can only express the hope that the law on such a serious offence will not be allowed to remain for long in such a state of uncertainty. For the present our decision on the first point is that the penalty is a maximum one and not mandatory and that the courts have a discretion to impose sentences either of death or of imprisonment. In the latter case the sentence must by virtue of s. 274 (A) be accompanied by a sentence of corporal punishment where permissible. It must not exceed fourteen years since this is the maximum term provided for the felony of robbery and no other term is specified in s. 273 (2). It goes without saying that in assessing the appropriate punishment the court will have regard to the obvious intention of the legislature that robbers should not be dealt with leniently.

The second point is whether paras. (a), (b) and (c) of s. 273 (2) should be read conjunctively or disjunctively. They have been read in the former manner by the High Court in a number of cases and we think rightly so having regard to the absence of the disjunctive “or” between them and of any other indication to the contrary.

The third point is whether to be liable to the death penalty the offender must be the robber who is actually armed, accompanied by others and wounds, etc. as required by paras. (a), (b) and (c) or whether he may be an offender by reason of the provisions of ss. 21 and 22 of the Penal Code which relate to aiding and abetting and common design. Again there has been a divergence of views on this point but Fuad, J. has consistently favoured the latter view and we think, with respect, that he is right. Like him we see no good reason to exclude the application of ss. 21 and 22, which are general provisions, to s. 273 (2). We are unable to accept counsel for the first appellant’s contention that it was the intention of the legislature to punish only the actual offender. It could not have been intended, for example, that a robber who instigates his confederate to cut and beat the person robbed should be less severely punished than the person instigated. Neither could it have been intended that a person who though not armed himself goes on a robbing expedition with others whom he knows to be armed and with the knowledge that the arms will, if necessary, be used in the course of the expedition or who holds the victim while he is cut by another robber should be treated more leniently than the person actually using the arms or cutting the victim. Nevertheless we wish to point out that to bring a person within the meaning of offender in s. 273 (2) it is not sufficient merely to show that he was one of the robbers. He must be proved to have had a common design or aided and abetted the actual offender in the several requirements of paras. (a), (b) and (c) of the section.

In convicting both appellants of an offence against s. 273 (2) the learned judge said:

“I find that the wounding of the complainant by Accused No. 2 in the immediate presence of Accused No. 1 was part of the common design to rob with violence, and that Accused No. 1 is as guilty of wounding the complainant as is Accused No. 2, as if he, too, were holding the panga. Accused No. 1 knew that Accused No. 2 was armed with a panga and that he would use it if resistance was offered. Indeed, Yowasi did try to seize Accused No. 1, and it was after he had broken away that he was assaulted. I am satisfied that this is not a case of a secondary party not being liable for unexpected consequences. The two accused persons embarked on their joint unlawful enterprise to rob with violence and their acts were done in pursuance of their common design.

The wounding of the complainant was a probable consequence of the prosecution of their common purpose.”

There was abundant evidence to support his finding and indeed he might well have added that since the first appellant shone the torch on the complainant while the second appellant was striking him he was also aiding and abetting in the assault. So much for the three points of law.

Counsel for the second appellant contended that the indictment was defective because it omitted to allege that the violence used was in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained as required by s. 272 of the Penal Code to constitute the offence of robbery. The indictment in question reads:

“Statement of Offence

Robbery with aggravation contrary to ss. 272 and 273 (2) of the Penal Code.

Particulars of Offence

Laurence Opoya and Adulufu Ochwo on or about the 6/7 day of June, 1966, at Baranyanga village, Gombolola, Paya, West Budama, Bukedi District, being armed with pangas, whips and torches robbed Yowasi Okecho of his box containing shirts 1 vests and 2 pairs of trousers and Shs. 80/- and at or immediately before or after the said time of robbery wounded the said Yowasi Okecho.”

It will be noticed that the particulars of the indictment contain the word “robbed”. That word is a term of art and connotes not simply a theft but a theft preceded, accompanied or followed by the use or threats of use of actual violence to any person or property for the purpose required by s. 272. The allegation of wounding was obviously introduced to bring this case within s. 273 (2). Consequently we can see no defect in the information. For the guidance of prosecutors and judges we would, however, take this opportunity of stressing that there cannot be robbery of any sort without threats of or actual violence for the purpose required by s. 272 and that there should invariably be a finding on this point on every case. But where robbery is proved it does not appear that the violence required to bring it within s. 273 (2) need be for any of those purposes.

Counsel for the second appellant also contended that the verdict against the second appellant should be quashed on the ground that the learned judge failed adequately to consider certain matters itemised in the memorandum of appeal. Be it noted that it is not alleged that he omitted altogether to consider these matters. Indeed in an exhaustive judgment free from any misdirection of any sort he analysed all the evidence for the prosecution and the defence carefully and in detail and it is difficult to see what else he could have done. The evidence he finally accepted fully supports his decision and we can see no substance in this ground of appeal.

In the result the appeals of both appellants against conviction are dismissed. As regards sentence the learned judge following Kichanjele’s case (1) as he was bound to, held that sentence of death was mandatory and as we have indicated sentenced both appellants to death. As we have now held that it is discretionary and not mandatory we would normally set aside the sentences and remit the case to the learned trial judge to impose such sentences as in the exercise of his discretion he considers proper in all the circumstances. Having regard however, to the relatively minor nature of the injuries inflicted on the complainant we think that this is not a proper case for the imposition of the death sentence and in order to avoid delay and in the interest of the

appellants we think it advisable to determine the sentences ourselves. We accordingly quash the sentences of death and sentence each appellant to twelve years' imprisonment and twelve strokes of corporal punishment.

Appeals against conviction dismissed. Appeals against sentence partially allowed. Sentences of death quashed. Twelve years and twelve strokes substituted.

For the first appellant:

P. J. Wilkinson and Abu Mayanja, Kampala

For the second appellant:

S. V. Pandit, Kampala

For the respondent:

Attorney General, Uganda

J. S. B. G. Masika (State Attorney, Uganda)

Kiwala v Uganda
[1967] 1 EA 758 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	27 September 1967
Case Number:	66/1967 (171)
Before:	Sir Charles Newbold P, Sir Clement de Lestang VP and Duffus JA
Sourced by:	LawAfrica
Appeal from:	The High Court of Uganda – Sir Udo Udoma, C.J.

[1] *Criminal Law – Jurisdiction – Revision – Whether High Court can revise its own order made on revision – Criminal Procedure Code, ss. 337, 339, 341, 342 and 343; Judicature Act 1967, s. 11 (U).*

[2] *Jurisdiction – Revision – Criminal Law – Whether High Court can revise its own order made on revision – Criminal Procedure Code, ss. 337, 339, 342 and 343; Judicature Act 1967, s. 11 (U).*

Editor's Summary

The appellant was convicted of stealing and was sentenced to a fine of Shs. 5,000/- or eighteen months' imprisonment in default. He appealed and applied for bail. On the hearing of the application for bail a judge of the High Court reduced the sentence to six months. The State then petitioned the High Court for a revision of the sentence and the Chief Justice made a revisional order setting aside the sentence and

substituting for it six years' imprisonment without the option (reported at [1967] E.A. 590). The appellant appealed to the Court of Appeal claiming that the Chief Justice had no jurisdiction to make this order, the matter having already been dealt with on revision.

Held –

- (i) the order of the judge reducing the sentence was not made on appeal and could only have been made in the exercise of his powers of revision under s. 341 of the Criminal Procedure Code;
- (ii) the Chief Justice had no jurisdiction to proceed to a further revision of the sentence as the matter had already been revised.

Appeal allowed. Sentence (as revised to six months) restored.

Cases referred to in judgment:

- (1) *R. v. Sironga and Mindo* (1918), 7 E.A.L.R. 148.
- (2) *Suleman Ahmed v. R.* (1922), 9 E.A.L.R. 19.

(3) *Michael Meshaka v. R.*, [1962] E.A. 81.

C.A.V.

Judgment

Duffus J.A delivered the following judgment of the Court: The appellant was charged in the Chief Magistrate's Court of Masaka for stealing Shs. 10,744/-. On December 16, 1966, the chief magistrate convicted him of the offence as charged and inflicted the rather lenient sentence of Shs. 5,000/- or in the alternative eighteen months' imprisonment.

On December 30, 1966, the appellant by his advocate filed a notice of appeal and followed this with an application for bail pending the hearing of his appeal. The application for bail was heard by a judge of the High Court on February 8, 1967, and refused. However, during the hearing of this application, the State Attorney appearing for the Republic drew the court's attention to the fact that the alternative sentence of eighteen months' imprisonment for the non-payment of the fine was illegal, as the maximum penalty that can be imposed for non-payment of a fine under s. 302 of the Criminal Procedure Code is six months. In doing so the State Attorney is recorded as submitting:

"The sentence of eighteen months in lieu is illegal and I would not resist a legal sentence being imposed now. On appeal we are going to ask for an enhancement."

At this stage, counsel for the appellant, who was present, apparently made no comment and the learned judge on the matter being thus brought to his attention immediately made the following order:

"order

I order that the sentence of eighteen months' imprisonment in lieu of the fine be reduced to six months."

The application for bail then proceeded and bail was refused.

No further steps were taken on the appeal proceedings, the appellant no doubt being now only too happy to accept the reduction of the sentence to an alternative of six months' imprisonment and not desiring to risk a possible enhancement of the sentence if the appeal proceeded. The Director of the Public Prosecutions then on April 5, 1967, petitioned the High Court asking for a revision of the sentence under the provision of s. 341 (1) (a) of the Criminal Procedure Code, with a view to its enhancement on the ground that the sentence of a fine of Shs. 5,000/- on a charge of stealing Shs. 10,744/- was so inadequate as to amount to a miscarriage of justice. The petition was heard by the Chief Justice who delivered his revisional order on May 2, 1967, setting aside the sentence of a fine of Shs. 5,000/- or in default six months' imprisonment and substituted therefore a sentence of six years' imprisonment without the option of a fine.

The appellant now appeals to this court and his only ground of appeal is that the Chief Justice had no jurisdiction to revise the case and make the order that he did, as the matter had already been dealt with on revision when the judge of the High Court altered the period of imprisonment in default of payment of the fine from eighteen months' imprisonment to six months' imprisonment.

Two questions therefore arise on this appeal, first, was the order made by Jones, J., reducing the alternative sentence to six months' imprisonment a revision made under the powers given to the High Court under s. 341 of the Criminal Procedure Code and then, if this was the position, did the High Court have any further powers of revision?

Magistrates' courts are established by statute, the Magistrates' Courts Act (Cap. 36), and the jurisdiction powers and the authority of a magistrate are all given by statute. The High Court of Uganda is established by the constitution, and its jurisdiction is declared by the Judicature Act of 1967 (11 of 1967). Section 3 gives the High Court full jurisdiction, civil and criminal, over all persons and over all causes and all matters in Uganda and s. 11 states that the High Court shall exercise general powers of supervision over magistrates. Whilst the High Court undoubtedly has very wide powers of supervision and control over a magistrate's court, the exercise of these powers, in so far as the trial of cases is concerned, has to proceed in a judicial manner, and according to law, and is not to be exercised arbitrarily. Generally speaking the High Court's control over a magistrate's judicial decision, apart from action under any of the prerogative orders, is done either on appeal or by way of a case stated or by its power of revision under s. 341 of the Criminal Procedure Code. Certain sentences of a magistrate's court are also subject to confirmation by the High Court but this does not apply to the sentence in this case which was imposed by a chief magistrate.

The learned State Attorney concedes that the reduction of the sentence by Jones, J., could only have been done in the exercise of his powers of revision under s. 341 of the Criminal Procedure Code. This matter first came before the judge in interlocutory proceedings on an application for bail pending the hearing of the appeal, but it is clear that the order reducing the sentence was not made in exercise of his powers on appeal, and we agree with the State Attorney that the learned judge must have been exercising his powers of revision.

The relevant portions of the sections of the Criminal Procedure Code that deal with revision are as follows:

- | | |
|--|--|
| <p>"Power of courts to call for records.</p> | <p>339. The High Court may call for and examine the record of any criminal proceedings before any magistrate's court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such magistrate's court.</p> <p>...</p> |
| <p>Power of High Court on revision.</p> | <p>341(1) In the case of any proceedings in a magistrate's court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, when it appears that in such proceedings an error material to the merits of any case or involving a miscarriage of justice has occurred, the High Court may –</p> <p style="padding-left: 40px;">(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by ss. 331 and 334 of this Code and may enhance the sentence;</p> <p>...</p> <p>(2) No order under this section shall be made unless the Director of Public Prosecutions has had an opportunity of being heard and no order shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence.</p> |

- (3) Where the sentence dealt with under this section has been passed by a magistrate's court, the High Court may inflict a greater punishment for the offence, which in the opinion of the High Court the accused has committed, than might have been inflicted by the court which imposed the sentence.

...

	(5) Where an appeal lies from any finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.
	...
Discretion of court as to hearing parties.	342. Save as provided in s. 341 of this Code, no party has any right to be heard either personally or by advocate before the High Court when exercising its powers of revision:
	Provided that such court may, if it thinks fit, when exercising such powers hear any party either personally or by advocate, and that nothing in this section shall be deemed to affect sub-s. (2) of the last preceding section.
Number of judges in revision.	343. All proceedings before the High Court in the exercise of its revisional jurisdiction may be heard and any judgment or order thereon may be made or passed by one judge."

It will be seen that all the essential requirements for the making of a revisional order by the High Court are present in this case: thus, the power was exercised by one judge (s. 343); the error in the proceedings had been brought to the notice of the judge (ss. 339 and 341); the question affects the illegality of the sentence passed (s. 339); the Director of Public Prosecutions and the appellant by his advocate had the opportunity of being heard (s. 341); and the judge then made the order revising the sentence. No special procedure is provided for revision by the High Court. The short answer to the first question is that the learned judge could only have acted under his powers of revision in altering the sentence.

The further question arises whether the High Court then had any further power of revision. The general rule of law is expressed by the maxim, "interest reipublicae ut sit finis litium". Once an act is the subject of litigation and final judgment is entered by a competent court that is the end of the matter, except there is statutory provision providing for further consideration of that judgment on appeal or, as in this case, on revision; but once that right has been exercised and the appeal or the revision heard then again the litigation comes to an end unless there is again statutory provision for further appeal or revision. The law in this case only provides for one revision; no provision is made for further revision or for the High Court to revise its own order of revision. The court once it has exercised its power of revision is "functus officio" and has no authority to subsequently revise its own order.

The following extract from the judgment of Hamilton, C.J., in the case of *R. v. Sironga and Mindo* (1) the Kenya High Court, is on this point:

"On the other hand the capacity in which the High Court passes an Order confirming a sentence has to be considered, for if by so doing it has exercised its revisional powers I am then in agreement with the argument that it is 'functus officio' and cannot subsequently revise an Order so made."

In this case it was held that an order passed by the High Court in confirmation cannot be the subject of revision, and this would be even more clearly the case when the first order was one passed in revision. This part of this decision was not dissented from in the subsequent cases of *Suleman Ahmed v. R.* (2) or *Michael Meshaka v. R.* (3). These two cases dealt with the question as to when an order passed in confirmation became a revisional order and on the right of appeal to the High Court. A conviction or a

sentence merely confirmed remains that of the subordinate court and an appeal lies to the High Court: but where a conviction or a sentence has been altered this then becomes a revisional order of the High Court and no appeal lies to the High Court.

Provision is however expressly made by s. 337 of the Criminal Procedure Code of Uganda for an appeal to lie to this court from an order of the High Court passed on revision. The relevant portions of this section states:

- “Second
appeals.
- 337(1) Either party to an appeal from a magistrate’s court may appeal against the decision of the High Court in its appellate jurisdiction to the Court of Appeal on a matter of law, not including severity of sentence, but not on a matter of fact or of mixed fact and law.
- ...
- (6) For the purposes of this section the proceedings of the High Court on revision shall be deemed to be an appeal.”

The provisions of this section would apart from any other reason make it abundantly clear that once a case has been revised by the High Court, that court becomes “functus officio” and that the revision is final unless there is an appeal to this court.

We are therefore of the view that the learned Chief Justice had no jurisdiction to proceed to a further revision of the sentence in this case, as the matter had already been revised by Jones, J., in his order of February 8, 1967. This appeal has been properly brought to us on a question of law under the provisions of s. 337. We would therefore allow this appeal and set aside the revisional order made by the Chief Justice on May 2, 1967, and restore the sentence of the chief magistrate as revised by the revisional order of Jones, J.

Order accordingly.

For the appellant:

Kiwanuka & Co., Kampala
C. M. Kakooza

For the respondent:

Attorney General, Uganda
M. P. Radia

Loponge Sayokwo v Republic Loitarok v Republic
[1967] 1 EA 763 (HCK)

Division: High Court of Kenya at Nairobi

Date of judgment: 17 April 1967

Case Number: 24 and 25/1967 (154) (155)

Before: Sir John Ainley CJ and Mosdell J

Sourced by: LawAfrica

[1] *Criminal Law – Possession of property suspected to have been stolen – Stock stolen outside Kenya – Stock and Produce Theft Act, s. 9 (1); Penal Code, s. 326 (K.).*

[2] *Criminal Law – Stock theft – Possession of stock reasonably suspected of being stolen – Stock stolen in Uganda – Conviction under s. 9 (1) of the Stock and Produce Theft Act (K.) not competent.*

[3] *Statute – Construction – s. 9 (1) of the Stock and Produce Theft Act (K.) – The words “reasonably suspected of being stolen” must be confined to “reasonably suspected of being stolen in Kenya”.*

Editor’s Summary

In the first of these appeals the appellant was charged under s. 9 (1) of the Stock and Produce Theft Act with being in possession of cattle alleged to have been stolen from the herds of the seven complainants who were Sebei tribesmen living in Uganda. The appellant was a Suk tribesman of West Pokot District of Kenya and was charged under the Kenya Act in a Kenya Court. The particulars of the charge read:

“Loponge s/o Sayokwo. On or about September 22, 1966, at Prinda Riwa Location in the West Pokot district of the Rift Valley Province, was found in possession of 9 head of cattle reasonably suspected to have been stolen or unlawfully obtained. Property of Zedekia Simba and others (9 cattle).”

Held –

- (i) so long as the appellant knew to which animals the charge referred, which it was perfectly clear that he did know, the form of the charge occasioned no injustice;
- (ii) s. 326 of the Penal Code referred to persons in possession of property obtained outside Kenya;
- (iii) where the words “stolen” or “unlawfully obtained” occur in a Kenya statute, unless a different meaning emerges from the context, those words must be taken to mean stolen or unlawfully obtained in Kenya;
- (iv) as the power to punish for property stolen in neighbouring countries was given under s. 326 of the Penal Code, there was no necessity for giving a wider meaning to the words “stolen” or “unlawfully obtained” in s. 9 (1) of the Stock and Produce Theft Act;
- (v) the magistrate had therefore no jurisdiction to convict in this case.

Conviction quashed and sentence set aside.

Obiter: if the State had undertaken to prove that the appellant had stolen the animals referred to in the charge or that he had received them contrary to s. 322 (1) of the Penal Code, it would have been necessary to frame a large number of distinct charges.

Cases referred to in judgment:

- (1) *R. v. Smith*, [1962] 2 All E.R. 200; 46 Cr. App. Rep. 277. C.C.A.

(2) *R. v. Debruiel* (1861), 11 Cox. C.C. 207.

Editor's Summary

In the second of these appeals the facts were similar, with the exception that the appellant was charged with being in possession of cattle some of which were allegedly stolen in Uganda together with six others allegedly stolen in Kenya.

Held –

- (i) no conviction could be sustained under s. 9 (1) as to the cattle allegedly stolen in Uganda;
- (ii) as there was no sufficient identification of the cattle stolen in Kenya, the appellant was not properly convicted of being in possession of those cattle stolen in Kenya although the Court was not precluded from upholding such a conviction should the evidence have warranted it.

Conviction quashed and sentence set aside.

No cases referred to in judgment.

Loponge Sayokwo v. Republic

Judgment

Sir John Ainley CJ, read the following judgment of the Court: In this case the appellant was convicted of the offence created by s. 9 (1) of the Stock and Produce Theft Act. That subsection reads:

“9(1). Any person who has in his possession any stock which may reasonably be suspected of being stolen or unlawfully obtained shall, if he fails to prove to the satisfaction of the court that he came by the stock lawfully, be guilty of an offence and liable on conviction to the penalties prescribed for theft.”

The appellant is a Suk of the West Pokot District of Kenya. The complainants were Sebei tribesmen living near Bukwa in Uganda, and it is clear that for the last five or six years (to say the very least) the Sebei in that neighbourhood have suffered from cattle raids made by Suk tribesmen from Kenya. The fifth prosecution witness, Laurien Tallam, lost cattle in this way in August, 1961.

The first prosecution witness, Zedekiah Simba, lost cattle in a Suk raid in September, 1961, the seventh prosecution witness, Meteiwa Kisome in May, 1963, the fourth and sixth prosecution witnesses, Ndema Chila and Ngeiwa, in March 1965, the eighth prosecution witness Salimo in July 1965 and the second and third prosecution witnesses Zablon and Chemwerim lost cattle in May, 1966.

In September, 1966, these complainants came from Uganda to the Kenya police saying that they knew the whereabouts of some of the stolen cattle, and in the course of a search round the Suk villages on the Kenya side of the border a large number of cattle, said to be cattle stolen from Uganda, were pointed out by the Sebei. Moreover among a herd of cattle undoubtedly in the possession of the appellant each of the complainants we have named professed to pick out at least one of their stolen animals, and in fact nine beasts in all were picked out from the appellant's herd at the trial.

Now the particulars of the charge read:

“*Loponge s/o Sayokwo*. On or about September 22, 1966, at Prinda Riwa Location in the West Pokot District

of the Rift Valley Province, was found in the possession of 9 head of cattle reasonably suspected to have been stolen or unlawfully obtained. Property of Zedekia Simba and others (9 cattle).”

It is clear that the State has based the allegation that the nine beasts mentioned were “reasonably suspected of being stolen” upon the evidence of the numerous cattle owners to the effect that those beasts had in fact been stolen on various occasions at various places over a period of years. Had the State undertaken to prove that the appellant stole the animals, or that he had received them contrary to s. 322 (1) of the Penal Code then, questions of jurisdiction apart, it would have been necessary to frame a large number of distinct charges, and to those charges framed in respect of animals allegedly stolen three or five years ago there would in all probability have been no case to answer. However s. 9 (1) of the Stock and Produce Theft Act is quite obviously designed to aid the State to secure a conviction and the application of the very great penalties for stock theft in cases where they would fail to do so under the general law of Kenya or under the law of England. Whether in the circumstances which exist here the particulars to the charge are sufficiently informative is a question to which we have given some attention. It is true that these short particulars mask a great deal of evidence, but the prosecution were not required to set out their evidence, nor to set out why they said that they “reasonably suspected” these beasts to have been stolen. So long as the appellant knew to which animals the charge referred, and it is perfectly clear that he did know that, his concern was to recollect how he came by each individual animal, and he would not have been aided in that doubtless difficult task by more elaborate particulars, or by a series of separate charges. Certainly in this case the form of the charge occasioned no injustice. There we leave that matter.

We now approach what appears to us to be a very much more difficult question. All the cattle dealt with by the evidence were stolen in Uganda, if they were stolen at all. The prosecution who had to show that the cattle were “reasonably suspected of being stolen” undertook to prove that the suspicion which attached to the cattle was reasonable by calling witnesses who swore that each individual animal had been stolen, and had been stolen in Uganda. The trial court could not of course accept the assertion that the suspicion was reasonable unless that court believed that the prosecution witnesses were truthful and un mistaken. There may very well be cases, it was probably expected by the legislature that the majority of cases under the section would be such cases, where though it is reasonable to suspect that the cattle in question have been stolen, it is virtually impossible to discover the owner or owners. In such cases the question which we are considering will not arise. But in the present case it was forced on the attention of the magistrate that if he was to convict he had, in effect, to make a finding that all the animals had been stolen beyond the jurisdiction of his court. It is a question whether under s. 9 (1) of the Stock and Produce Theft Act an accused person can be asked as a condition precedent to acquittal to prove to the satisfaction of the court that cattle reasonably suspected to have been stolen, or demonstrated to have been stolen beyond the jurisdiction of the court, came to his possession lawfully. It scarcely needs pointing out that if such an accused were charged with the actual theft of cattle stolen abroad it would be incumbent on the court to declare that it had no jurisdiction to try such an offence.

It is also the law, we think, that if such an accused were charged under s. 322 (1) of the Penal Code with receiving the cattle in Kenya, well knowing them to have been stolen, say, in Uganda once more the Kenya court would have no jurisdiction to try him, and a conviction had under that subsection would be set aside. Here we follow the reasoning and the decision in the English case of *R. v. Smith* (1). That case was decided in 1962 and touching the matter under consideration there appears to us to be no real difference between the statute law of England in that year and the statute law of Kenya today. In particular

s. 33 (4) of the English Larceny Act 1916 is reproduced almost word for word by our s. 326 of the Penal Code. Our section reads:

“326. Any person who, without lawful excuse, knowing or having reason to believe the same to have been stolen or obtained in any way whatsoever under such circumstances that if the act had been committed in Kenya the person committing it would have been guilty of a felony or misdemeanour, receives or has in his possession any property so stolen or obtained outside Kenya, is guilty of an offence of the like degree (whether felony or misdemeanour) and is liable to imprisonment for seven years.”

That is the section which an English lawyer visiting Kenya would probably suppose was the one relied upon to punish persons dishonestly in possession of a cow stolen in Uganda, a pair of ducks stolen in England, or a diamond tiara stolen in France and so on. This at any rate is certain that with such a section in our Penal Code alongside s. 322 (1) the latter subsection cannot as a matter of construction be relied upon where the property in question has been stolen abroad. But the question in England received the same answer before any provision corresponding to s. 33 (4) of the English Larceny Act of 1916 existed.

In *R. v. Debruiel* (2) (a case decided in 1861 long before the enactment of any provision of the nature of s. 33 (4) of the Larceny Act), the prisoner had stolen property in Guernsey and had brought it to England. Guernsey is not, or at any rate was not, a part of the United Kingdom. It was held that the prisoner could not be convicted of larceny, for having them in possession here, nor for receiving in England the property stolen in Guernsey. Byles, J., who had consulted Channell, B., said:

“Nor could the prisoner be convicted of receiving, because that crime consisted in the guilty receipt of stolen goods; that is to say, goods stolen according to the law of England, and that law does not recognise a stealing in a foreign country as a crime which it will punish.”

We are not disposed to disagree with Byles, J., and Channell, B., as to what may be the law of England, and subject to the written law of Kenya, and to special local circumstances which render it inapplicable, that law applies here. We see no cause in the written law of Kenya or in the circumstances which exist in Kenya for declining to apply that dictum to Kenya. We think it clear that where the words “stolen” or “unlawfully obtained” occur in a Kenya statute, then unless a different meaning emerges from the context, those words must be taken to mean stolen or unlawfully obtained in Kenya. Counsel for the respondent has sought to persuade us that the geographical position of Kenya, her long land boundaries and the ease with which stolen goods and cattle in particular can cross those boundaries, are circumstances which entitle this court to give a more liberal interpretation of those words in the context of s. 9 (1) of the Stock and Produce Theft Act. We are unable to agree with counsel for the respondent. It is of course quite essential that in Kenya the courts should have power to punish the thief who steals in Tanganyika and is found with his ill-gotten gains in Kenya. The courts must have power to punish the man who acts as a receiver of cattle or other property stolen in the countries of our neighbours. But the legislature by enacting s. 326 of the Penal Code have given the courts such powers, and as it seems to us there is no necessity or warrant for giving the wider meaning contended for by the State to the words “stolen or unlawfully obtained” in s. 9 (1) of the Stock and Produce Theft Act. We would surely be entirely in the wrong if, bound as we are to interpret “stolen” in s. 322 (i) of the Penal Code as “stolen in Kenya”, we were to interpret the words “reasonably suspected of being stolen” in s. 9 (1) of the Stock and Produce Theft Act as “reasonably suspected of being stolen in Kenya or elsewhere”.

It is of course true that a man who knowingly receives in Kenya cattle stolen in, say, Uganda, could not, in view of s. 326 of the Penal Code, demonstrate without perjury that he came by the cattle lawfully, that is to say in accordance with the laws of Kenya. But the prosecution in cases under s. 9 (1) of the Stock and Produce Theft Act must lay a proper foundation before they can ask the court to call on the accused. Clearly if a man is found in possession in Kenya of what is, very probably, stolen property of a kind which could have been stolen in Kenya, it is not unreasonable to suspect, until the contrary is established, that it was stolen in Kenya. But when, as in this case, the prosecution calls many witnesses for the express purpose of proving that the property, the stock, was stolen in Uganda they fail, as we think, to bring the case within s. 9 (1) of the Stock and Produce Theft Act, for they cannot in such circumstances assert that they reasonably suspect the stock to have been stolen within the jurisdiction of the courts of Kenya and that is the foundation which, as we have tried to show, must be laid in cases under s. 9 (1).

For the reasons set out we consider that once it was made apparent to the magistrate that the stock had been stolen in Uganda he should have stopped the case, leaving it to the prosecution to proceed under the Penal Code if they chose. He had no jurisdiction, as we think, to convict in this case.

We quash the conviction and set aside the sentence.

We do not for one moment blame the magistrate in this case. We understand that the points which we have raised have not previously been taken by the High Court on appeal or upon confirmation. Nevertheless in these days when flogging for this type of offence is obligatory, and massive sentences of imprisonment are frequently awarded, it is proper to scrutinize the provisions of this subsection afresh. If the legislature wish to apply the provisions of the subsection to stock suspected to have been stolen in foreign countries that can be done by a very simple amendment of s. 9 (1) of the Stock and Produce Theft Act. That however is not a matter for this court.

Conviction quashed and sentence set aside.

No appearance for the appellant.

For the respondent:

Attorney-General, Kenya

H. G. D. Graham (State Attorney, Kenya)

Loitarok v. Republic

Judgment

Sir John Ainley CJ, read the following judgment of the court: The appellant in this case was convicted of the offence created by s. 9 (1) of the Stock and Produce Theft Act in respect of twenty head of cattle.

The background of the case is very nearly identical with that in Criminal Appeal No. 24 of 1967. The appellant is a Suk of West Pokot. Suk from that district have been cattle raiding over the Kenya border into the Sebei area of Uganda for years. In September, 1966, the appellant was found in possession of a number of cattle allegedly stolen from the Sebei in Uganda. For the reasons given by this court in the case to which we have made reference it is plain that no conviction under s. 9 (1) aforesaid could properly be had in respect of those cattle, But the appellant was also in possession of six cattle allegedly stolen in Kenya. These six cattle were lumped together with the Uganda cattle in one charge. The

question now arises whether this Court can say in effect that though the appellant should not have been called upon to demonstrate his innocence in respect of the Uganda cattle, he was properly called on to do so in the case of the Kenya cattle; that he failed to do so, and was therefore properly convicted in respect of those cattle.

We think that this court is not precluded from taking such a course in a case where the facts fully warrant it. But in the present case it seems to us that if the prosecution case is split in this way it is weakened. The strength of the case against the appellant lay really in the extraordinary number of apparently

honest identifications of cattle by different owners. If we concentrate on the Kenya cattle the identifying witnesses are reduced to five and the identifications of three of those witnesses, though they may be honest, can surely be strongly challenged on the grounds that they may be mistaken.

Kimutai Kimao professed to identify a beast eight years after he had lost it. Kiring Morei said he could recognize his animal seven years after its theft. Kimaiyo said that his animal had been stolen five years ago. Though we recognize the magistrate's experience and the care with which he tried this case we think that the possibility of a mistake was not excluded here, and that the appellant's assertion that these were his father's cattle which had been "in the family" for a very long time and were not stolen so far as he knew, may well have been true. Certainly there remains the evidence of Kipkoske who was speaking of an animal which he said was stolen a year before he professed to identify it, and of Markus Dimba who spoke of two cattle which had been stolen, he said, only three months or so before he identified them. Had the prosecution charged the appellant in respect of these cattle only it may very well be that they would have secured an unshakeable conviction. But it does seem to us that the prosecution has opened its mouth too widely here. Without this mass of identifications some of which the magistrate should not have considered at all (though we do not blame him) and some of which were at any rate dubious, we cannot really be certain that the magistrate would have convicted in respect of the cattle claimed by Kipkoske and Markus Dimba.

For these reasons we allow this appeal, quash the conviction and set aside the sentence.

Appeal allowed.

No appearance for the appellant.

For the respondent:

Attorney-General, Kenya

H. G. D. Graham

Bwaneka v Uganda
[1967] 1 EA 768 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	4 September 1967
Case Number:	936/1966 (157)
Before:	Sir Udo Udoma CJ
Sourced by:	LawAfrica

[1] *Criminal Law – Practice – Alterations made in record of proceedings – Necessity of initialling all alterations.*

[2] *Criminal Law – Practice – Failure to call investigating officers – Practice of not calling such*

witnesses for the prosecution unsatisfactory.

[3] Criminal Law – Practice – Unsworn statement by accused – Duty of magistrate to inform accused of his rights – Criminal Procedure Code Act, s. 210 (U.).

Editor's Summary

The appellant was alleged to have taken a pair of shoes from the carrier of a bicycle left outside a shop and after being pursued by the owner of the shoes and two local government police constables, to have dropped the shoes on the ground. The appellant was apprehended by one of the local government constables and was handed over to two central government police constables who arrived on the scene. He was later at Mbarara police station charged with the offence of theft from a bicycle. At his trial in the magistrate's court, the appellant elected to make an unsworn statement from the dock in which he said that the complainant arrested him while he was on his way to Mbarara

Hospital and had pointed him out as the man who stole his shoes. He denied running away. He was convicted and sentenced to twenty-four months' imprisonment. The appeal was against sentence and conviction but no argument was put forward by the appellant on sentence.

Held –

- (i) the trial magistrate was entitled to accept the evidence of the prosecution and reject that of the appellant;
- (ii) there was no record that the appellant's rights under s. 210 of the Criminal Procedure Code Act had been explained to him; there was a duty on a trial magistrate to record such an explanation;
- (iii) no miscarriage of justice had been occasioned by the failure to record and the appellant was rightly convicted;
- (iv) when alterations are made in a typed record of proceedings such alterations must be initialled by the person making them;
- (v) it is the duty of prosecutors to call as witnesses the police officers who investigated the case and charged the accused.

Appeal dismissed.

No cases referred to in judgment.

Judgment

Sir Udo Udoma CJ: The appellant, Twaha Bwaneka, was convicted of theft from a vehicle contrary to s. 252 and punishable under s. 256 (c) of the Penal Code. He was sentenced to twenty-four months' imprisonment. This appeal is against his conviction and sentence.

In his memorandum of appeal the appellant in substance has complained that he was wrongly convicted by the magistrate in that the evidence given against him by the witnesses for the prosecution was insufficient to warrant or support his conviction. The appellant has however not indicated in his memorandum of appeal the respect in which he considers the sentence passed upon him to be excessive.

The facts of the case were that on July 26, 1966. James Mukasa went from Masaka to Mbarara on his bicycle, on the carrier of which he had tied a pair of ladies shoes, Exhibit 2, together with a suitcase, the shoes being fastened with a rubber band on the top of the suitcase. On the road to Kakoba he left his bicycle unlocked but with the suitcase and the pair of shoes still thereon on the verandah of a shop. He entered the shop.

While in the shop, he heard a clicking sound indicating that the rubber band with which he had tied his baggage on the bicycle had got snapped. It was cut by someone. Immediately the Indian owner of the shop in which James Mukasa was, informed him that his goods on his bicycle, which he had parked on the verandah of the shop had been stolen by a thief.

As a result James Mukasa came out of the shop and immediately saw the appellant holding his pair of shoes in his hand. The appellant then began to run towards the direction of Kakoba, still carrying the pair of shoes in his hand.

James Mukasa raised the alarm. Many people were attracted to the scene, among whom were Charles Mwesige and Manasi Ngazaire – both of whom were local government police constables. On their way to the scene from a nearby shop both Charles Mwesige and Manasi Ngazaire met the appellant with a pair of shoes in his hand in a nearby lane.

The appellant was then pursued by a number of people and was himself still running. On seeing Charles Mwesige, the appellant dropped the shoes on

the ground. Charles Mwesige immediately arrested him. He held onto him until the arrival of James Mukasa and others who were pursuing the appellant. James Mukasa identified the shoes as his property, which he had bought from Messrs. Bata Shoes Co. shop.

At the request of Charles Mwesige, two central government police constables arrived at the scene. The appellant was handed over to them. He was taken to the Mbarara police station where he was charged with the offence of which he was convicted by the trial magistrate.

At the close of the prosecution's case the appellant elected to make an unsworn statement from the dock, which he did. He denied the charge and said that James Mukasa had arrested him on his way to Mbarara Hospital and had pointed at him as the man who had stolen his shoes. He also denied having run away at all.

After due consideration of the evidence including the unsworn statement of the appellant, the trial magistrate accepted the evidence of the witnesses for the prosecution, which he held to be the true version of what happened. He rejected the unsworn statement of the appellant, which he described as lies.

I am satisfied that in the circumstances of this case and the facts established by the evidence, the trial magistrate was entitled to accept the evidence of the prosecution in preference to the unsworn statement made by the appellant.

There is, however, an important point of law in regard to procedure, which calls for comment. In the record of the trial proceedings, the note made by the trial magistrate at the close of the case for the prosecution reads as follows:

“The accused opted to make an unsworn statement and states . . .”

On the face of the record it appears that the rights of the appellant enshrined in the provisions of s. 210 of the Criminal Procedure Code Act were not explained to the appellant. This is a serious omission which is capable of being regarded as fatal to the conviction of the appellant.

The only saving grace in the instant case is that the expression – “the accused opted to make an unsworn statement and states”, considered together with the comment made by the trial magistrate in his judgment, the terms of which were as follows:

“In his defence the accused opted to give unsworn evidence, thereby avoiding cross-examination”,

does carry the implication that the provisions of s. 210 of the Criminal Procedure Code Act must have been in fact explained to him and that he elected not to give evidence on oath.

While in the instant case the court is satisfied that the rights of the appellant contained in s. 210 of the Criminal Procedure Code Act had been explained to him, it cannot be over-emphasised that it is the duty of trial magistrates to record the fact of such explanation in the record of trial. It is not sufficient merely to state that an accused person had opted to make an unsworn statement and to leave it to the Court of Appeal to infer therefrom that the section had been duly complied with.

The provisions of the section are very clearly worded. It is provided that the court shall again explain the substance of the charge to the accused and shall inform him that he has the right to give evidence on oath from the witness box and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock. So that it is not even sufficient merely to state that the provisions of s. 210 of the Criminal Procedure Code Act have been duly complied with.

In the case under consideration, however, I am satisfied that no miscarriage of justice had been occasioned by the fact that the magistrate omitted to record in the record of proceedings that the rights of the appellant contained in the provisions of s. 210 of the Criminal Procedure Code Act had in fact been explained to the appellant. The evidence against the appellant was overwhelming. The appellant, in my view, was rightly convicted.

There is no substance in the appellant's complaint to the effect in substance that the decision of the trial magistrate was unreasonable, unwarranted and could not be supported on the evidence.

The appeal of the appellant both as to conviction and sentence is dismissed. The sentence of twenty-four months' imprisonment cannot be said to be unreasonable in view of the fact that the appellant had had two previous convictions – one in 1964 and the other in 1965 – both of them being concerned with dishonesty, namely, housebreaking and theft.

Before I am done with this appeal, there are two matters upon which I wish to make observations. The first, of course, is a simple one. After the preparation of the record many alterations regarding words, phrases and sentences were made. These alterations were made in ink. None of them was initialled so as to indicate by whom the alterations and additions were made.

It should be emphasised that it is irregular to make alterations in a compiled record of proceedings, which alterations might involve sometimes addition of a whole sentence or the substitution of a new word in the place of the word which had appeared on the record. It does not appear to be appreciated that records of proceedings forwarded to a Court of Appeal are important documents and should not be treated with indifference. When alterations are made in an already typed record such alterations must be initialled by the person by whom the same had been made.

Then there is the practice indulged in by the police or other prosecutors when prosecuting in magistrates courts of not calling police officers who had investigated the case and arrested and charged an accused person involved in such a case. It seems to me that the police do not attach importance to their duty of investigating cases reported to them, but are content to sit back and wait for a civilian to bring to them someone suspected of or arrested for an alleged commission of a crime.

The result of this practice is the tendency for the police to place much more reliance on complaints made to them without themselves enquiring into the matter. Even where the police consider it unnecessary to make further investigations into allegations made against a suspected person, one would normally have thought that ultimately, in any case, it must be the duty of the police to arrest and charge the suspected person with having committed the offence before bringing him before a magistrate for trial.

The prevailing practice of not calling police officers during trials in magistrates' courts to testify as to the part they played in deciding ultimately to arrest and charge an accused person is most unsatisfactory. It gives the impression that the police do not seem to realise that it is their duty to control and conduct all prosecutions in the magistrates' courts in criminal cases.

Generally speaking, criminal prosecutions are matters of great concern to the State; and such trials must be completely within the control of the police and the Director of Public Prosecutions. It is the duty of prosecutors to make certain that police officers, who had investigated and charged an accused person, do appear in court as witnesses to testify as to the part they played and the circumstances under which they had decided to arrest and charge an accused

person. Criminal prosecutions should not be treated as if they were contests between two private individuals.

In the instant case the evidence was that after the appellant had been arrested by local government police, he was taken and handed over to the central government police station at Mbarara. There was no evidence as to which police officer had taken charge of the case and what steps, if any, he had taken when he decided to arrest and charge the appellant. The absence of such evidence necessarily creates a lacuna in the case for the prosecution because it gives the erroneous impression that the central government police officers had nothing to do with the case and had taken no part whatsoever in investigating and deciding on the charge to be preferred against the appellant.

It is to be hoped that in future this practice would be discontinued, because without the evidence of an accused person having been arrested and charged by the police, the proceedings of the trial with respect to the prosecution case appear to be incomplete.

Appeal dismissed.

No appearance for the appellant.

For the respondent:

Attorney-General, Uganda

S. T. Manyindo (State Attorney, Uganda)

Re K A Thabiti
[1967] 1 EA 772 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	7 June 1967
Case Number:	5/1967 (166)
Before:	Saidi J
Sourced by:	LawAfrica

[1] *Elections – Ballot papers – Misprint – Voting symbols reversed on ballot papers.*

[2] *Elections – Illiterate electorate – Results of voting probably affected by misprinted symbols on ballot papers.*

Editor's Summary

The petitioner was the unsuccessful candidate in the elections held at Rufiji on December 4, 1966 for the seat in Ward 10 of Rufiji District Council. On successful nomination the petitioner was given the symbol of a House and the successful candidate was given the symbol of a Hoe. Both parties carried out their

election campaigns using the symbols as allocated, but on polling-day, two hours after polling was begun, it was discovered that the symbols had been reversed in printing the ballot papers. An attempt to stop polling was unsuccessful and the petitioner lost the seat by a vote of 31 for and 267 against. Seventy-five per cent. of the voters in the Rufiji District were illiterate.

Held – it was difficult to say that the results of the election would have been the same had the ballot forms been properly printed. Any voter who was illiterate and wanted to vote for the petitioner on the strength of the symbol House, would have cast that vote for the wrong candidate.

Election declared null and void.

No cases referred to in judgment.

Judgment

Saidi J: The petitioner, who was unsuccessful in the election to the seat in Ward 10 of the Rufiji District Council, prays that the election be declared void on the ground that it was not fairly conducted, as the election symbols given to him and his rival were reversed on the ballot papers.

The petitioner is Kimbanga Abdallah Thabiti; his rival was Mkamba Abdallah Mohamedi. Both were duly nominated by the District Executive Committee of Rufiji. Kimbanga was given the symbol House; Mkamba was given the symbol Hoe. This was notified by the Rufiji District Council to the public by its notice, reference No. L.5/5A/20 dated November 14, 1966, Ex. A in this court.

It is admitted that on the polling day, i.e. December 4, 1966, after the election had been going on for about two hours, it was found that the symbols allotted to Kimbanga and Mkamba had been reversed on the ballot papers to the effect that the Hoe was printed opposite Kimbanga's name and the House symbol was printed opposite the name of Mkamba. Kimbanga lodged a complaint immediately, but the election officers in charge informed him that they had no power to stop the election, and the polling continued. Kimbanga went to report to the Returning Officer, about thirty-two miles away from the polling station, reaching the latter's house at midnight. The Returning Officer contacted the Secretary of the Electoral Commission, Mr. Msekwa, in Dar-es-Salaam by telephone. He said he was told that the elections could not be cancelled, at that stage, and that he should advise the petitioner to file an election petition in court. In the election to this contested seat, Mkamba polled 267 votes, and Kimbanga polled 31 votes.

It was contended by counsel for the petitioner that had there been no misprint in the ballot papers, Kimbanga would have been the successful candidate. It was admitted by the Returning Officer that seventy-five per cent. of the voters in the Rufiji District are illiterate and that they are guided by the symbols rather than the names of the candidates when they cast their votes. When questioned by the court as to why he had allowed the election to continue when the symbols had been reversed, he admitted that the election officers representing him at this particular polling station did not carry out their duties properly. He, however, contended that although the ballot papers were received some days before the polling date, there was no opportunity of checking the symbols as they were in sealed covers and these covers could not be opened more than half an hour before the time the election had to start. According to him, the two candidates for the ward, the polling assistant, the presiding officer, the polling agent for each candidate, had to meet and check the papers to see if everything was in order before they allowed the polling to start. He was therefore of the opinion that these officers as well as the candidates did not examine the papers very carefully, because if they did, the voting in this ward would not have taken place at all.

On the facts as they are, it is difficult to say that the results of the elections would have been exactly what they are if the ballot papers had been properly printed and the symbols given to their respective candidates, according to the District Council Circular of November 14, 1966. The voters had been assured by the candidates in their election campaigns that they were respectively represented by the symbols announced by the District Council and by the candidates. It would appear that a voter who was illiterate and wanted to vote for the petitioner on the strength of the symbol House, would have cast his vote to the wrong candidate.

For the foregoing reasons this court will accordingly grant the petition and declare the election for the seat in Ward 10 of the Rufiji District Council null and void. It will not, in the circumstances, be safe to

reverse the results of the

election by declaring the petitioner elected as it was prayed by his counsel. I think the fairest solution would be to hold the election afresh.

On the question of costs, I feel that neither candidate is responsible for the misprint of the election symbols, this matter might be an accidental misprint by the government printer, for which he is also not to blame. I will, in the circumstances, order that each party bear his own costs.

Election declared null and void.

For the petitioner:

Kanabar and Co., Dar-es-Salaam

T. C. Kanabar

Respondent in person.

Karshe v Uganda Transport Co Ltd [1967] 1 EA 774 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	30 October 1967
Case Number:	553/1966 (174)
Before:	Sir Udo Udoma CJ
Sourced by:	LawAfrica

[1] *Estoppel – Estoppel by record – Judgment in running down action that both parties negligent – No counterclaim by defendant – Whether failure to counterclaim operates to estop defendant from bringing suit against plaintiff in first suit – Effect of previous judgment.*

[2] *Practice – Counterclaim – Effect of failure to file – Whether defendant then estopped from filing proceedings later – Civil Procedure Act, s. 7; Civil Procedure Rules, O. 8, r. 2 (U.).*

[3] *Res judicata – Same parties – Whether failure to counterclaim by defendant operates as res judicata to prevent him from bringing a suit against plaintiff – Civil Procedure Act, s. 7; Civil Procedure Rules, O. 8, r. 2 (U.).*

Editor's Summary

In a previous suit (No. 672 of 1964) the present plaintiff had been sued by the present defendant for damages for negligence arising out of a road accident which occurred on March 28, 1964. In that suit the present plaintiff filed no counterclaim. The judge in that suit found both parties fifty per cent. to blame, and gave the present defendant judgment for half its claim. After that judgment was delivered the present plaintiff filed this suit claiming fifty per cent. of the damages suffered by him as a result of the accident.

At the hearing the present defendant took the preliminary objection that the present plaintiff was estopped by the judgment in the previous suit from bringing this suit, having failed to file a counterclaim in the previous suit.

Held – The present plaintiff was not precluded from bringing this action by estoppel or by res judicata because the issue of the loss or damage suffered by the present plaintiff was never enquired into by the court in the previous suit.

Preliminary objection overruled.

Cases referred to in judgment:

- (1) *Low v. Bouverie*, [1891-94] All E.R. Rep. 349.
- (2) *Randolph v. Tuck*, [1961] 1 All E.R. 814.
- (3) *Marginson v. Blackburn Borough Council*, [1939] 1 All E.R. 273.
- (4) *Ord v. Ord*, [1923] All E.R. Rep. 206.
- (5) *Hills v. Co-operative Society Ltd.*, [1940] 3 All E.R. 233.

- (6) *Davis v. Hedges* (1871), 6 Q.B.D. 687.
- (7) *Re May* (1885), 28 Ch.D. 516.
- (8) *Wood v. Luscombe*, (*Wood, third party*), [1964] 3 All E.R. 972.
- (9) *Bell v. Holmes*, [1956] 3 All E.R. 449.
- (10) *Hindley v. Haslam* (1878), 3 Q.B.D. 481.
- (11) *Bake v. French*, [1907] 1 Ch.D. 428.
- (12) *Mondel v. Steel* (1841), 8 M. & W. 858; 151 E.R. 1288.
- (13) *Brunsdon v. Humphrey* (1884), 14 Q.B.D. 141.
- (14) *Rosenfeld v. Newman and Others*, [1953] 2 All E.R. 885; [1953] 1 W.L.R. 1135.
- (15) *Beharilal v. Ram Swarrup*, [1949] All. 144.
- (16) *Kailash Mondul v. Baroda Sundari Dasi* (1879), 24 Cal. 711.
- (17) *Fateh Singh v. Jagannath Baksh Singh* (1925), 52 I.A. 100; 47 All. 158; [1925] A.P.C. 55.

Judgment

Sir Udo Udoma CJ, delivered this ruling: The plaintiff, Ismail Karshe, was the defendant in a previous suit of this court, No. 672 of 1964 – *Uganda Transport Co. Ltd. v. Ismail Karshe* – in which the present defendant, the Uganda Transport Co. Ltd. was the plaintiff. In the previous suit the plaintiff therein had claimed damages suffered by it as a result of a collision on March 28, 1964 between the plaintiff's motor omnibus No. URH 937 and the then defendant's Mercedes Benz No. URT 68, due, it was alleged, to the negligence of the defendant's servant or agent, one Yosamu Subu.

From the pleadings in No. 672 of 1964 three questions arose for determination and decision by the court and on those questions issues were joined. Those questions were:

1. Between the plaintiff and the defendant, who was negligent?
2. If the defendant was negligent, did the plaintiff contribute towards such negligence, and, if so, to what extent: and
3. Did the plaintiff suffer the loss and damage claimed as a result of the collision, and if the plaintiff contributed to the negligence, what proportion of such loss and damage was the plaintiff entitled to?

Issues having thus been joined, the case was tried by Bennett, J., who came to the conclusion that both the plaintiff and the defendant were negligent. The learned judge concluded his judgment as follows:

"I have come to the conclusion that the driver of the bus and the defendant's servant are equally to blame for the collision. The plaintiff is therefore entitled to half the amount claimed, and there will be judgment for the plaintiff for Shs. 3625/-, interest and costs."

That judgment was delivered on July 30, 1965.

On August 13, 1966 the defendant, Ismail Karshe, instituted this action against the defendant company, that is, the Uganda Transport Co. Ltd., claiming half of the loss and damage alleged to have been suffered by him in consequence of the collision between the present plaintiff's Mercedes Benz No.

URT 68 and the defendant's motor omnibus No. URH 937, which collision was the subject-matter of the previous suit No. 672 of 1964.

On October 2, 1967, when the case came up for hearing counsel for the defendant company claimed the right of the defendant company to begin and thereupon, after the pleadings and judgments in Suit No. 672 of 1964 had been tendered and admitted in evidence without any objection by counsel for the plaintiff, submitted that the plaintiff in the instant suit was estopped by reason

of the judgment in the previous suit No. 672 of 1964 from relitigating the matter again. He submitted that the issues pleaded in the present suit were *res judicata* and could not be enquired into again by this court.

Counsel then referred the court to the plea by the plaintiff in the previous suit No. 672 of 1964 and the statement of defence which was filed by the then defendant in answer thereto. He contended that all the defendant in that suit did was only to deny negligence as well as plead contributory negligence in the alternative. He did not, contended counsel, counterclaim for any loss or damage suffered by him even though he had full opportunity of doing so. Had he then counterclaimed for his loss or damage, if he had suffered any, then the court would have disposed of the case once and for all. The present plaintiff, having omitted to have counterclaimed then, was precluded from reopening the issue afresh.

It was further submitted by counsel that because the trial judge in the previous suit had in his judgment decided that both the plaintiff and the defendant were equally to blame for the accident, the present plaintiff was seeking to rely on that decision as the foundation for his claim for loss and damage; and that it was not competent for him to do so.

In support of these submissions counsel cited and relied on the principles established in *Low v. Bouverie* (1), *Randolph v. Tuck* (2), *Marginson v. Blackburn Borough Council* (3), *Ord v. Ord* (4) and *Hills v. Co-operative Society Ltd.* (5).

In answer to these submissions, counsel for the plaintiff submitted that the objection raised being grounded on the plea of *res judicata* was ill-founded, and that all the English authorities cited and relied upon are based on English law and the rules and practice applicable to English courts. To that extent counsel contended they were irrelevant as the plea of *res judicata* is provided for in s. 7 of the Civil Procedure Act applicable to this court.

It was also submitted by counsel that the plea of *res judicata* would not apply to the facts and circumstances of the instant case, because in the previous suit between the parties enquiries by the court were restricted to the issues of negligence and the loss and damages suffered by the then plaintiff and those were the only issues decided by the court. The question of the loss and damage suffered by the present plaintiff were not before the court and were not therefore enquired into by the court. Hence this action.

Counsel then referred the court to O. 8, r. 2 of the Rules of this court and submitted that, according to that rule, it was optional for a defendant in a suit to set off or set up by way of counterclaim against a claim by a plaintiff. A defendant was not bound to counterclaim. It was open to him either to do so in that action or to bring a separate and fresh action for his claim as in any case a counterclaim is a cross-action. Therefore there was nothing to preclude the defendant in the previous action from bringing his claim against such a plaintiff after disposal of the plaintiff's action.

It was further submitted by counsel that this court was bound to give effect to s. 7 of the Civil Procedure Act, the provisions of which were based on the Indian Civil Procedure Code, s. 11. Counsel then referred the court to Mulla's Code of Civil Procedure 1965 (13th Edn.), Vol. 1, at pp. 48 to 62, and contended that s. 7 of the Civil Procedure Act of this court and the explanatory provisions thereof were taken verbatim from s. 11 of the Indian Code of Civil Procedure, and therefore s. 7 of the Civil Procedure Act must be interpreted by the court in the light of Indian decisions in giving effect to the provisions of s. 11 of the Indian Code of Civil Procedure; and that before the plea of *res judicata* could be raised and sustained the judgment relied on must have extinguished the right of the plaintiff in the action; and that could only occur where a relief was claimed and

rejected by the court. The court was also referred to Everest and Strode's Law of Estoppel 1923 (3rd Edn.) and Sarkar's Commentary on Evidence (11th Edn.), at pp. 1023, 1026. The case of *Davis v. Hedges* (6) was also cited and relied upon.

I now proceed to examine these submissions and the authorities to which the court has been referred by both counsel. While it is of course correct that this court must give effect to the provisions of its law and rules of practice, I propose first to examine the English authorities before dealing with the provisions to be found in our own local law and rules. In adopting this course, this court bears constantly in mind that all things being equal preference must of necessity be given to our local law and rules, as decisions of what might be termed foreign courts have only persuasive effect and ought to be respected where the principle therein enunciated is sound, reasonable and equitable.

This court is not oblivious of the cardinal principle that the doctrine of res judicata is not a technical doctrine applicable only to records. It is a fundamental doctrine of all courts that there must be an end to litigation as a matter of public policy. This doctrine has found expression in the Latin maxim, interest reipublicae ut sit finis litium. (See 15 Halsbury's Laws (3rd Edn.), p. 185, per Brett, M.R. in *Re May* (7), 28 Ch.D. at p. 518.)

[His Lordship then set out at length the facts and decisions in *Randolph v. Tuck* (2); *Marginson v. Blackburn Borough Council* (3); *Ord v. Ord* (4); *Hills v. Co-operative Society* (5) and *Wood v. Luscombe*, (*Wood third party*) (8) and continued:] It seems to me that none of the decisions set out above had dealt directly with the issue raised in the present case. The issue of res judicata in the present case, as I understand it, is as to whether the defendant can bring a fresh action for damages suffered by him as a result of an accident where in a previous action instituted against him by the same plaintiff for damages he had failed to counterclaim for the injuries or loss sustained by him in the accident.

In general terms, the impression I form from these cases seems to me to be this: that once a decision has been given by a court of competent jurisdiction between two persons over the same subject-matter, neither of the parties would be allowed to relitigate the issue again or to deny that that decision had in fact been given, subject to certain conditions. This point was more clearly brought out in *Bell v. Holmes* (9). There on March 26, 1955, a collision occurred between two motor vehicles driven by Bell and Holmes respectively, and on August 18, 1955, Bell commenced an action in the High Court, in which he claimed damages against Holmes for personal injuries suffered as a result of the collision. Holmes counterclaimed for his own injuries. On October 7, 1955, the passenger in Holmes' vehicle at the time of the collision instituted proceedings against Bell and Holmes in the county court in respect of injuries received by her during the collision. The action was heard and determined in February, 1956, when the passenger was awarded damages against both Bell and Holmes. No formal notice claiming contribution was served by either of the defendants in that action on the other, but the county court judge was requested to deal with the matter of apportionment between Bell and Holmes. The judge adjudged that Bell should contribute five-sixths of the damages and Holmes one-sixth only. Both Bell and Holmes paid the damages awarded against them.

In the action in the High Court, the allegations of negligence between Bell and Holmes were substantially the same as in the the county court action and Holmes, the defendant, claimed that, by reason of the judgment in the county court proceedings by Bell, the plaintiff ought not to be admitted to say that he was other than five-sixths to blame for the collision.

It was held that, despite the absence of a notice claiming contribution in the county court proceedings,

the county court judge had jurisdiction to have

apportioned the damages; and even if a contribution notice were necessary in the first place, the fact that Bell had raised no objection to the county court judge dealing with the matter of contribution amounted to a waiver of the necessity for notice; and that estoppel by *res judicata* would arise, although the judgment in the county court was not pronounced until after the commencement of the action in the High Court.

I think the fact that, despite the decision of the county court judge, the action in the High Court was allowed to proceed to judgment would lend colour to the submission that a party could still sue, even after judgment had been pronounced in a previous action, for the purpose of asserting his right and recovering damages, provided in doing so he is not seeking to reopen the whole case as to liability.

As a result of research undertaken by me, I have come across a passage in Everest and Strode's *Law of Evidence* (3rd Edn.), p. 37. There the learned authors, in the course of their discussion of the principle and doctrine of *res judicata* by record said:

"The mere omission by a defendant to plead matters by way of set-off or counterclaim does not, it seems, estop him from bringing a subsequent action against plaintiff in respect of such matters."

The authority for this view appears to be *Davis v. Hedges* (6) to which the court was referred by counsel for plaintiff; *Hindley v. Haslam and Others* (10) and *Bake v. French* (11), also support this point of view. I propose to consider these authorities.

Davis v. Hedges was an action for damages for the non-performance and improper performance of certain work which the plaintiff had employed the defendant to do. The defence set up by the defendant was that the defendant had sued the plaintiff for the price of the work alleged to have been improperly done; that the plaintiff had settled by paying the whole amount then sued for; and that as the plaintiff might have given non-performance and the defective performance complained of in evidence in reduction of damage, the plaintiff was precluded from bringing a cross-action for them.

It was held that, although the plaintiff might have used the causes of action for which he sued in reduction of the claim in the previous action, yet he was not bound to do so, but was entitled to maintain a separate action for them.

This was a case stated on appeal from the county court of Oxfordshire, holden at Oxford. The action was brought to recover the sum of £42 19s. 6d., being damages sustained by the plaintiff for improper performance of certain work agreed to be done by the defendant for the plaintiff at his house, Burford, Oxon. under a building contract and for not performing the work according to certain specifications and also for removing certain partitions and appropriating certain materials. After opening the case for the plaintiff, it was stated to the judge that the defendant had brought an action in the Court of Common Pleas against the plaintiff for the recovery of the price of the work under the contract and had recovered the whole amount. It was, however, contended on behalf of the plaintiff that he was not in any way prejudiced in the present action, which was for damages for the nonfulfilment of a contract, by the fact that the defendant had brought a previous action against him in a superior court to recover the price of the work done, the proper performance of which was the subject-matter of the present case. In other words, that the plaintiff either could not, or in the alternative was not bound to, set-off the subject-matter of the present action in and to the previous action of the defendant but could bring his cross-action. The judge decided the contrary and non-suited the plaintiff.

It was held on appeal, that the decision of the judge was erroneous and a new trial was ordered.

In his judgment Hanen, J., after having discussed the decision of Parke, B., in *Mondel v. Steel* (12) said:

“It appears, from the passages above cited from the judgment in *Mondel v. Steel*, that the present practice of allowing the defence of the inferiority of the thing done to that contracted for to be applied in reduction of damages was introduced (on the same principle as the Statutes of Set-off were passed) for the benefit of defendants. It would accordingly diminish the benefit, and in some cases altogether neutralise it, if the defendant was not allowed an option in the matter.”

In *Bake v. French* (11) the defendant charged her property with the repayment of £100 and interest to the plaintiff and subsequently gave him four supplementary charges to secure further advances. She then gave him another supplementary charge to secure a further advance and his professional costs. The plaintiff brought an action on the first five charges, omitting the sixth which was mislaid. He obtained an order for foreclosure nisi for the five. He afterwards found the sixth charge and applied for an order extending the relief to that charge. The application was, however, dismissed with costs. He then brought a fresh action for the foreclosure on all the six charges. The defendant took out a summons asking that the proceedings might be stayed on the ground that the plaintiff was estopped by the foreclosure order.

It was held by Warrington, J., that the subject-matter of the fresh action was not the same as that in the first action, and that in the circumstances, the plaintiff was not estopped from setting up his present case, and that the defendant's application must be dismissed. It was accordingly dismissed with costs.

In *Brunsdon v. Humphrey* (13) the plaintiff brought an action in the county court for damage to his cab caused by the negligence of the defendant's servant, and having recovered the amount claimed afterwards brought an action in the High Court of Justice against the defendant claiming damages for personal injuries sustained by the plaintiff through the same negligence. It was held on appeal in the second action by Brett, M.R. and Bowen, L.J., Lord Coleridge dissenting, that the action in the High Court was maintainable and was not barred by the previous proceedings in the county court; for damage to goods and injury to the person, although they had been occasioned by one and the same wrongful act, were infringements of different rights, and gave rise to distinct causes of action; and therefore the recovery in an action of compensation for the damage to the goods was no bar to an action subsequently commenced for the injury to the person.

In the course of his judgment Brett, M.R., said:

“The plaintiff was a cabman driving in his vehicle, when he was run into by the defendant's vehicle. The collision was caused by the negligence of the defendant's servant. In the case in which the present appeal is brought, the plaintiff has sued the defendant for injury done to his person. The jury have found a verdict for £350, showing clearly that the personal injuries were serious. Before this the plaintiff had brought an action in the county court for damages to his cab, by which he recovered a certain amount. In this second action it was urged that the plaintiff could not succeed, because no person can sue twice for one and the same cause of action. On the other side it was contended that there were two distinct causes of action, and there was no law to prevent two actions; that it might be sometimes oppressive to bring two actions, but that in that event the

court might summarily stay one of them, and that in the present case the two actions were not oppressive. The question is whether there are two causes of action or whether there is only one; and if there is but one cause of action, the present suit is not maintainable. For the defendant, reliance has in effect been placed upon the maxim 'interest reipublicae ut sit finis litium', and it has been contended that it enunciates the admirable rule of law. When that rule is applied to damages which are patent it is a good rule; but where damages are afterwards developed, it is not a rule to be commended. It is a rule which sometimes produces a harsh result, and if it were now for the first time put forward, I could not assent to its being pushed to the length to which it has sometimes been carried; in fact it is never wanted except when injury, undeveloped at the time of action brought, is afterwards developed. However, the maxim exists, and it must receive a proper application."

Then there was the case of *Rosenfeld v. Newman and Others* (14), which was an action in a county court for possession. The plaintiff elected not to proceed with a claim in trespass but with an alternative claim not inconsistent therewith, it was held that it was not a final abandonment of the claim in trespass so as to estop him from bringing it in a subsequent action in the High Court.

There the plaintiff was the owner of a dwellinghouse occupied by the defendants. He brought proceedings for possession in the county court on the ground of trespass, and, by amendment to the particulars of the claim, on the alternative ground that if, contrary to his contention, the defendants were protected by the Rent Acts, the house had been sublet or assigned to them by the original tenant without his consent. The annual value of the house exceeded £100, and the defendants objected that the county court judge had no jurisdiction so far as the claim of trespass was concerned.

The plaintiff thereupon elected to proceed on the alternative ground, and the county court judge said:

"Owing to lack of jurisdiction, I am compelled to hold that the plaintiff's claim fails as there is no evidence that the defendants are contractual or statutory tenants."

In proceedings for possession on the ground of trespass brought by the plaintiff in the High Court, in which each party contended that the county court proceedings and findings raised an estoppel against the order, Parker, J., held that the plaintiff having elected to proceed in the county court on his alternative claim that the defendants were tenants, it was not open to him in the High Court to prove that they were trespassers, and the plaintiff was estopped from asserting his claim. Parker, J., found as a fact that the defendants had never been tenants. On appeal it was held that, on the true construction of the plaintiff's amended particulars of claim and having regard to the course of the proceedings and to the decision of the county court judge, the plaintiff had not in fact abandoned his claim in trespass nor had he finally elected to treat the defendants as tenants. Accordingly he was not estopped from proceeding in the High Court for possession, and he was entitled to an order for possession.

This then brings me to a consideration of the law and the rules of this court to which I was referred by counsel for the plaintiff. It was submitted by counsel for the plaintiff that under O. 8, r. 2 of the Civil Procedure Rules, a defendant is given an option of either setting off or of setting up by way of counterclaim in an action any right or claim against the claim of the plaintiff, but that he is not bound to bring a counterclaim in the same action in his defence to the plaintiff's claim.

The provisions of O. 8, r. 2, are in these words:

- “2. A defendant in an action may set-off, or set up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and such set-off or counterclaim shall have the same effect as a cross-action, so as to enable the court to pronounce a final judgment in the same action, both on the original and on the cross-action. But the court may on the application of the plaintiff before trial, if in the opinion of the court such set-off or counterclaim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to defendant to avail himself thereof.”

There are also the provisions of s. 7 of the Civil Procedure Act which deal with the defence of res judicata. They are in the following terms:

- “7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

Thereafter there follow six explanations of which only the fourth explanation is relevant to the point under consideration. In the fourth explanation it is provided:

- “4. Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.”

The provisions of O. 8, r. 2 of the Rules of this court and of s. 7 of the Civil Procedure Act do not appear to have been raised and considered before in this court. At least there appears to be no reported decision on the point in the Eastern Africa Law Reports. For that reason it is an entirely new point of law. It is by no means easy and requires careful consideration.

I agree with counsel for the plaintiff in the present suit that s. 7 of the Uganda Civil Procedure Act and explanation 4 thereof, which forms part of the Statute, are in identical terms with s. 11 of the Indian Code of Civil Procedure and explanation 4 thereof. I have had therefore to have recourse to Mulla's Code of Civil Procedure for assistance.

Having regard to the contention of counsel for the defendant that since the present plaintiff, when defendant in Suit No. 672 of 1964, had failed to counterclaim in his defence therefore he was precluded on the grounds of res judicata from bringing the present action as he was bound to have counterclaimed in the previous suit, the most important and relevant portion of the provisions of s. 7 of the Uganda Civil Procedure Act for consideration and determination as to its effect is explanation 4 already set out above.

In Mulla, explanation 4 of s. 11 of the Indian Civil Code is considered under title B – “Matters which might and ought to have been made ground of attack and defence”, and under the sub-head – “Matter constructively in issue”: explanation 4 at p. 62. Mulla explains that a matter which might and ought to have been made a ground of attack or defence is a matter which is substantively in issue. The learned author then proceeded to draw a distinction between the word “attack” and the word “defence” as used in the section. He points

out that in the intendment of the passage “attack” is referable only to a plaintiff whereas “defence” naturally is referable only to a defendant.

In his own words he says:

“It often happens, however, that a matter which might and ought to have been made a ground of attack by the plaintiff to substantiate the relief claimed by him in the suit is not alleged by him as a ground of attack; and also that a matter which ought to have been made a ground of defence by the defendant is not set up as a ground of defence.

A matter, which might and ought to have been made a ground of attack or defence in the former suit, but which has not been alleged as a ground of attack or defence, will be deemed to have been a matter directly and substantially in issue in such a suit, that is to say, though it has not been actually in issue directly and substantially, it will be regarded as having been constructively in issue directly and substantially.

If the parties had an opportunity of controverting it, that is the same thing as if the matter had been actually controverted and decided (see *Beharilal v. Ram Swarrup* (15)). The plea of res judicata applies, except in special cases, not only to points on which the court was actually required by the parties to form an opinion and to pronounce judgment, but to every point which properly belonged to the subject of the litigation and which the parties exercising reasonable diligence might have brought forward at the time.”

Mulla, having given a number of illustrations from decided and reported Indian cases, some of which reports regretfully are not available in the library of this court, he formulated four rules derived from explanation 4 and for the proper construction of the section and the explanation. For the purpose of this judgment only r. 2 need be considered, and it is as follows:

“Rule 2 – If a matter which forms a ground of attack in the subsequent suit could have been alleged as a ground of defence in the former suit, but was omitted to be so alleged in that suit, it will be deemed to have been directly and substantially in issue in the suit within the meaning of explanation 4.”

In his explanation of this particular rule Mulla maintains that it contemplates cases in which the plaintiff in the subsequent suit was the defendant in the former suit. Therefore a claim which might have been pleaded by way of set-off or counterclaim to a previous suit would not be barred on the ground of res judicata. I think this construction of the provisions in question is most persuasive and appears both equitable and reasonable and although this court is not bound by it I readily adopt it as it applies to the issue under examination in this case and seems to be consistent with the spirit and the intention of the legislature as may be gathered from the provisions of O. 8, r. 2, which give to a defendant a right of option either to set-off or counterclaim or not to do so in his defence to a claim by a plaintiff. In adopting this course I am not unaware of the observation of Bannerjee, J., in *Kailash Mondel v. Baroda Sunderi Dasi* (16), that although a matter which might and ought to have been a ground of attack or defence should be deemed as provided by explanation 4 to have been directly or substantially in issue, yet it could not be deemed to have been “heard and finally decided” as there was nothing in explanation 4 to suggest that such matter should also be deemed to have been heard and finally decided. This view has since been discredited, and was the subject of criticism by the Privy Council in *Fateh Singh v. Jagannath Baksh Singh* (17).

Having given very careful consideration to and having exhaustively, I think, examined the submissions of counsel, I have reached the conclusion that the objection raised and urged upon the court that the claim of the plaintiff in the present suit is res judicata is not well founded. As already stated in the early part of this judgment I am satisfied and hold that the only issues which were before the court and upon which the court had pronounced its decision in the previous suit between the parties were limited to the following questions, namely:

1. Between the plaintiff and the defendant in that suit who was negligent?
2. If the defendant was negligent, did the plaintiff contribute towards such negligence, and if so, to what extent? and
3. Did the plaintiff suffer the loss and damage claimed as a result of the collision, and if it contributed to the negligence, what proportion of such loss and damage was the plaintiff entitled to?

The issues set out above and which had been decided by the court in the previous suit are of course res judicata and cannot be enquired into again by any court. The result of this is that the defendant in the present suit is estopped from denying that it was fifty per cent. responsible for the accident occasioned by it. Similarly the present plaintiff is estopped from denying that he was fifty per cent. responsible for the accident.

The issue of loss or damage suffered by the present plaintiff was never enquired into by the court in the previous suit and therefore is not caught by the plea of res judicata.

In view of the principles established by the various authorities cited above in so far as those authorities support the conclusion now reached by this court, and in virtue of O. 8, r. 2, of the Rules of this court, I hold that the present plaintiff was not bound to have counterclaimed in his defence to the claim of the plaintiff in the previous suit No. 672 of 1964 between himself and the defendant in the present suit for whatever loss or damage had been sustained by him by reason of the accident. He was entitled to the option of either counter-claiming in the previous suit or of bringing a fresh action for the recovery of his loss and damage, if any. Accordingly the objection raised by the defendant is over-ruled as ill-founded. The plaintiff is entitled to the costs of this ruling and I accordingly award him such costs.

Order accordingly.

For the plaintiff:

J. S. Shah, Kampala

For the defendant:

Hunter & Grieg, Kampala

O. J. Keeble

De Souza v Uganda
[1967] 1 EA 784 (HCU)

Division: High Court of Uganda at Kampala

Date of judgment: 30 October 1967

Case Number: 505/1967 (175)
Before: Sir Udo Udoma CJ
Sourced by: LawAfrica

[1] *Criminal Law – Trial – Visit by magistrate to locus in quo after trial concluded – Whether proper.*

[2] *Criminal Law – Minor offence – Whether conviction of assault can be made on charge of robbery – Penal Code, s. 180 (U.).*

[3] *Criminal Law – Evidence – Court’s power to summon witness – Whether should be exercised after trial concluded – Criminal Procedure Code, s. 148 (U.).*

Editor’s Summary

After he had concluded the appellant’s trial on a charge of robbery and had reserved his judgment the trial magistrate visited the locus in quo and thereafter himself called a witness. The magistrate then convicted the appellant of common assault, instead of robbery, relying on s. 180 of the Penal Code. (The case is reported only for the Chief Justice’s observations on these two points.)

Held – It was irregular for the magistrate, after having concluded a trial and reserved judgment to a stated date, to visit the locus in quo and thereafter to call a witness.

Appeal allowed (on this and other grounds).

Cases referred to in judgment:

- (1) *William Mukasa v. Uganda*, [1964] E.A. 698.
- (2) *Tameshwar v. R.* (1957), 41 Cr. App. Rep. 156.
- (3) *Karamat v. R.* (1955), 40 Cr. App. Rep. 13.
- (4) *R. v. Sullivan*, [1923] 1 K.B. 47.
- (5) *R. v. Chapman* (1838), 8 C. & P. 558; 173 E.R. 617.
- (6) *R. v. Holden* (1838), 8 C. & P. 606; 173 E.R. 638.
- (7) *R. v. Harris*, [1927] 2 K.B. 587.

Judgment

Sir Udo Udoma CJ: In this appeal the appellant was tried by the magistrate grade I in the magistrate’s court, Jinja, on two counts of robbery contrary to ss. 272 and 273 (1) of the Penal Code, and of assaulting a police officer in the due execution of his duty contrary to s. 230 (b) of the Penal Code. After due trial the magistrate found the appellant not guilty of robbery charged on the first count. He, however, convicted him of common assault described by the magistrate as “a minor offence, in accordance with the provisions of s. 180 of the Criminal Procedure Code Act”. The appellant was also convicted of assaulting a police officer in the execution of his duty as charged on the second count. The appellant was sentenced

to six months' imprisonment on the first count and on the second count to one year's imprisonment. Both sentences were to run consecutively.

This appeal is against conviction and sentence on the first count only. At the hearing of the appeal, the appellant was absent as he is serving his sentence in prison. The State was represented by Mr. Masika, Deputy Director of Public Prosecutions. [His Lordship then dealt with the facts and continued:]

At the close of the defence the trial magistrate reserved his judgment to March 17, 1967. On March 17, 1967 when the magistrate was expected to deliver his judgment, on the record of proceedings are to be found the notes hereunder set forth:

“Court: Having read through the whole of the evidence of both the prosecution witnesses and defence I felt there was a gap to be filled in so that I may be able to make a fair judgment. I shall therefore visit the scene of the incident the house of James a brother of Teopisita Nnazziwa and the house of the accused. The object of this visit is to ascertain if Teopisita Nnazziwa and the accused were friendly or not. This visit must be made in the presence of Teopisita Nnazziwa and the accused.”

Thereafter there are to be found the following notes:

“1.10 p.m. Court:

I visited the scene of the incident this afternoon. I also visited the home of James and the house of the accused person. I observed that the complainant and the accused live in the same enclosure behind shops in the municipality of Jinja. The incident is alleged to have occurred at a small entrance to the enclosure. I found James at home who told me that Teopisita Nnazziwa and the accused knew each other before the occurrence of this incident. However as he was not on oath I decided to take his evidence on oath in court.”

Thereupon the court, at its instance, called James Aremi, Samia by tribe, and of the age of forty-five years, as an independent witness.

[His Lordship dealt with the evidence of this witness and other matters, and continued:]

When the attention of the Deputy Director of Public Prosecutions was drawn to the additional evidence called by the magistrate at the close of the case for the defence, and also to the visit of the learned trial magistrate to the locus in quo after the conclusion of the trial and judgment had been reserved, counsel submitted that it was competent for the learned magistrate to have visited the locus in quo and also to have called additional evidence having regard to the provisions of s. 148 of the Criminal Procedure Code Act.

I do not subscribe to this submission. The provisions of the section referred to by the Deputy Director of Public Prosecutions are permissive, and therefore discretionary, and such discretion must be exercised judicially. While it is correct that, under s. 148 of the Criminal Procedure Code it is competent for a court to exercise the power therein provided, in my view, it was never intended that the said power should be exercised in the manner in which it had been done by the learned trial magistrate in this case and at the stage at which the trial had reached. To allow the power to be so exercised would, in my view, be to overstretch the provisions of the section beyond the intention of Parliament.

The provisions of s. 148 of the Criminal Procedure Code Act are as follows:

“148. Any court may, at any stage of an enquiry, trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine any person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to be essential to the just decision of the case:

Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such

person, and the court shall adjourn the case for such time, if any, as it thinks necessary to enable such cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of any such person as a witness.”

In the present case, the hearing had been concluded and judgment reserved to be delivered on a date certain. The learned trial magistrate, after having perused the proceedings, came to the conclusion, according to him, that there were gaps to be filled in so that he might be able to render a fair judgment. He indicated in his notes in the proceedings that the object of his visit was to ascertain if the first prosecution witness and the accused were friendly or not. It is not clear how a visit to a locus in quo would yield any information in regard to the question of relationship between two persons, i.e. whether such persons were friendly. In any case the question as to whether the witness and the accused were friendly or not, could not be regarded as gaps to be filled. It seems to me clear that the gaps spoken of by the learned trial magistrate involved more than the ascertainment of the relationship between the witness and the accused. Furthermore, apart from the question of friendship between the witness and the accused, the magistrate did not indicate the respect in which there were gaps in the evidence, whether it was in relation to the case of the prosecution and were sufficient to raise a reasonable doubt in the mind of the magistrate, the duty of a reasonable court would have been to give the benefit of that doubt to the accused person.

In my opinion, it was irregular in law for the magistrate to have decided after having concluded a trial and reserved judgment to a stated date, to have visited the locus in quo and thereafter to have called an independent witness, so-called, for the purpose of filling in the gaps in the evidence before him, and without indicating for the benefit of whom and for what purpose the additional evidence was being called.

As was stated by me in *William Mukasa v. Uganda* (1) ([1964] E.A. at p. 700) a magistrate is perfectly entitled to a view of a locus in quo so long as the view takes place in the presence of an accused person who is being tried and his advocate, if he has one, and of the prosecution and witnesses, if necessary, and proper notes are taken of observations and demonstrations by witnesses on the spot, and so long as it is appreciated that in law a view of a locus in quo, coupled with ocular demonstrations by witnesses, forms part of the evidence in the case as well as of the trial. (See *Tameshwar v. R.* (2)).

In that case I had quoted the observations of Lord Goddard, C.J. in *Karamat v. R.* (3) (40 Cr. App. Rep. at p. 18), which observations were as follows:

“That a view is part of the evidence is, in their Lordships’ opinion, clear. It is in substitution for or supplemental to plans, photographs, and the like. In such a view as took place and for the purpose for which it was held, there can, in their Lordships’ opinion, be no objection to the judge asking a witness to place himself at a particular spot which he has mentioned in his evidence or to show to the jury [in the present case – magistrate as a judge of fact] the place where someone else stood or the direction from which someone came.”

Another point which ought to be noted is the meaning of the phrase “at any stage” contained in the provisions of s. 148. Would such a stage include a stage at which a judgment had been reserved and fixed for delivery on a particular date, and in the course of writing a judgment or perusing the evidence, the court discovers that there are certain gaps to be filled in without which he could not write a fair judgment? I think not. I am of the view that a line must be drawn

somewhere. I do not think that the wording of the provisions is wide enough to permit a court to visit a locus in quo and then to call further evidence to cover up gaps in the evidence in the proceedings. The usual purpose of visiting a locus in quo is to check on the evidence given by witnesses and not to fill gaps. For then the trial magistrate may run the risk of making himself a witness in the case. Such a situation must be avoided.

In the present case it would have been perfectly in order for the learned trial magistrate at the close of the case for the defence and before reserving his judgment to have decided to view the locus in quo and to check on the evidence already given by witnesses and thereat to make note of what witnesses who had already given evidence might point out to him, in which case he would of course remind them of their oath. Thereafter he would also have been perfectly entitled to invite the independent witness whom he had called to come to court and testify on oath as to what he knew about the case. It would then have been proper thereafter for him to reserve his judgment.

It may not be irrelevant at this juncture to refer to English practice on the point. It should however be observed that in England the practice of recalling witnesses who had already given evidence must be done prior to the conclusion of the summing up of the evidence to the jury. In *R. v. Sullivan* (4), it was held that a judge has, in a criminal trial, a discretionary power, with which a Court of Appeal cannot interfere unless it appears that any injustice has thereby resulted, of recalling witnesses at any stage of the trial and of putting such questions to them as the exigencies of justice require.

That was a murder trial. In the trial of the murder of a woman, evidence was given on behalf of the prosecution that the prisoner had been seen near the scene of the murder shortly before it was committed and on several of the preceding days; that certain articles which had been left by the murderer in the cottage where the murder was committed had previously been seen in the possession of the prisoner, and that the prisoner had sold a suit of clothes stolen from the cottage to a woman. The prisoner gave evidence on his own behalf, in which he set up an alibi and denied that he was in the neighbourhood of the scene of the murder when it was committed; or that the articles found in the cottage belonged to him; or that he had sold the suit to the woman. By the direction of the judge certain witnesses for the prosecution were recalled to rebut the evidence given by the prisoner. Counsel for the prisoner subsequently in his speech to the jury after the speech for the prosecution suggested that the husband of the murdered woman might have committed the murder, and also commented upon the fact that certain of the articles found in the cottage were not found till two days after the murder. The judge directed that the two police constables who searched the cottage should be recalled to say when and where the articles were found, the evidence which they gave being mainly a repetition of what they had previously said. The husband of the murdered woman was also recalled to deny the suggestion made against him.

It was held that the witnesses had been recalled not for the purpose of repeating their evidence but for the purpose of rebutting the case set up by the prisoner in his evidence and of meeting the suggestion made by counsel for the prisoner in his speech to the jury, namely, that the murder had been committed by the husband of the murdered woman and that therefore the witnesses were properly recalled even after counsel for the prisoner had made his speech to the jury.

As already stated, the power given to a court under s. 148 of the Criminal Procedure Code Act is much wider than that which obtains under English practice. It is also true to say that under English practice a trial judge has a right to call a witness not called either by the prosecution or the defence and

without the consent of either, if in his opinion, that course is necessary in the interests of justice: see *R. v. Chapman* (5), and *R. v. Holden* (6). But this power is very much restricted and the calling of such a witness after the close of the case for the defence is usually limited to cases where something has arisen on the part of the prisoner ex improviso, which no human ingenuity could foresee: see *R. v. Harris* (7).

In the case under consideration, on the evidence there was nothing which had arisen ex improviso. It is however not being suggested that in terms of the provisions of s. 148 of the Criminal Procedure Code Act, the power of a court to call a witness of its own volition is restricted to matters which may arise ex improviso.

I now turn to consider the most important error in law which has been committed by the learned trial magistrate in this case. It is this: after the learned trial magistrate had acquitted the appellant of the offence of robbery with which he was charged, he turned round and convicted him of common assault – an offence with which he was never charged. In doing so, the learned trial magistrate purported to rely on s. 180 of the Criminal Procedure Code Act, the provisions of which are in the following terms:

“180. When a person is charged with an offence and facts are proved which reduce it to a minor cognate offence, he may be convicted of the minor offence although he was not charged with it.”

The offence of common assault created in s. 227 of the Penal Code cannot properly be regarded as a minor cognate offence to the offence of robbery. The Deputy Director of Public Prosecutions was right in not seeking to support the conviction of the appellant on this count. The learned trial magistrate was wrong in law to have convicted the appellant of common assault.

The appeal is therefore allowed. The conviction of and the sentence of six months’ imposed on the appellant are quashed. The appellant is acquitted and discharged on the first count of the charge only.

As the appellant did not appeal against his conviction and sentence on the second count of the charge, namely, assaulting a police officer in the due execution of his duty contrary to s. 230 (b) of the Penal Code, the conviction and sentence on that count are confirmed; and the appellant shall now only serve his sentence of one year imposed upon him on that count. In any case the evidence against the appellant in respect of that count was overwhelming.

Order accordingly.

The appellant did not appear and was not represented.

For the respondent:

Attorney-General, Uganda

G. J. Masika (Deputy Director of Public Prosecutions, Uganda)

Turon v Republic
[1967] 1 EA 789 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	11 May 1967
Case Number:	69/1967 (152) (153)

Before: Sir Charles Newbold P, Duffus and Law JJA
Sourced by: LawAfrica
Appeal from: The High Court of Kenya at Nairobi – Trevelyan, J.

[1] Criminal Law – Firearms – Unlawful possession – Section 3, North-Eastern Province and Contiguous Regulations, 1966.

[2] Criminal Law – Firearms – Theft by a person in the public service – Penal Code, s. 280 (K.).

[3] Criminal Law – Sentence – Death sentence not to be passed on person under the age of eighteen years – Penal Code, s. 25 (K.).

[4] Criminal Law – Sentence – Several counts – Whether sentence should be passed on all four counts – Accused not to be punished twice for the same offence.

[5] Firearms – Theft of by person in public service – Unlawful possession of.

Editor's Summary

The appellant was a policeman stationed in Wajir in the North-Eastern Province and was charged with (1) being in unlawful possession of a firearm in contravention of reg. 3 of the North-Eastern Province and Contiguous Regulations; (2) being in unlawful possession of 40 rounds of 303 ammunition contra the same regulation; (3) under s. 280 of the Penal Code, being a person in the public service, stealing the rifle and (4) under the same section, stealing the ammunition. The charges were tried together. The appellant left his post at Wajir without leave or licence between January 1 and 2, 1967 in possession of the rifle and ammunition, and his evidence that he was induced to leave his post by his father's younger brother was rejected by the trial judge who found that the accused deserted his post and duty at Wajir and intended going to Somalia. The learned judge further found that the appellant knew that he had no right to take the rifle and ammunition away and that as he intended to make away with them his prima facie lawful possession of the rifle and ammunition had been turned into an unlawful possession. The appellant was convicted in the court below on all four counts and sentenced to death on counts (1) and (2). On counts (3) and (4) the learned judge considered whether to sentence the accused to seven years' imprisonment on each of counts (3) and (4) but decided that as both counts could have been charged together, the sentences should run concurrently. The appellant appealed against both conviction and sentence.

Held –

- (i) counts (3) and (4) were not in the nature of alternative counts to counts (1) and (2) and therefore the judge was right in convicting on all four counts;
- (ii) the judge was correct in passing sentence on all four counts;
- (iii) under s. 25 of the Penal Code, sentence of death shall not be pronounced on a person under the age of eighteen years and the appellant was under eighteen years of age when he committed the offence.

Sentence of death set aside and the appellant ordered to be detained during the President's pleasure.

Cases referred to in judgment:

- (1) *Kagai s/o Kagerera and Another v. R.* (1955), 22 E.A.C.A. 416.
- (2) *Chege s/o Kamau v. R.* (1954), 21 E.A.C.A. 363.
- (3) *Gatheru s/o Njagwara v. R.* (1954), 21 E.A.C.A. 384.
- (4) *Santokh Singh Kehar v. R.* (1955), 22 E.A.C.A. 430.
- (5) *Myano s/o Ileme v. R.* (1951), 18 E.A.C.A. 317.
- (6) *R. v. Dobbs* (1951), 18 E.A.C.A. 319.
- (7) *Cosma s/o Nyadago v. R.* (1955), 22 E.A.C.A. 450.
- (8) *Munyao s/o Mwei v. R.* (1954), 21 E.A.C.A. 206.
- (9) *Njeroge Nganga and Another v. R.* (unreported) (Court of Appeal Nos. 115 and 116 of 1954).
- (10) *Kimari s/o Mihindi and Others v. R.* (1955), 22 E.A.C.A. 472.
- (11) *Josephine Arissol v. R.*, [1957] E.A. 447.

[**Editorial note:** The facts are set out in the judgment of the lower court which is reported in full, followed by the judgment of the Court of Appeal.]

Judgment

Trevelyan J: The accused, Abdullahi Adan Turon, is charged on four counts, the first, contra reg. 3 of the North-Eastern Province and Contiguous Regulations 1966, that he was in unlawful possession of a rifle, number PF.322230, in a prescribed district, the second, contra the same regulation that he was, similarly, in unlawful possession of forty rounds of 303 ammunition, the third, laid under s. 280 of the Penal Code, that as a person in the public service he stole the rifle and the fourth, laid under the same section, that he stole the ammunition. The offences are said to have been committed on or about January 7 last, the first two at Sekela (the pronunciation and spelling of which have varied throughout the trial) and the other two at Wajir. The charges, this being a special assize court (which I directed by my order of April 14 last to take place in Nairobi) were properly charged and tried together: *Kagai s/o Kagerera and Another v. R.* (1). The assessors were of the opinion that the guilt of the accused had been established on each count.

Much of the prosecution evidence was not challenged or seriously challenged and it is not, I trust, unfair or wrong to say that the accused's defence rests upon one simple proposition, that is, that the presumption that he was in lawful possession of the articles concerned has not been displaced. But this is a criminal trial and it is for the prosecution to prove all the ingredients of the offences charged if convictions are to be secured; it is not for the accused to admit anything or prove his innocence.

At all material times the accused was an administration policeman employed in the public service and was stationed in Wajir in the North-Eastern Province, a prescribed district as defined. He left his post without leave or licence between January 1 and 2 last. He was seen on duty on the 1st; he was absent from morning parade on the 2nd. When he left, he took with him, inter alia, exhibits 1 and 2 which, upon the evidence, I am satisfied are respectively a firearm and ammunition as defined. The definitions to be

consulted are those contained in s. 2 of the Firearms Act (Cap. 114). Exhibit 1 is a lethal barrelled weapon from which a bullet can be discharged which can cause death and the articles said to be forty 303 bullets comprising part of Exhibit 2 are such bullets and ammunition for a rifle such as Exhibit 1 and capable of being used therewith. It would have been better if one of the bullets had been fired through the barrel of the rifle but there is an abundance of evidence that at all material times Exhibit 1 was a firearm and Exhibit 2 ammunition for the purpose of the Regulations with which we are concerned in this case. We have the evidence

of Mr. Belwood whom I believe to be an expert on firearms and that of Mr. Haig whom I believe to be an expert not only on firearms but also on ammunition; which evidence I accept. According to Ali Adan Ali the rifle was used en route against wild animals, and, for what, if anything, it is worth, the accused speaks of his “rifle and ammunition”. There was a mix-up as to the reason for the rifle reaching Mr. Belwood but it does not matter. Then, and at all material times it was serviceable and within the definition aforesaid.

The rifle and ammunition (with ten further rounds) had been issued to the accused as such administration policeman as I have referred to. He therefore had both lawful authority and lawful excuse to have them. The issue in relation to the first and second counts is whether he dissipated such lawful authority and lawful excuse by his conduct. This involves a consideration as to whether he stole them, which must be done, in any event in regard to the third and fourth counts. In other words we must ascertain whether the presumption of his *prima facie* lawful possession has been rebutted by the prosecution: *Chege s/o Kamau v. R.* (2).

Having left his post at Wajir the accused was not again seen by anyone in this case (except Ali Adan Ali) until he was arrested by civilians (including his uncle Abdi Rahman Turon) on January 7. We must discover by findings upon the evidence whether he left to pay a visit to a relative, because he was deserting, or for some other reason.

Abdi Rahman Turon was a truthful witness and I accept what he told me as an accurate account of what occurred. He had no reason to wish to get his nephew into trouble for nothing. In any event, I believe that the circumstances show that he spoke the substantial truth. But Ali Adan Ali is not a witness whose evidence I am prepared to accept without corroboration. He is not for discarding, but were he discarded it would make no difference to the result of this case. His demeanour was poor – he contemplated the floor throughout his evidence – and, having tested that demeanour he, at least, must be treated or considered as an accomplice. Even were the rifle, as he claims, ever pointed at him, which I do not believe, he could have reported at Sekela; and did not. He could have explained his position to someone before the police came on the scene; and did not. And he could have explained the apparently uninvestigated discrepancy of the several days; and would not. But his evidence is corroborated in essential particulars by at least Abdi Rahman Turon (and I believe by the circumstances). But Ali played his part in the adventure down, relying on his youthful looks.

Ali’s evidence is that, needing a job, he was pleased enough to accept the position of the accused’s cook when it was offered to him. He says that this was in January or February 1966 but he may have meant 1967. I do not think the offer was made. But if it were, when was it? Ali says that he was told that the destination was to be Gurar. There was a time when the accused was in line for transfer there but that was at least three weeks before the two men left Wajir. If, as Ali says, they left the day after the offer was made and accepted, it was January 2 or 3 that they left and Gurar was mentioned only the day before. If it was mentioned as Ali says, it was to put him on to the wrong trail for it is near Ethiopia and not Somalia. But I do not believe the men discussed Gurar in that context. At some point of time they went south to Sekela, and, says Ali, somewhere en route the accused told him that they were bound for Somalia. I believe both of them had decided to go there. I do not see how Ali could have been brought into the adventure against his will. How could the accused have expected to succeed in taking him to Somalia? Why? Of course, from the defence point of view the suggestion is that Somalia was not the

avowed destination – indeed that if it were, it could have been reached before January 7 – but Somalia was the stated destination. And Ali never suggested to anyone before he spoke to the police that he was an unwilling traveller at all. But he stood firm on his evidence that the accused said “We are going to Somalia” and denied that “next morning or during the night he wanted to go to Sekela manyatta to see his uncle”. At some point of time – I think it to have been before Wajir was left (and re-iterated thereafter) “We are going to Somalia” was said by the accused. Ali, I think, thought up the story of compulsion for his self-preservation. (I hope I do him no injustice.) But there seems to be no reason why he should have said that no mention was made of going to Sekela if it was spoken about. But then it is fair to say that Sekela was reached and there was no need for the men to have gone there simply to get to Somalia.

Abdi Rahman, a retired veterinary scout, told us that he was in his boma, where he had returned some five days earlier, when he saw the accused and Ali outside it, this being the first time he had seen him since he (Abdi Rahman) left his work which was a month or two back. I wondered whether there was a discrepancy here. But I do not think so. He had been away somewhere and had been home five days. But even if it can be said to leave open that he met his nephew the accused, or may have met him, about five days before, it makes no difference on my reading of the case. It is a pity that we were not told where Abdi Rahman worked as a scout. It may well have been in Wajir for he says that he used to see the accused there. But they had not met for some time in Sekela – there is other evidence about it. Be that as it may, as I said, Abdi Rahman saw the two men outside his boma – the evidence leads one to believe that the accused did not enter, except that in one place Abdi Rahman says that he did. (But I think he may have been confused at that point.) He says, and there is quite a body of evidence to support him, that the accused was in possession of the rifle and ammunition. He says that he asked the accused where he was going and the accused said, to Somalia. I cannot see any reason for Abdi Rahman making that up. However, the reply may, indeed did, cause him embarrassment or concern, or both for he said “You are a tribal police and you have a rifle. If you want to go to Somalia give me the rifle so that I may take it back to Government”. Which the accused would not do. Let us suppose for the moment, though it is not so, that Abdi Rahman induced the accused to leave Wajir, this would be for consideration as to Abdi Rahman’s credibility and as to his complicity, but such complicity could not possibly, in the circumstances, have embraced the taking of the rifle and ammunition for it is an undoubted and unchallenged fact that Abdi Rahman dispossessed the accused of them and gave them to the police. Nor, as I read the statement, Exhibit 9, does the accused suggest that Abdi Rahman induced him to take his rifle and ammunition away.

The accused says that when he left Wajir he did so unwillingly and under inducement of his father’s younger brother, i.e., Abdi Rahman. But why should Abdi Rahman, for no suggested reason, induce his nephew the accused to desert or even just leave his post, and then arrest him? If it were to induce the accused merely to visit him that would hardly have caused the accused to say “my father’s younger brother induced me to go” rather would the accused have said “My father’s younger brother wanted me to visit him so I went without first getting leave to do so”. If it were to induce the accused to work for him at Sekela instead of working for Government at Wajir why take him back to Wajir? And if it were to induce him to “join the other side” why take his rifle and ammunition away from him? Abdi Rahman did not induce the accused at all.

The accused's statement is against a mere visit as I said. "I did not like going away" and "induced me to go" do not fit in with it. But suppose the statement can and does refer to such a visit. It would mean that the accused would be going back to Wajir with his rifle and ammunition. Whence, therefore, stemmed Abdi Rahman's concern? The accused never, upon the evidence, told anyone "Why are you arresting me? I only came to visit my uncle by arrangement". And it is more than coincidence that both Ali and Abdi Rahman say that the accused said he was going to Somalia. As to defence counsel's point that the word "go" in the statement might refer to going anywhere, I believe it refers, and must refer to "going away". It refers to desertion. The words "When I saw him about twenty miles from Wajir I told him that he had brought me here and I told him that I was going to leave him" are quite untrue. The accused was arrested in Sekela, not Wajir, and there was nothing beyond punishment after disciplinary proceedings to be expected upon a return to Wajir, and a meeting twenty miles in the bush is hardly a social visit to a relative. Such a visit would be to a home, a boma, or manyatta. Indeed the words "brought me here" are, perhaps, against a mere social call of any kind. And if a social visit had been contemplated why was not leave of absence sought? There is no evidence or suggestion that it was. Moreover if there was to be just the visit to a relative why did a journey which could be done (as it was in the reverse direction) in fifteen or sixteen hours take the accused several days? That "I agree that I went away with the rifle and ammunition" needs no more comment than that it is so.

To my mind there are certainly three separate ways of arriving at the accused's guilt herein. The evidence of Ali corroborated in the required particulars; the evidence of Abdi Rahman read above or considered in relation to the circumstances, and the statement itself, at least read with those circumstances for it clearly shows that the accused deserted with his rifle and ammunition and in those circumstances it is idle to suggest that he ever intended that Government should get them back.

A word about witnesses. I have, as I said, accepted Mr. Belwood and Mr. Haig as experts in their spheres. Mr. Abwodha, the District Officer, Sgt. Emoi and Sgt. Major Omar Dore spoke the truth, though Mr. Abwodha was wrong when he said that the accused's posting to Gurar was never on the cards. Ali Adan Ali have I dealt with. So too have I dealt with the evidence of Abdi Rahman whose evidence alone would I act on (together with the technical evidence). (I am bound to say that it is inexplicable why he, and others, patently loyal and law-abiding citizens, were arrested and kept in custody for thirty-four days. It is not the way to get the public's support. They had marched through the night with a prisoner, a rifle and ammunition which they gave to the police. How could it, in all conscience, have taken thirty-four days for the authorities to become satisfied as to their bona fides and innocence?) I believe and need not comment upon the evidence of Mohamed Bulle, Akibar Akale, Adan Hassan, Mr. Parry, Sub-Inspector Festus, Cpl. Kombo, Sub-Inspector Njeru, Constable Munoke, Mr. Jethwa, Mr. Joshi, Mr. Abdi, Chief Inspector Kent, Mr. Robertson, Mr. Gitau and Cpl. Silas. Constable Adan was confused and relied on by neither side and Mrs. Haira was called but not used. Discrepancies were too small to merit publication in writing.

I believe that the accused deserted his post and his duty at Wajir. It was his intention to go to Somalia. I have not forgotten that his father lives there but if it were his father whom he had in mind why did he take his rifle and ammunition with him? He was not thinking of his father at all. Nor did he ever intend to return to duty. There is no doubt that he deserted in any event. He knew that he had no right to take his rifle and ammunition away. He did not "just take them". He intended to make away with them. As the Kenya

Government was never intended to see and possess them again the accused's prima facie lawful possession has been proved to have been turned into an unlawful possession. And so to the points for determination.

Counts 1 and 2

On or about January 7 last at Sekela a place about twenty-eight miles due South of Wajir and which is in the North-Eastern Province (a prescribed area under Legal Notice 264 of 1966) the accused had in his possession a mark IV .303 rifle, PF.322230 and ammunition for which by his avowed intention and conduct he lacked lawful authority and lawful excuse. That rifle (Exhibit 1) is a firearm as defined in the Firearms Act and the forty rounds of .303 bullets (Exhibit 2) are ammunition as defined in the said Act. It follows, then, that he is guilty of the two offences charged against him and laid under reg. 3 of the North-Eastern Province and Contiguous Districts Regulations, 1966.

Counts 2 and 3

These offences should not have been charged as having taken place at Wajir on January 7. If it was felt that the date should be the 7th the place should have been Sekela. If, as was I think the case, the theft took place before the 7th it should have been charged as the 2nd at Wajir, or between January 2 and 7 at a place in the North-Eastern Province (though it could be urged that this should be a time more specific). But it does not matter. The accused was not deceived, misled nor prejudiced: s. 235 Criminal Procedure Code. Never was the defence in doubt as to the case it was meeting. The accused at all material times was a person employed in the public service. The rifle and ammunition (which have a value) belong to the Republic and came into the accused's possession by virtue of his employment. When he decided, as he did, to leave Wajir with the articles (as he did) with a view to going to Somalia, or, if you wish, to desert, he converted the articles to his own use. He did so fraudulently intending permanently to deprive Government, then owner of them. It follows, then, that he is guilty of the two charges laid against him under s. 280 of the Penal Code.

I convict him on all four counts as charged.

[After an address by counsel the learned judge continued:] I confess that I cannot see why we have both counts 1 and 2 for the rifle and ammunition could have been made the subject matter of one charge. But there were two such counts in *Gatheru s/o Njagwara v. R.* (3) and the accused was sentenced to death on each of them without comment by the Court of Appeal. In the present trial I direct that the accused shall suffer death in manner provided by law on each of the first and second counts charged against him.

It may now be no more than of academic value to consider whether sentences should or should not be passed on the other two counts. But I do not think the matter to be free from doubt, and, as far as I am aware, the Court of Appeal has not decided the point though it has got very near to having done so. Almost all of the cases known to me emanate from Kenya or from Tanganyika (as it then was). Both countries had – I have not looked to see if Tanzania still has – a section numbered 21 in their Penal Codes to the effect that no-one shall twice be punished for the same act; see *Santokh Singh Kehar v. R.* (4). The section is no more in Kenya. But the maxims “Nemo debet bis vexari pro una et eadem causa” and “Nemo debet bis puniri pro uno delicto” are well enough known and of long enough standing. However, in *Myano s/o Ileme v. R.* (5) it was laid down that if the facts of a case disclosed two offences involving two acts, the accused might be charged with and punished for both of them but that if all the facts amounted to one act he could not be punished twice for that act. In *R. v. Dobbs* (6) the accused, a

district officer, was convicted of stealing

(by conversion) some game trophies. He was also convicted of being in unlawful possession of them. He was sentenced on each count. The Court of Appeal thought that he had twice been punished for the same act because the charge for unlawful possession would have failed had the prosecution not been able to prove the conversion so that the two offences flowed from the same act. *Cosma s/o Nyadago v. R.* (7) may, perhaps, have overruled *Myano s/o Ileme* (supra). I am not sure but I think it was not referred to at the hearing or in the judgment. *Munyao s/o Mwei v. R.* (8) was decided in January, 1954. There were two charges, one for an Emergency offence carrying the death penalty and the other for a Penal Code Crime which did not. The learned trial judge convicted on both counts but awarded no sentence on the second of them. The Court of Appeal made no comment about it. The unreported appeal of *Njeroge Nganga and Another v. R.* (9) was decided about two months later. There was a conviction and sentence of death on one count but no sentence, just a conviction, on the non-capital charge. The appeal being, as I said, unreported, I will quote therefrom, though, as will be seen, the comments are obiter dicta:

“As matters stand, it appears probable that the omission to sentence the appellants on the second count was an illegality. . . . In this case no sentences at all were passed on the non-capital charge. In other cases the judge has postponed sentence sine die There is a practical objection to this course Other judges again pass sentence on the non-capital offence in the normal way. The Crown’s submission was that this is the correct course. . . . We think there is much force in these arguments . . .”

But no decision was given for the question was not really before the court.

If one should not, unless there be statutory authority to the contrary, punish a man twice for the same act, then perhaps the case of *Dobbs* (6) (supra) is the nearest we have to the present trial. I trust that I may say that with all respect it occurs to me that merely to convict might in relation to the topic now being canvassed be considered a punishment. All in all, though I have reservations about it, I will award sentences on counts 3 and 4. They will, of course, run concurrently. At least for the reason that I think that one and not two charges of theft would have been enough.

The facts are serious. A member of this country’s security forces, in an area of armed conflict, stole a rifle and ammunition. I am entitled to take notice of notorious facts: *Kimari s/o Mihindi and Others v. R.* (10) and it is a notorious and regrettable reality of the situation that there are bands of shifta operating in the area with which we are, in this case, concerned and that they derive help from over the border. Does one need to point to the fact that the rifle and ammunition might, had not the accused been arrested, have been used against people in this country? It is not usual to impose a maximum sentence upon a first offender: *Josephine Arissol v. R.* (11) but I venture to say that in a proper case such an award may be made. Indeed the case of *Marriott* which I discovered in the 1963 volume of the Criminal Law Review at p. 447 says that there is nothing wrong in principle in the award of such a sentence. It would be wrong, I think, for me to award less than the maximum punishment permitted by law. On counts 3 and 4, therefore, I sentence the accused to seven years’ imprisonment; concurrent as I said.

Sir Charles Newbold P, read the following judgment of the Court of Appeal: We are satisfied that counts 3 and 4 were not alternative to counts 1 and 2, nor were they in the nature of alternative counts. We consider that the judge was right in convicting on all four counts. The appeal against conviction is accordingly dismissed. Subject to the question of the sentence of death we also consider that the judge was correct in passing

sentence on each of the counts on which he convicted and that the sentence on counts 3 and 4 was proper in the circumstances of this case. Accordingly we dismiss the appeal against sentence on counts 3 and 4.

As regards the sentence of death on counts 1 and 2, under s. 25 of the Penal Code sentence of death shall not be pronounced against a person under the age of eighteen. From the medical evidence given before us we are satisfied that the appellant at the time he committed the offence was under eighteen. Accordingly we set aside the sentence of death on each of these counts and substitute therefore on each count an order that the appellant be detained during the President's pleasure.

Appeal against conviction dismissed and sentence altered.

For the appellant:

S. K. Kapila, Nairobi

For the respondent:

Attorney-General, Kenya

S. Sangale

Haslett v Republic
[1967] 1 EA 796 (CAD)

Division:	Court of Appeal at Dar-es-Salaam
Date of judgment:	5 August 1967
Case Number:	54/1967 (163)
Before:	Sir Clement de Lestang VP, Duffus and Law JJA
Sourced by:	LawAfrica
Appeal from:	The High Court of Tanzania – Mustafa, J.

[1] *Criminal Law – Theft – Claim of right by the appellant – No evidence of benefit to the appellant – No intention proved to deprive true owner of the property – Penal Code, s. 258 (2) (T.).*

[2] *Criminal Law – Theft by a public servant – Penal Code, ss. 265 and 271 (T.).*

[3] *Criminal Law – Sentence – Minimum sentence – Necessity of proving value of article stolen – Whether court has discretion where value not proved – Minimum Sentences Act, ss. 4, 5 and Sched. I (T.).*

Editor's Summary

The appellant was a mechanical inspector employed by the Ministry of Communications and Works at Mwanza. When he took up his duties on October 1, 1965 there was a store within his division which

contained a large quantity of used and unused spare parts of which there were no official records. The appellant was advised to apply for a board of survey to recommend as to the disposal of the spare parts and although he was given power to arrange such a board, he was unsuccessful in doing so because of the difficulty of convening a meeting of all the members. On March 30, 1965, S., the owner of an engineering workshop, came on business to the appellant's division and the appellant asked him to transport a heap of the spares lying in the yard of the division, to the premises of the Fisheries Department. S. contended that when he reached the Fisheries Department the gate was locked and he therefore deposited the spares in the open on his own adjacent premises and sent his lorry back to the appellant's division for another load. The police stopped the vehicle as it was leaving the division with the second load, and later charged the appellant and S. with theft and S. with the alternative of receiving. The appellant was convicted by the magistrate but S. was acquitted. The appellant appealed to the High Court which dismissed his appeal.

Held –

- (i) the acquittal of the co-accused on the magistrate's finding that the appellant had ostensibly sent the spares to the Fisheries Department was not

necessarily incompatible with holding the appellant guilty, provided the appellant were given the benefit of that finding;

- (ii) the appellant was in breach of duty in taking steps to dispose of the spares without holding a board of survey but neither that factor nor the fact that he had told a lie about having the authority of a board of survey to dispose of the spare parts led necessarily or irresistibly to an inference of fraud;
- (iii) there was nothing to show that the appellant stood to benefit from his action as there was no evidence that the spares were of any value and although the appellant knew that he was disobeying instructions, he was not intending to cause loss to the Republic as he believed the spares to be unserviceable and valueless.

Conviction quashed and sentence set aside.

Obiter: The Court deliberated the last ground of appeal which was against sentence under s. 4 of the Minimum Sentences Act 1963 and in view of the fact that the value of the spare parts had not been proved, considered that the magistrate would have had a discretion under s. 5 of the Act to impose a lesser sentence because the value of the goods was less than Shs. 100/-, and that the appellant would have been entitled to the benefit of s. 5.

Cases referred to in judgment:

- (1) *R. v. George Smith* (1967), 51 Cr. App. Rep. 22.
- (2) *Sinnasamy Selvanayagam v. R.*, [1951] A.C. 83.

Judgment

Sir Clement De Lestang VP, delivered the following judgment of the Court: In this case the appellant appeals against his conviction for theft by a person employed in the public service, contrary to ss. 265 and 271 of the Penal Code, and the minimum sentence of two years imposed on him under s. 4 of the Minimum Sentences Act 1963. This is a second appeal and lies only on a question of law. The facts are relatively simple and may be set out as follows:

The appellant was employed on contract by the United Republic of Tanzania as a mechanical inspector and placed in charge of the Electrical and Mechanical Division of the Ministry of Communications and Works at Mwanza. When he took up his duties on October 1, 1965, there was in the store of the division a large quantity of used and unused spare parts which the division had taken over from another Government department and of which there were no records. The spare parts were not easily identifiable and had no labels. One Richard Makinga was in charge of them. On February 18, 1966, following an audit query the appellant was asked for certain information regarding the spare parts which he gave in writing on February 24, pointing out at the same time that he had discussed the matter with Mr. Nichols, the mechanical engineer, during his inspection in January, and that Mr. Nichols had advised him to apply for a board of survey. On March 12, 1966, again following the suggestion of the auditor, the appellant was instructed to arrange for a board of survey consisting of himself, and Messrs. Swatman and Vials. It would appear that no board of survey could be held as both Swatman and Vials were very busy and most of the time out on other work. Nevertheless the appellant prepared a form entitled "Schedule of Unserviceable Stores" (Exhibit B.1) addressed to the Regional Engineer, Mwanza,

and dated March 25, 1966. This form is used when a board of survey recommends the disposal of unserviceable stores. The form in question purports to recommend the dumping of "used motor vehicle spares" in the lake as they had no commercial value as scrap and should be destroyed. The names

of the appellant, Swatman and Vials were written in the places allotted for their signatures. The form was put in a file but not sent out and a glance at it shows that it was only a very rough draft. On March 29 or 30, the appellant approached Mr. Mwanika the Regional Engineer, Mwanza, about the spare parts and Mr. Mwanika advised him to make a list of the obsolete ones and to bring the list to him. Meanwhile the appellant had put Richard Makinga to sort out the spares, retain the identifiable ones in the store and put the rest outside the yard in a heap. On the morning of March 30, one Mr. Savy, the owner of an engineering workshop who used to do repair work for the division, came to return a pump which had been given to him for repairs but which he had not succeeded in repairing and the appellant requested him to transport the heap of spares in the yard to the Fisheries Department premises which were adjacent to his own premises. Mr. Savy took a load away and dropped them in the open on his own premises because, according to him, the Fisheries gate was locked. He then sent his vehicle back to the division for the remainder. On leaving the division with another load the vehicle was stopped by the police and taken to the police station where it was unloaded and later the parts which Mr. Savy had taken to his premises were collected as well.

When asked by the police for an explanation shortly afterwards the appellant made a statement in which he said, *inter alia*, that there had been a board of survey which had recommended the disposal of the unserviceable parts by destruction. This he later admitted was untrue.

The appellant was jointly charged with Mr. Savy with the theft of the spare parts and Mr. Savy was also charged in the alternative with receiving them.

The appellant's defence was that although no survey had, in fact, been carried out he honestly believed that it was in order for him in all the circumstances to get rid of the parts by dumping them in the lake as he considered them to be unserviceable and useless and that as he had no transport available he asked Mr. Savy to carry them for him to the premises of the Fisheries Department to that end. He had been advised by the chief accountant that dumping into the lake would be proper. He had not made any previous arrangement with the Fisheries Department but this was not essential. Mr. Savy's defence was that he had been so requested and took them to his own premises because, as we have pointed out already, the gate of the Fisheries Department was locked.

The learned magistrate, in a long and involved judgment, which the learned judge on appeal rightly criticised in several respects, acquitted Mr. Savy but convicted the appellant. He acquitted Mr. Savy because he accepted both the appellant's explanation that the spares were to be delivered to the Fisheries Department and Mr. Savy's for not doing so. It would appear that he convicted the appellant because he was satisfied that the appellant had not acted in good faith and had feloniously caused the removal of the spare parts with the intention of depriving the Republic of its property. How he arrived at his conclusion is by no means clear. He was, to some extent at least, influenced in his decision by the conviction that the appellant had no intention of dumping the parts in the lake but instead of disposing of them to an unknown third party. There was not a scrap of evidence to support the learned magistrate's conviction; it was contrary to the prosecution case which was squarely that Mr. Savy was in league with the appellant and the receiver of the parts; it was, as the learned judge rightly commented, pure speculation on his part and founded on at least two serious misdirections, namely that the appellant knew that it would be practically impossible to convey the parts into the lake for dumping, and that useless Government stores had not been so dumped in the preceding two years at least. The learned magistrate also rejected the prosecution evidence as to the value of the parts alleged to be worth some Shs. 20,000/- and yet found

that an electric fifty amp mains switch, which was among the spare parts, “could be worth Shs. 250/-” as shown on a price list.

To complete the picture we might add that the Republic appealed by way of case stated against the dismissal of the charges against Mr. Savy and we are informed that this appeal was unsuccessful. The appellant appealed to the High Court which dismissed his appeal.

The learned judge expressed some doubt on the finding of the learned magistrate that the appellant had ostensibly sent the spares to the Fisheries Department but attached no importance to it or to the acquittal of Mr. Savy upon which it is based entirely. He found that the appellant could not have genuinely believed that he was entitled to dump the spares in the lake without the approval of a board of survey and concluded:

“In my view appellant deliberately tried to dispose of these spare parts for reasons which must be fraudulent in the face of the express instructions given to him up to the last moment.”

He also found that it was for that reason that he had lied to the police about the board of survey.

As regards the value of the parts, he disagreed with the value placed on the switch by the learned magistrate, and concluded:

“As I have said I am satisfied that the parts have economic value and despite the lack of proper evidence of value I am satisfied that they are worth more than Shs. 100/-. There is evidence that some of the spare parts were wrapped in paper and would be brand new.”

We pause here to point out that the finding of the learned magistrate that the appellant instructed Mr. Savy to take the spares to the Fisheries yard from which the intention to dump them into the lake should clearly be inferred was most relevant and ought not to have been disregarded by the learned appellate judge both in holding that in spite of the misdirections in his judgment the learned magistrate must, in any event, have convicted the appellant and also in arriving at his own conclusion that the appellant must have been fraudulent.

It was strongly urged upon us that despite the doubt expressed by the learned appellate judge the finding of the learned magistrate which still stands should not be disturbed. As this finding was made in a joint trial, was highly relevant to the defence of both defendants and was acted upon to acquit one of them, we agree that it would be unjust to deprive the appellant of the benefit of it and that in the circumstances it must be accepted as a fact. Relying on this finding it was contended for the appellant that there was no “taking” on his part. We are unable to agree. It is quite true that the spares were under the control of the appellant in the division’s store but nevertheless they were in the possession of the Republic to whom they belonged. The appellant was not at liberty to interfere with them except in the due performance of his duties. It is quite clear, on his own evidence, that he caused Mr. Savy to take them away and that he was not justified in doing so without a board of survey.

Relying on the same finding it was contended that as this was a joint trial the acquittal of Mr. Savy in the circumstances was fatal to the conviction of the appellant. Counsel for the appellant relied on the case of *George Smith* (1). That case is clearly distinguishable from the present one in many respects. Three men were jointly charged of theft, the prosecution case being that they had plotted the theft together and depending largely on incriminating statements made by two of the accused which implicated the third. These two accused were acquitted and the third convicted. The Court of Appeal found that the jury could not have acquitted the two unless they disbelieved their statements and that the rest of the evidence was insufficient to support the conviction of the third.

This is not the position here and we can see no incompatibility between the innocence of Mr. Savy and the guilt of the appellant, provided he is given the benefit of the learned magistrate's finding which we have decided he should have.

Relying again on the same finding it was contended that the appellant acted under a bona fide claim of right because, it is submitted, he must have honestly believed that the spares were really useless scrap which is normally disposed of by destruction such as dumping in the lake, otherwise he would not have sent them openly to the Fisheries Department for that purpose and that he was merely taking a short cut in anticipation of the board of survey which he believed would condemn the spares. There are concurrent findings of both courts below that he knew he could not dispose of the spares without the board of survey which we think are amply supported by the evidence. When the question of the disposal of the spares arose the appellant was instructed to have a board of survey as we have already indicated. It may well be that it was difficult to convene such a board owing to pressure of other work on the two other members. However, on March 25, the appellant prepared a schedule of unserviceable stores to which we have referred. Again it may well be that he did so in anticipation of the board meeting. Nevertheless on March 29 or 30, he saw the Regional Engineer, Mr. Mwanika, about the spares and was told to prepare and submit a list of them. He ignored all this and sent the spares away without satisfying himself that they were valueless, relying apparently on Mr. Makinga. When he was asked by the police for an explanation on the same day he told a lie about the board of survey. Again a lie in itself does not conclusively negative a bona fide claim of right especially as it was post factum and may have been told for the purpose of avoiding disciplinary action only. But taken in conjunction with the other matters to which we have referred it provides abundant evidence to support the concurrent findings of the courts below. At the very least these matters show that the appellant knew he was acting irregularly and this could be sufficient to negative a bona fide claim of right.

Relying again on the same finding it was contended that the courts below erred in holding that the appellant was fraudulent. The courts below inferred fraud on the part of the appellant from the absence of a claim of right together with (1) the fact that he did not carry out the survey or prepare a list of the unserviceable stores as he was required to do; (2) the preparation in advance of the schedule of unserviceable stores; and (3) the lie he told to the police about the board of survey. In our view these matters, taken either singly or cumulatively without more do not necessarily or irresistibly lead to an inference of fraud. All of them are capable of explanation other than fraud such as that the appellant disobeyed instructions, was in breach of duty in taking the steps he did to dispose of the spares, and realising that he was not entitled to do what he had done, when asked to explain, told a lie hoping that he would thus avoid the consequences of his misconduct. There is nothing to show that he stood personally to benefit from his action.

Had the spares been proved to be of great value, which they were not, that factor, added to the others, might perhaps have justified the inference of fraud. It was not even proved though that the appellant knew that the few parts alleged to have some value were in the scrap heap. The man who had done the sorting was not called to give evidence and the appellant himself said from the very beginning that he did not check and did not know that they were there. At most he was negligent. In any event on the issue of fraud the value of the parts does not appear to have weighed at all, either with the magistrate or with the judge. Moreover the inference of fraud is, of course, further vitiated in the case of the magistrate by the speculative finding unsupported by any evidence

and contrary to the prosecution case that the appellant intended to dispose of the spares to an unknown third party and by other misdirections and in the case of the learned appellate judge by his failure to attach any importance to the learned magistrate's finding already referred to.

Assuming, as we think we must, that no conclusive inference of fraud may properly be drawn from the facts found proved it is yet necessary to consider the effect of s. 258 (2) (a) Penal Code which provides that a person who takes or converts anything capable of being stolen is deemed to do so fraudulently if he does so with the intent permanently to deprive the general or special owner of the thing of it. The appellant knew of course that it was irregular to dump the spares in the lake without special authority or the recommendation of a board of survey. He must have known also that his act would result in the loss of the spares to the Republic. Can it nevertheless be said, having regard to his honesty of purpose, that his intention was not to deprive the Republic of them but to rid the store albeit irregularly of what he considered to be a lot of rubbish? Although the appellant's knowledge of the certainty of the consequence of his act is strong evidence of an intention to achieve that consequence it is not necessarily conclusive. In the case of *Sinnasamy Selvanayagam v. R.* (2), Sinnasamy was convicted of criminal trespass. A necessary ingredient of that offence was an intention to enter and remain on another's property with intent to annoy him. The trial court found the intent proved and this finding was endorsed by the Supreme Court on appeal. The Judicial Committee however allowed the appeal and held, *inter alia*, that the Crown had failed to prove the existence of the required intention and said this at p. 87:

"It was suggested in argument that there were concurrent findings of fact as to the appellant's intention, but intention, which is a state of mind, can never be proved as a fact; it can only be inferred from facts which are proved. It may well be that in doing a particular act a man may have more intentions than one; . . . but even if the appellant did anticipate that Rajapakse would be annoyed, it is perfectly clear from his evidence that his dominant intention was to remain on the estate where he and his family had lived for generations and not to find himself homeless."

In the present case there is a great deal to support the view that it was not the intention of the appellant to deprive the Republic of the spare parts. Briefly recapitulated the facts are that he got the Assistant Sub-Inspector of Works to sort out the spares; he sent them to the Fisheries Department yard for the purpose of being dumped in the lake; although he knew he was disobeying instructions and acting in breach of regulations he acted openly and before numerous witnesses; he was not benefiting himself or anybody else by destroying the spares nor did he intend to cause loss to the Republic as he believed them to be unserviceable and valueless. These facts are, in our view, at least equally consistent with an intention to rid the store of rubbish, as the appellant maintained, as with an intention to deprive the Republic of them. Indeed we think that they are more consistent with the former. But whatever be the true position an intent to deprive the Republic of the spares was in the circumstances not proved beyond reasonable doubt. It follows therefore that the deeming provision quoted above does not apply. The result is that the appellant was not proved to be fraudulent either in fact or in law and the conviction cannot stand. It is accordingly quashed and the sentence set aside.

Having reached this conclusion it is unnecessary to consider the last ground of appeal which is whether the appellant was rightly sentenced under s. 4 of the Minimum Sentences Act 1963. Nevertheless as the point was argued we will briefly express our views on it.

When a person is charged with an offence contained in Sched. I of the Act, of which the present offence is one, it is necessary in the case of a first offender like the appellant to prove strictly the value of the articles allegedly stolen because where the value is less than Shs. 100/- the court has a discretion under s. 5 of the Act, if there exists special circumstances, to impose a lesser sentence. In the instant case this was clearly not done since the only evidence of value was rejected in toto and the value, if any, of the parts, which have been variously described as “rubbish”, “unserviceable”, “scrap”, “unidentifiable”, etc. cannot on the evidence be ascertained with reasonable certainty. In these circumstances the prosecution failed to prove one of the essential ingredients to bring the case within s. 4 and the appellant has been deprived of the benefit of s. 5.

Having regard to the peculiar circumstances of this case we think that a court would have been justified in applying s. 5 as in reality the appellant was only guilty of a breach of Service Regulations and even if his conduct had come within the definition of theft the offence would have been a highly technical one.

Conviction quashed and sentence set aside.

For the appellant:

J. S. Mann, Mwanza

For the respondent:

Attorney-General, Tanzania

Effiwatt

Omondi and another v Republic [1967] 1 EA 802 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	4 August 1967
Case Number:	46 and 47/1967 (176)
Before:	Sir John Ainley CJ and Madan J
Sourced by:	LawAfrica
Appeal From:	The Resident Magistrate's Court, Kisumu.

[1] *Criminal Law – Evidence – Character of accused – Whether allegation by accused that prosecution witness is committing perjury enables prosecution to question accused about previous convictions – Whether “imputation on the character of a witness for the prosecution” – When discretion to exclude such evidence should be exercised – Evidence Act 1963, s. 57 (1) (c) and proviso (K).*

[2] *Criminal Law – Evidence – Dog – Behaviour of tracker dog – When admissible in evidence.*

[3] Criminal Law – Evidence – Cross-examination – Fairness of – Whether line of questions put to accused to make him accuse prosecution witness of perjury is fair.

Editor's Summary

The appellants were charged with robbery with violence contrary to s. 296 (2), Penal Code. During his cross-examination (conducted through an interpreter) the first appellant, in answer to questions from the prosecutor, alleged that a police sergeant who had given evidence against him was “deliberately committing perjury”. The prosecutor then put to the first appellant details of his past convictions, and these questions were allowed by the magistrate, on the ground that the first appellant had put his own character in issue by accusing the sergeant of perjury.

In the case of the second appellant, a large part of the evidence against him consisted of the evidence of the handler of a police tracker dog.

Both appellants were convicted, and appealed. On appeal the main points in issue were whether the questions to the first appellant about his previous convictions should have been permitted by the court; and whether undue reliance had been placed on the evidence about the dog.

Held –

- (i) to challenge the evidence of a witness is not “to conduct the defence so as to impugn the character of a witness” within s. 57 of the Evidence Act 1963 (dictum of Channell, J. in *R. v. Preston* (1) applied);
- (ii) the line of cross-examination which was adopted in this case was unfair to the first appellant;
- (iii) the questions should not have been allowed;
- (iv) in any event, the trial magistrate should have exercised his discretion under the proviso to s. 57 of the Evidence Act 1963 to exclude them;
- (v) the evidence of dogs should be admitted with caution and should be treated with great care. Evidence of the dog’s training and reliability must be given.

Appeal of first appellant allowed. Appeal of second appellant dismissed.

Case referred to in judgment:

- (1) *R. v. Preston*, [1909] 1 K.B. 575.

Judgment

Sir John Ainley CJ, read the following judgment of the court: The two appellants, whose appeals we have consolidated, were convicted of robbing with violence one Joseph Muma contrary to s. 296 (2) of the Penal Code.

The case against the first appellant, who was the third accused in the court below, was a very strong one, but during his cross-examination by the prosecutor he was questioned about his previous convictions. He admitted to fourteen convictions for theft and to having spent most of the last fifteen years in prison. Whether the questions about the previous convictions should have been permitted by the court below is the matter which we will consider in the case of the first appellant.

In the case of the second appellant, who was the second accused in the court below, the question which we will consider is whether undue reliance was placed upon what we may call the evidence of a police tracker dog. There are no other matters in either case which deserve consideration.

An important part of the case against the first appellant was the evidence of a police sergeant named Samuel Kimutei. The sergeant swore that acting on certain information he had gone, two days after the robbery, to a house in Kaloleni where he found the appellant. Under the bed in the house he found a box, and in the box, so he swore, he found certain property which one Mohammed Khan identified as part of the proceeds of the robbery. This property, the sergeant asserted, was said by the appellant to be his own property. According to the sergeant the property and the appellant were together taken to the police station.

The appellant, who was unrepresented at the trial, cross-examined the witness with what appears to

have been restraint. He obtained an admission from the witness that his (the appellant's) home was not at Kaloleni but was at a place called Majengo and though it does not appear clearly from the record the tenor of the cross-examination probably was that the sergeant's story must be untrue because the appellant had no house or home where he was said to have been found. Certainly this appellant went no further than that to impugn the sergeant's

evidence. He did not put to the sergeant that he had been guilty either in the course of the investigations or at any other time of conduct which made his testimony unreliable.

When the time came for the appellant to make his defence he gave evidence on oath. He said that the story of the finding of the goods in a house at Kaloleni was untrue. He said, "I don't stay in Kaloleni". He said that the sergeant had arrested him in circumstances entirely different from those alleged. He was then cross-examined. Because the learned magistrate, with perfect propriety as it said, recorded the evidence in narrative form, it is of course impossible to state the exact words of the questions asked, but the tenor of the questions is unmistakable and very familiar. The record reads:

"Many people tell lies in court. I don't see why they should tell lies about me. The sergeant has deliberately telling (told) lies because I was acquitted in a case he brought against me. He is deliberately committing perjury. I know he has many years' service in the police force."

Roughly, the cross-examination must have run – "These witnesses are telling lies about you?" "Why are these witnesses telling lies about you?" "What about the sergeant – why should he tell lies?" and so on.

Then we get this statement attributed to the appellant: "He is deliberately committing perjury". The appellant was giving his evidence in Dholuo, and it seems reasonably certain, at any rate highly probable, that an affirmative answer to the interpreter's translation of the English question "Do you say that he is deliberately committing perjury?" has been recorded as the appellant's statement.

We do not for a moment criticize the learned magistrate's method of recording the matter. It is the method declared to be proper by s. 197 (1) (b) of the Criminal Procedure Code. We have mentioned the matter because it seems to us very highly improbable that the appellant volunteered a phrase of that kind in Dholuo, or that the interpreter so translated into English any words of the appellant.

Now immediately following the words "I know he has many years' service in the police force" in the record we find this passage: "I was released from prison on August 14, 1966 after my fourteenth conviction for theft". Then follow details of this appellant's appalling criminal record which was clearly put to the appellant by the prosecutor. It is proper to add at this stage that in the learned magistrate's judgment he says:

"The 3rd accused accused Sergeant Samuel of deliberate perjury and, as a result, put his own character in issue and it was revealed that he had fourteen previous convictions and had only been released from prison on August 14, 1966."

The questions which arise here were once dealt with by s. 159 (vi) of the Criminal Procedure Code. As is well known para. (vi) followed almost word for word the provisions of s. 1 (f) of the English Evidence Act 1898. The whole of s. 159 was repealed by the Evidence Act, 1963 and its provisions were scattered about in various sections of that Act. A great deal of what was once found in para. (vi) of the repealed s. 159 can now be found in s. 57 of the Evidence Act, but that section approaches the matter from a fresh angle. Section 57 of the Evidence Act deals with what may be proved against, and not directly with what may be asked of, an accused person. The effect appears to be much the same, however. We set out the relevant part of s. 57 of the Evidence Act:

"57(1) In criminal proceedings the fact that the accused person has committed or been convicted of or charged with any offence other than

that with which he is then charged, or is of bad character, is inadmissible unless:

- (a) the proof that he has committed or been convicted of such other offence is admissible under s. 14 or s. 15 of this Act to show that he is guilty of the offence with which he is then charged; or
- (b) he has personally or by his advocate asked questions of a witness for the prosecution with a view to establishing his own character, or has given evidence of his own good character; or
- (c) the nature or conduct of the defence is such as to involve imputations on the character of the complainant or of a witness for the prosecution; or
- (d) he has given evidence against any other person charged with the same offence;

Provided that the court may, in its discretion, direct that specific evidence on the ground of the exception referred to in para. (c) of this subsection shall not be led if, in the opinion of the court, the prejudicial effect of such evidence upon the person accused will so outweigh the damage done by imputations on the character of the complainant or of any witness for the prosecution as to prevent a fair trial.”

The repealed s. 159 (vi) expressly forbade the prosecutor to ask questions of an accused which might lead to the revelation of previous convictions and bad character, save in certain circumstances, and provided that if an accused was asked such questions he was not to be required to answer them.

Section 57 (1) makes the evidence of such convictions and character inadmissible, save in certain circumstances. But a question tending to elicit the fact of previous convictions or tending to obtain admissions of bad character when evidence of such matters is not admissible is clearly a question to which objection must be taken, and no accused should be required to answer any such question, for very obvious reasons.

In the present case the learned magistrate clearly supposed that in the words of para. (c) of the subsection quoted “the nature of conduct of the defence” was “such as to involve imputations on the character . . . of a witness for the prosecution”, to wit the sergeant.

Now no strained interpretation should be given to these words, otherwise the centuries old rule that an accused person may put forward any defence he wishes without running the risk of a disclosure of his past misdeeds will be largely abrogated. To move a step at a time, it is surely apparent that to give an account of affairs which differs from the account given by a witness for the prosecution will not let in questions and evidence as to character and past convictions against an accused even if it is apparent that either the accused or the witness must be committing perjury. Channell, J. in *R. v. Preston* (1) said in reference to para. (f) of s. 1 of the English Evidence Act 1898, to which we have already referred:

“The latter part of the section is that which it is material to consider in the present case. It appears to us to mean this: that if the defence is so conducted, or the nature of the defence is such, as to involve the proposition that the jury ought not to believe the prosecutor or one of the witnesses for the prosecution upon the ground that his conduct – *not his evidence in the case, but his conduct outside the evidence given by him* – makes him an unreliable witness, then the jury ought also to know the character of the prisoner . . .”.

The italics in the passage we have set out are our own. Clearly that dictum, with which we very respectfully agree, is applicable to s. 57 of our Evidence Act. Provisions of the kind we are considering are no doubt designed in part to restrain scandalous attacks on honest men by men of evil character, but the true ratio is surely that suggested by Channell, J. Now it must be noted how careful Channell, J. was to indicate, in effect, that to challenge a witness's evidence is not to conduct the defence so as to impugn the character of the witness within the meaning of the provision. How much the less does an accused conduct his defence so as to let in evidence of bad character if he merely gives an account of affairs which differs, albeit radically and irreconcilably, from the prosecution evidence? But then what if he says, having given his version of the facts, "This is what happened, and Mr. X who has said otherwise is a liar"? Of course, if he goes on to explain that Mr. X is a notorious liar who has been twice convicted of perjury, then the mischief is done. But if it is apparent that he is merely asking that his word should be accepted as against that of Mr. X there is surely no ground whatever for saying that the circumstances envisaged by para. (c) of s. 57 (1) exist. A situation has not arisen where in the interests of justice a jury or a court should know the character of the accused. The court is faced only with its everyday task of deciding which of two men is telling the truth. Each man has asserted that he is telling the truth. Each has implied or asserted that the other man is untruthful, but that is all. It is a situation which arises every hour in a magistrates' court and every magistrate should know that in a criminal case he must resolve that kind of conflict without taking a look at the accused's prison record. The position is not altered, to our minds, if a Luo accused, speaking Dholuo, contrives to convey to a magistrate his belief that a prosecution witness has "deliberately committed perjury" in the course of his evidence.

The line of cross-examination which was adopted in this case can be very unfair to accused persons and should always be watched very carefully by the court. "If what you say is true, then this witness must have lied deliberately, he must have committed the felony of perjury" and so on, are questions which are almost invariably answered in the affirmative by excited or indignant African accused, even when the obvious and sensible answer is "This witness may be honestly mistaken, and I very much hope that he is. Will the court pardon me if I refuse to accuse him of anything. I am merely here to give my account of affairs". However, though that line of questioning may be thought to lead to useful results in some circumstances, it very clearly must not be allowed to form the basis of a request to ask questions about previous convictions. The matter really does not admit of argument. Whatever can be made of the ponderous proviso to s. 57 (1) of the Evidence Act, and it is very difficult to know how a magistrate can apply that proviso without knowing what the previous convictions are, it is we think clear that the court has a discretion to disallow questions about convictions and bad character even if the accused has in strict law let them in by the conduct of his defence or otherwise.

Even if the appellant's answers in this case can be said to fall within para. (c) of the subsection (and we do not think that they can be said to do so) it is to our minds abundantly evident that it was an improper exercise of the discretion to which we have referred to let in this appalling record, simply because the appellant had called a policeman a liar.

With respect to the learned magistrate, who had not so long to think about matters as we have had, the admission of this record served no end of justice and was, again with respect, unfair. It is impossible to say that the court below would certainly have convicted had this evidence not been admitted. We therefore quash the conviction of Oloo Omondi and set aside the sentence.

The second appellant, Ongao Ojulu, who was the second accused in the court below, was convincingly identified by the courageous and formidable night watchman Joseph Muma who fought the robbers, as being one of the robber gang. It is however the evidence of Corporal Mureithi which requires attention. Corporal Mureithi is attached to the police dog section. He handles a seven-year-old police dog called Bongo. Joseph Muma showed the corporal where he said he had fought the robbers, including this appellant. Bongo picked up a scent at that place, and followed what Corporal Mureithi said (or at any rate implied) was the same scent, for about a mile. At that point Corporal Mureithi saw two men hiding in what he described as “a bush”. This bush, probably a patch of scrub and grass, was remote from any roads, paths or dwellings. One of the two men was this appellant and the other was the first accused in the case. Both men, according to Mureithi, ran away. Bongo caught this appellant. The learned magistrate, who had been told by the corporal that Bongo had 1,181 arrests to his credit, was clearly impressed with the animal’s experience and did, we think, hold that Bongo made no mistake. In view of the watchman’s evidence, the guilty behaviour of the appellant and his companion, and the fact that they were concealed in true “bush”, we think that he was right, and that the conviction was correct. But we think it proper to sound a note of warning about what, without undue levity, we may call the evidence of dogs. It is evidence which we think should be admitted with caution, and if admitted should be treated with great care. Before the evidence is admitted the court should, we think, ask for evidence as to how the dog has been trained and for evidence as to the dog’s reliability. To say that a dog has a thousand arrests to its credit is clearly, by itself, quite unconvincing. Clear evidence that the dog had repeatedly and faultlessly followed a scent over difficult country would be required, we think, to render this kind of evidence admissible. But having received evidence that the dog was, if we might so describe it, a reasonably reliable tracking machine, the court must never forget that even a pack of hounds can change foxes and that this kind of evidence is quite obviously fallible.

However, we make no doubt that this conviction was proper. In view of the fact that this appellant had a previous conviction for robbery with violence the sentence of eighteen months was very far from excessive. The appeal of Ongao Ojulu, the second appellant, is dismissed.

Appeal of first appellant allowed. Appeal of second appellant dismissed.

The appellants did not appear and were not represented.

For the respondent:

Attorney-General, Kenya

A. F. Kisebu (State Counsel, Kenya)

Muiruri v Republic
[1967] 1 EA 808 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	20 September 1967
Case Number:	779/1967 (178)
Before:	Sir John Ainley CJ and Trevelyan J

Sourced by: LawAfrica

Appeal from: The Resident Magistrate's Court, Nairobi.

[1] *Criminal Law – Attempt – Whether accused may be convicted of attempt to commit an offence other than that charged in the particulars – Criminal Procedure Code, s. 180 (K.).*

Editor's Summary

The appellant was seen manipulating a coin-operated gaming machine with a piece of wire. He was charged, however, with stealing a sum of money found in his sock. The trial magistrate acquitted him of the offence charged; but then proceeded to convict him of attempted theft based on the manipulation.

Held – The conviction should not have been entered. “Offence” in s. 180 of the Criminal Procedure Code means “the crime charged as detailed in the particulars of the offence”, and not an offence based on other facts. (*R. v. McPherson* (1) applied.)

Appeal allowed. Conviction quashed.

Cases referred to in judgment:

- (1) *R. v. McPherson* (1857), Dears. & B. 197; 169 E.R. 975.
- (2) *R. v. Ring, Atkins and Jackson* (1892), 61 L.J.M.C. 116.
- (3) *R. v. Brown* (1889), 24 Q.B.D. 357.

Judgment

Sir John Ainley CJ, delivered the following reasons for the judgment of the Court: The appellant was seen to be manipulating a coin-operated gaming machine with a piece of wire. By doing so he might enrich himself without the attendant risk of loss. He was, it would seem, clearly attempting to steal from the machine, but he was not charged with that. He was charged with stealing a sum of Shs. 8/40 which was hidden in his sock. The learned magistrate was not prepared to find that this money had dishonestly been obtained and so he acquitted him of the offence charged but found him guilty of attempted theft instead, the conviction being based on the said manipulation. In doing so he purported to utilise the provisions of s.180 of the Criminal Procedure Code which provides that:

“Where a person is charged with an offence, he may be convicted of having attempted to commit that offence although he was not charged with the attempt.”

It is our view that the conviction should not have been entered, for the word “offence” where it twice appears in the section means the crime charged as detailed in the particulars of the offence. We believe that this must be so for it is surely unfair to charge a crime based on a certain set of facts and to convict of an attempt to commit a crime based on a different set of facts to which the accused person may never have directed his mind at the trial or at all.

There is support for our view in *R. v. McPherson* (1). This was a case on s. 9 of the Criminal Procedure Act 1851 which provides:

“If, on the trial of any person charged with any felony or misdemeanour, it shall appear. . . that the defendant did not complete the offence charged but that he was guilty only of an attempt to commit the same . . . such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for attempting to commit the particular felony or misdemeanour charged in the said indictment . . .”

The bench, which consisted of five judges, was of the unanimous view that under the enactment an accused person can only be convicted of attempting to commit the very offence with which he was charged. So far as we are aware there has never been a decision to the contrary. It is true that the learned editors of Archbold's Pleading, Evidence and Practice in Criminal Cases (1966 Edn.) say at p. 173 that “The authority of this case is shaken by *R. v. Ring, Atkins and Jackson* (2) and *R. v. Brown* (3)” but this criticism relates only to the point that, upon the facts, McPherson should have remained convicted, for though he could not have completed the crime which he set out to commit, he tried to commit it and one can be guilty of attempting to commit a crime which cannot be completed.

It was for these reasons that we intimated that the appeal was allowed the conviction being quashed and the sentence set aside. We would conclude by saying that the learned Deputy Public Prosecutor did not feel that he could support the conviction.

Appeal allowed.

The appellant did not appear and was not represented.

For the respondent:

Attorney-General, Kenya

J. R. Hobbs (Deputy Public Prosecutor, Kenya)

Kella and another v Republic [1967] 1 EA 809 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	12 October 1967
Case Number:	106/1967 (179)
Before:	Sir Clement de Lestang VP, Duffus and Law JJA
Sourced by:	LawAfrica
Appeal from:	The High Court of Kenya – Mosdell, J.

[1] *Criminal Law – Identification – Laps of two and a half years – Identification parade – Evidence unsatisfactory.*

[2] *Criminal Law – Murder – Proof of death – Body not found – Evidence unsatisfactory.*

[3] *Evidence – Former statement – Admissibility of, as showing consistency – Desirability of giving*

evidence of – Evidence Act, s. 165 (K).

Editor's Summary

The appellants were convicted of murder at a trial some three years after the event. The body of the victim was never found and the identification of the appellants as members of a shifta gang was unsatisfactory. No evidence was given of former statements by the witnesses at the trial.

Held – Upon consideration of the evidence, it would be unsafe to allow the conviction to stand.

Observation as to the desirability of giving in evidence former statements of witnesses to show consistency under s. 165, Evidence Act (*Shabani Bin Donald v. R.* (1) applied).

Appeal allowed.

Case referred to in judgment:

(1) *Shabani Bin Donald v. R.* (1940), 7 E.A.C.A. 60.

Judgment

Duffus JA, read the following judgment of the Court: The two appellants were convicted on June 29, 1967 of a murder that is alleged to have taken place on March 6, 1964, over three years previously.

The prosecution's case is that the deceased, Mohamed Hassan, an Ethiopian, was abducted from his home at Kulamawe by a gang of shifta which included the two appellants. Some five other men were also abducted on the same occasion including two of the prosecution witnesses, the first prosecution witnesses, Jerevasio M'Kaura M'Arimba and the third prosecution witness, Jaldessa Molu. The gang took all the abducted men into the forest and there eventually first released a man called Simba who had provided the gang with a bull which was duly slaughtered and eaten, and then proceeded to shoot and kill the deceased and two others described as Meru men, the first prosecution witness was shot in the leg but escaped, while the third prosecution witness escaped unhurt. The prosecution relied on the evidence of these two men, and also on that given by the wife of the deceased, Hallima, and her daughter Bonja, who both identified the two appellants as being members of the gang that abducted the deceased. The dead body of the deceased or of the two men from Meru were never recovered.

Two main points arise on this appeal. The first question is whether the death of the deceased has been established with that degree of certainty required in a criminal case, and the second question depends on the identification of the two appellants as being members of the gang that killed the deceased. Proof of death depends to a great extent on the evidence of Jerevasio. It is true that the wife Hallima has never seen the deceased since he was abducted. This fact is evidence in support of his death but it is not conclusive especially bearing in mind the possibility that he might have either returned to his home in Ethiopia, or might have himself joined the shifta gang. The learned trial judge, however, depended on the evidence of Jerevasio to prove both the deceased's death and the fact of his murder. On this point he said shortly:

"The body of Mohamed Hassan was never found but I am further satisfied on the evidence of Jerevasio that he was killed by the accused gang of shifta."

In his submission to this court, counsel for the appellant attacked the reliance placed by the judge on Jerevasio's evidence. He referred to the entirely different account of events as told by the other abducted man, Jaldessa Molu, and then also on the fact that the police on inspection of the locus in quo found absolutely no trace of the body of the deceased or of the two other men, and no trace of their having been killed or of the gang's activities such as that of slaughtering the bull. Jerevasio took the police to the spot in the forest where he alleged these incidents took place.

Jaldessa agrees with Jerevasio that they were both abducted by the gang of shifta and that they met together in the forest. The main difference in their evidence is that Jerevasio identifies the two appellants as members of the gang and refers to the first appellant as being apparently the leader whose orders were followed by the rest of the gang, whilst Jaldessa said he did not see either of the two appellants there although he had known both these appellants before at Kulamawe. The learned judge does not reject

Jaldessa's evidence although

he found him to be equivocal and evasive and stated that he preferred the evidence of Jerevasio, but the judge apparently thought that Jaldessa might not have noticed the presence of the two appellants as the gang consisted of a large number of men. We think that in arriving at this conclusion the learned judge overlooked the fact that Jaldessa had in his evidence stated that he knew both these appellants before, and that if, in fact, the first appellant was the leader of the gang giving orders, then it would appear likely that Jaldessa must, at any rate, have recognized the first appellant as a member of the gang. The evidence of these two witnesses is also irreconcilable when it comes to the stage at which the shooting began and according to Jerevasio the three men including the deceased were killed and he himself shot. Jerevasio's account is that all the five abducted persons, that is the deceased, the two Meru men, Jaldessa and himself, were "squeezed together" when the shooting commenced and the deceased and the two men were killed. Jaldessa denied this and stated that he was never present on such an occasion. It is to be noted that on this point the learned judge accepts Jaldessa's evidence, but finds that he had been led away before the shooting started, and he then accepts Jerevasio's account of the shooting and killing of the deceased man and his identification of the two appellants.

Jerevasio's identification of the two appellants has to be carefully considered. This identification took place some two and a half years after the incident happened. The prosecution case as presented to the trial court relied on the fact that Jerevasio was with the two appellants in the forest from the early hours of that day until 4.30 p.m. and so had ample opportunity of observing who were in the gang. They then relied on the fact that Jerevasio picked out the two appellants at the informal identification parade held on September 19, 1966. The learned trial judge accepted Jerevasio's evidence and identification of the two appellants on this basis, but this does not appear to be the basis on which Jerevasio identified the two appellants at the identification parade. We would refer here to the evidence of Thomas Wahome, the constable who conducted the identification parade and who in cross-examination said:

"I asked Jerevasio if he could identify any of the men who had abducted him in 1964. Jerevasio told me he had known two of the men before in Kulamawe."

It was apparently on this understanding that the parade took place and Jerevasio identified the two appellants. The question then arises whether Jerevasio's identification depended on the fact that he had known both these appellants before the day of the incident and had identified them by reason of this knowledge, and if so, why he did not say so in his evidence, but rather gave the impression, which was accepted by the trial judge, that the identification depended on the fact that he had plenty of opportunity to observe them on the day of the killing two and a half years before. This aspect of his evidence was never cleared up, and is at least uncertain and unsatisfactory.

The trial judge did not comment on the fact that the police found no trace of the dead bodies nor any signs of the murder or of the other activities of the men in the bush. The police visit did not take place until May, 1964 and no explanation was given for the further delay of approximately two months before search was made for the bodies. Jerevasio said he took six days to walk to Kulamawe and then made a report to the police. It appears that Jerevasio also went to the hospital but no evidence was called to show whether he made a report and what was the report and whether he was in fact admitted to the hospital, and no evidence to explain why the police did not immediately investigate the case and recover the dead bodies.

The two appellants were also identified by the wife Hallima and her daughter Bonja as being members of the gang that abducted the deceased. Hallima said she knew the two appellants well before the day of incident. She said that the two appellants and herself had lived together for many years in Kulamawe and further that she had given their names to the police, and this was apparently done when the police took her statement the day after the abduction took place. If in fact Hallima had reported this incident to the police and had given their names or even a clear description of the two appellants, then her statement would have been admissible under s. 165 of the Evidence Act and would have afforded the most valuable confirmation of the consistency of her testimony. Section 165 of the Evidence Act states:

“In order to show that the testimony of a witness is consistent with any former statement made by such witness, whether written or oral, relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.”

This court has previously drawn attention to the desirability of such evidence being given. We refer to the following passage from the judgment of this court in *Shabani Bin Donald v. R.* (1) (7 E.A.C.A. at p. 60):

“We desire to add that in cases like this, and indeed in almost every case in which an immediate report has been made to the police by someone who is subsequently called as a witness evidence of the details of such report (save such portions of it as may be inadmissible as being hearsay or the like) should always be given at the trial. Such evidence frequently proves most valuable, sometimes as corroboration of the evidence of the witness under s. 157 of the Evidence Act, and sometimes as showing that what he now swears is an afterthought, or that he is now purporting to identify a person whom he really did not recognize at the time, or an article which is not really his at all.”

This case was from Tanganyika and refers to s. 157 of the Indian Evidence Act which then applied in Tanganyika. That section is similar to our s. 165 except that in Kenya the former statement is admissible in order to show the consistency of the witness' testimony in court whilst under s. 157 of the Indian Evidence Act it was admitted in order to corroborate the evidence of the witness.

The desirability for this practice would apply with special force to a case of this nature where the decision depends upon the identification of the accused persons some two and a half years after the incident happened. The police must in their investigation have taken statements from both the principal witnesses Hallima and Jerevasio. In her evidence Hallima states that she gave the statement the following day naming the two appellants. If this statement had been produced and she had in fact identified both appellants by name the day after the incident this would have considerably strengthened her testimony but if this portion of her evidence was untrue then it would have the opposite effect and have made her testimony of little value. Incidentally the evidence given by Hallima that she had given a statement to the police naming each of the appellants is of no value unless the statement itself was proved by the “authority legally competent to investigate” the matter, in this case the police.

We had in the course of the hearing of the appeal to remark on the apparent inefficient investigation and prosecution of this case. This case required the most careful investigation and presentation to the court in order to allow the court to determine whether the appellants had in fact murdered the deceased. We realise the considerable difficulty that the authorities have in dealing with the present troubles caused by shifta gangs in the North, but we do feel that

the evidence in this case has been most unsatisfactory, and there also appears to have been evidence in existence which would either have confirmed or greatly lessened the value of the evidence called at the trial.

In all the circumstances of this case, and especially those concerning the vital question as to whether Mohamed Hassan is in fact dead and killed in the manner described by the witness Jerevasio, we have, after the most anxious consideration, decided that it would be unsafe to allow this conviction to stand. We therefore allow this appeal and quash the conviction and sentence.

Appeal allowed.

For the appellants:

A. R. Kapila & Co., Nairobi

S. S. Rao

For the respondent:

Attorney-General, Kenya

A. F. Kisebu (State Counsel, Kenya)

Andiazi and another v Republic
[1967] 1 EA 813 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	3 November 1967
Case Number:	112/1967 (180)
Before:	Sir Clement de Lestang VP, Spry and Law JJA
Sourced by:	LawAfrica
Appeal from:	The High Court of Kenya – Harris, J.

[1] *Criminal Law – Amendment of information – No defect in original information – Section 275 (2), Criminal Procedure Code (Cap. 27) (K.).*

[2] *Criminal Law – Assessor – Objection to – Course to be adopted when objection taken by accused.*

[3] *Criminal Law – Evidence – Accused calling witnesses before making unsworn statement – Sections 306 (3) and 307, Criminal Procedure Code (Cap. 27) (K.).*

[4] *Evidence – Criminal Procedure – Accused calling witnesses before making unsworn statement – Sections 306 (3) and 307, Criminal Procedure Code (Cap. 27) (K.).*

Editor's Summary

There was no merit in the appeal on the conviction and the court dealt only with three procedural points. The original information was amended by the prosecution at the request of the court under s. 275 (2) of the Criminal Procedure Code. As the original information was in no way defective, the amendment was irregularly made. Further, the accused indicated that he wished to make an unsworn statement and to call witnesses and was allowed by the learned trial judge to lead the evidence of his witnesses before making his unsworn statement. Thirdly, a complaint was made against an assessor by an accused and the learned trial judge inquired into the complaint in a sort of trial within a trial. On holding the complaint to be unfounded, he ordered the trial to proceed.

Held –

- (i) the amendment to the information was made irregularly, but the appellants were not prejudiced thereby and were properly convicted of rape;
- (ii) where an accused person elects to make an unsworn statement he must do so before calling his witnesses;
- (iii) the course adopted by the judge in holding a trial within a trial upon a complaint made against an assessor by an accused was a proper one.

Appeal dismissed.

No cases referred to in judgment.

Judgment

Sir Clement De Lestang VP, read the following judgment of the Court: There is abundant evidence to support the convictions of the appellants and we would have dismissed their appeals summarily had we not been invited to make some observations on three matters which occurred at the trial.

The first concerns the amendment of the information. The original information charged both appellants jointly with rape contrary to s. 140 of the Penal Code. At a late stage in the trial as a result of the court drawing the attention of the prosecution to the desirability of amending the information it was so altered as to become, to all intents and purposes, a new information charging each appellant on two separate counts with rape and aiding and abetting each other in committing rape. Section 275 (2) Criminal Procedure Code under which the “amendment” was made authorises amendments of an information where it appears to the court to be “defective”. The original information was, however, in no way defective and the “amendment” was consequently irregularly made. Moreover it proved in the result to be quite unnecessary. We are however satisfied that the appellants were in no way prejudiced by this irregularity as they were both convicted of the offence of rape.

The second question arises out of a ruling by the learned trial judge to the effect that an accused person was at liberty to call his witnesses before making an unsworn statement. It seems fairly clear from s. 307 Criminal Procedure Code that where an accused person elects to give evidence he must do so before calling his witnesses and this has always been the practice and although the section does not in terms refer to an unsworn statement we think that the same rule should apply to it. We can see no good reason to differentiate one from the other and s. 306 (3), which provides that if an accused person says that he means to give evidence or make an unsworn statement or to adduce evidence the court shall call upon him to enter upon his defence, would appear to support that view. We think this is in the accused's own interest, because his unsworn statement will carry more weight if supported by the sworn evidence of witnesses who will not have heard it than if it were made after listening to such evidence.

The third and last matter concerns the proper course to be adopted by the court when a complaint against an assessor is made by an accused person in the course of the trial. In the present case on such a complaint being made the learned trial judge inquired into it in a sort of trial within a trial at the end of which, holding it to be unfounded, he ordered the trial to proceed. Although the Criminal Procedure Code gives no guidance on such a matter we think that the learned judge adopted the proper course. Indeed it was the only reasonable course in the circumstances.

Appeals dismissed.

The appellant did not appear and was not represented.

For the respondent:

Attorney-General, Kenya

H. G. D. Graham

Kuyate v Republic
[1967] 1 EA 815 (CAD)

Division: Court of Appeal at Dar-es-Salaam
Date of judgment: 4 November 1967
Case Number: 162/1967 (181)
Before: Sir Clement de Lestang VP, Spry and Law JJA
Sourced by: LawAfrica
Appeal from: The High Court of Tanzania – Saidi, J.

[1] Criminal Law – Appeal – Summary Procedure on appeal to High Court – When applicable – Criminal Procedure Code, s. 317 (T.).

[2] Criminal Law – View of scene – Observations as to proper use of and procedure at.

Editor’s Summary

An accused was convicted of stealing fifteen head of cattle before the District Court at Kilosa based on inadequate evidence. A veterinary supervisor of a sisal estate at Madoto testified that there were 4,867 head of cattle on the estate and a herdsman called Mando (not called as a witness) reported to the supervisor that “hoof marks indicated some cattle had been stolen and removed from the estate”. The day after receiving the report the supervisor attended a cattle auction with the herdsman Mando and a police constable (Maona) and saw an animal sold which the accused claimed was his property with two punch holes in the ear but which the supervisor claimed was owned by the estate. The constable confirmed the evidence of the supervisor as to what occurred at the auction. The accused was charged with the theft of fifteen cattle. He gave evidence that the animal was his property and that he had other cattle similarly punch-holed which he kept at a place called Turiani. The court reserved judgment for three days. On the day for delivery of judgment the court decided to visit “the herd of the veterinary at Madoto and Turiani where the accused’s cattle were”. It appeared from the judgment subsequently delivered that the trial magistrate visited some cattle and recorded “a great number of cattle were seen and all had punches similar to the cattle in dispute and the headman Mando confirmed that the cattle were born on the ranch”. On appeal to the High Court at Dar-es-Salaam the appeal was dismissed under s. 317 of the Criminal Procedure Code.

On further appeal to the Court of Appeal:

Held –

- (i) information given by Mando to the magistrate when the magistrate on his own visited the cattle was not evidence;
- (ii) after its hearing of the evidence in court the magistrate was clearly uncertain of the accused’s guilt, and instead of attempting to investigate further the alleged crime, he should have acquitted the

accused;

- (iii) the High Court should not have dismissed the appeal summarily because (a) the evidence at the trial left reasonable doubt as to the accused's guilt (b) the appeal was neither frivolous nor without substance.

Observation on the purpose of and on the procedure to be followed at a view.

Appeal allowed.

Cases referred to in judgment:

(1) *Boghani v. R.* (1951), 18 E.A.C.A. 152.

(2) *John Mwombeki v. Republic* (Mwanza Criminal Application No. 7 of 1966 – unreported).

Judgment

Law JA, read the following reasons for the judgment of the Court: The appellant was convicted in the District Court at Kilosa of stealing fifteen head of cattle. His appeal to the High Court of Tanzania was summarily dismissed. As his appeal to this court is a second appeal, it only lies on a point of law. On October 10, 1967, we allowed the appeal, and we now give our reasons.

The ground of law raised before us was, in effect, that it is apparent from the record that the trial in the District Court was so unsatisfactory that the appeal to the High Court ought not to have been dismissed under the summary procedure. An appeal against conviction can only be summarily dismissed, in terms of s. 317 (1) (b) of the Criminal Procedure Code, if the court considers that the evidence before the lower court leaves no reasonable doubt as to the accused's guilt and that the appeal is frivolous or is without substance. In our view the appeal to the High Court, for reasons which will appear hereinafter, was far from being frivolous or without substance, and its rejection under the summary procedure was not justified.

At the trial in the District Court, two prosecution witnesses were called. The first was Said Ali, the veterinary supervisor of Madoto Sisal Estate, who deposed that there were 4,867 head of cattle on the estate. On April 23, 1967, it was reported to him by one Mando, a headman on the estate, who was not called as a witness, that hoof-marks indicated that some cattle had been stolen and removed from the estate. Said Ali went on to say that on the same day he checked the cattle and found that fifteen were missing. Next day he went to a cattle auction at Mvomero accompanied by Mando and constable Maona. He there saw one animal being sold which he recognized as one of the stolen cattle from its appearance and from the presence of two punch-holes in one ear. This animal was claimed by the appellant, who was thereupon arrested and charged with stealing the missing fifteen head of cattle. Constable Maona gave evidence as to the events at the cattle auction. The appellant gave evidence to the effect that the animal in question was his property, and that several of his cattle, which he keeps at Turiani, were marked with two punch-holes in the ear. This completed the evidence on both sides, and the magistrate adjourned the case for three days for judgment. On that day, instead of delivering judgment, he noted on the record:

"The court will have to visit and see the herd of the veterinary at Madoto and Turiani where the accused's cattle are."

Clearly the magistrate was not satisfied at this late stage that the appellant's guilt had been proved, otherwise there would have been no need to visit the locus, and equally clearly, in our view, he should then have acquitted the appellant. It is no part of a magistrate's duties to investigate crime; that must be left to the police (*Boghani v. R.* (1)). It is competent for a court to view the locus at any time during a trial, but such a view must take place in the presence of the accused, his counsel (if any), the assessors (if any), the prosecutor, and such of the witnesses as may be required for the purposes of any demonstration or explanation. A view should not be held for the purpose of seeking additional evidence, but to clarify doubts which may have arisen in the course of evidence, for instance as to the nature of the terrain. A proper note must be made on the record of what took place, and if necessary evidence should be recorded, if any additional matter has come to light, and the accused given an opportunity to cross-examine. In this case no note whatsoever appears on the record as to what happened at the view, although a reference to it was made in the judgment, and it would appear that the appellant was present. The following is an extract from the judgment:

“A great number of cattle were seen and all had punches similar to the cattle in dispute and the headman Mando confirmed that the cattle was born in the ranch.”

What Mando told the magistrate at the view was not evidence in the case against the appellant, and could only have become evidence had Mando been called as a witness and the appellant allowed to cross-examine. The record is completely silent as to whether the appellant’s cattle at Turiani were viewed by the magistrate, and if so with what result.

It is clear to us that the magistrate would not have convicted the appellant on the evidence adduced at the trial, and that he only convicted the appellant because of Mando’s statement, which was not evidence, that the allegedly stolen animal was born “in the ranch”. Such a state of affairs, in our view, precluded the appellant’s appeal to the High Court from being considered frivolous or without substance, with the consequence that its purported dismissal under the summary procedure was an appealable error of law (*John Mwombeki v. Republic* (2)). As the appeal was bound to succeed, we did not consider it necessary to send it back to the High Court for re-hearing.

For these reasons we allowed the appeal, quashed the conviction and set aside the sentence passed on the appellant, and ordered his release unless detained on some other charge.

Order accordingly.

For the appellant:

Al Noor Kassum & Co., Dar-es-Salaam

A. Nazarali

For the respondent:

Attorney-General, Tanzania

S. K. Laxman

Ryde v Bushell and another [1967] 1 EA 817 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	17 November 1967
Case Number:	15/1967 (183)
Before:	Sir Charles Newbold P, Duffus and Law JJA
Sourced by:	LawAfrica
Appeal from:	The High Court of Kenya – Chanan Singh, J.

[1] *Act of God – Requirements for successful plea of – Whether absolves party from liability for damage suffered following performance of part of an obligation – Burden of proof – Heavy rain.*

[2] Damages – Assessment – Breach of covenant to plant coffee – Damages to be assessed at time of the breach.

[3] Landlord and Tenant – Breach of covenant to plant coffee – Measure of damages.

Editor's Summary

The plaintiffs/respondents leased a farm to the defendant/appellant in 1960 for a term of five years. The lease contained covenants by the defendant to plant a certain area with coffee and to manage the farm in a husbandlike manner. After the end of the lease the plaintiffs sued the defendant for (inter alia) damages for breach of these covenants in not planting the required area with coffee. The defendant admitted some breach, but disputed the extent of the breach and also the quantum of the damages. The evidence given at the trial was unclear, but the trial judge found that the defendant had failed to plant 23 3/4 acres and gave judgment for K. Shs. 30,000/- (i.e. at a rate of some K. Shs. 1,260/- per acre) reducing the amount because he was unsure of what permanent damage had

been done. One of the pleas raised by the defendant was that as to some of the area he had had to replant it because of what he described in evidence as a “deluge” at the end of 1960 which swept away part of his original planting, and that this deluge was an Act of God which subsequent to performance destroyed his work; but the defendant called no evidence about the normal rainfall in the district or about the normal precautions to be taken.

Held –

- (i) the plea of Act of God is available to relieve a defendant from liability for damage suffered following the performance of part of his obligation, and not merely to absolve a person from the performance of an obligation;
- (ii) nothing can be said to be an Act of God unless it is proved by the person setting up the plea to be due exclusively to natural causes of so extraordinary a nature that it could not reasonably have been foreseen and the results of which occurrence could not have been avoided by any action which should reasonably have been taken by the person who seeks to avoid liability by reason of the occurrence;
- (iii) the evidence was insufficient to support the plea in this case;
- (iv) on the issue of what acreage was actually planted and maintained in coffee the plaintiffs on whom the onus lay and failed to prove the extent of the default;
- (v) damages are to be assessed at the time of the breach and the plaintiffs should recover the difference in value of the land at that time.

Appeal and cross-appeal allowed in part. Damages increased in amount. Appellant to have one quarter of his costs of the appeal. Respondents to have costs of cross-appeal.

No cases referred to in judgment.

The following judgments were read:

Judgment

Sir Charles Newbold P: In May 1960 an indenture of lease was executed whereby the two plaintiffs, as proprietors, leased to the defendant a farm for five years from April 1, 1960. Under cl. 2 (12) of the lease the defendant undertook:

“To plant during each year of the term hereby created an area consisting of not less than ten (10) acres with young coffee . . . Provided that the maximum area to be planted shall not exceed fifty acres, which fifty acres shall include any area already planted with coffee . . .”

The lease also included covenants by the defendant

“2(6) To farm, cultivate, manure and manage the whole of the demised premises in a good and husbandlike manner according to the most approved methods of husbandry practised in the district . . .”

and

“2(15) To yield up the premises at the expiration of the tenancy in such a state of repair, cultivation and management as shall be in compliance of the tenants covenants hereinbefore contained.”

On the termination of the tenancy a dispute arose between the plaintiffs and the defendant relating to the performance by the defendant of his covenants under the lease and eventually the plaintiffs sued the defendant. The plaint included a number of claims but the only claim which is relevant to this appeal is the claim by the plaintiffs to the effect that the defendant failed to plant and maintain coffee in accordance with the requirements of the defendant's covenants.

The defendant did not dispute some breach of his covenants, but disputed the extent of the breach and the amount of damages which he would have to pay for any breach. As the case, so far as the plaintiffs were concerned, to a large extent turned on the area under coffee cultivation at the commencement of the lease and the area under coffee cultivation on the termination of the lease, I should have thought it would have been extremely simple for either the plaintiffs or the defendant or both to have brought evidence which would have clearly established those simple facts. I should, however, have been wrong in so thinking. There is a great paucity of evidence on those two simple facts and such evidence as does exist is most confusing. Since the case for the defendant rests to a large extent upon, to quote from para. 16 of the defence, "extensive flooding from exceptional rains beyond the control of the defendant", which rains appear from the defendant's evidence to have fallen upon a particular day, I should also have thought that it would have been a simple matter for clear evidence on this to have been called by the defendant. I should, however, have been equally wrong in so thinking.

In essence the plaintiffs claim that the defendant had failed to plant and maintain with coffee 35 1/2 acres in accordance with the terms of the lease; and they claim damages for that failure, which damages amounted to £110 an acre, giving a total of £3,905. In essence the defendant admits a breach of his obligation in failing to plant 6 3/4 acres and he submits that the damages resulting therefrom were £450. The judge, in an admirably clear judgment, held that the defendant had failed to plant 23 3/4 acres and that the damage which the plaintiffs had suffered therefrom amounted to £1,500; and on this aspect of the case he gave judgment for the plaintiffs for £1,500. From that judgment the defendant has appealed and the plaintiffs have cross-appealed.

With effect from January 1, 1964, by a Government Order, any further planting of new areas with coffee was prohibited. It was agreed therefore at the trial and before us that the defendant could not be required to comply with his obligation to plant after that date. This left a period of 3 3/4 years in which the defendant's obligation to plant existed and the judge, on the assumption that the area under coffee cultivation at the commencement of the lease was eleven acres, held that during that period the defendant should have planted a minimum total of 36 3/4 acres. Counsel for the defendant accepted that this figure was correct; and counsel for the plaintiffs, although he submitted that the figure should have been slightly more, did not seriously dispute it. For reasons I shall subsequently give I consider that the area under coffee at the beginning of the lease was only about five acres, with the result that the minimum acreage which the defendant should have planted is 37 1/2 acres. As, however, the difference is small and the acreage in question subject to considerable uncertainty I see no reason to interfere with the judge's conclusion that the amount of acreage which the defendant should have planted and maintained was 36 3/4 acres. As I have already said, there is considerable uncertainty as to what acreage was under coffee at the beginning of the lease and what acreage was under coffee at the end of the lease. Inasmuch as it was for the plaintiffs to prove any breach of the covenants on the part of the defendant the plaintiffs have no ground of complaint if any uncertainty is resolved in favour of the defendant. There was some evidence for the plaintiffs that the only new area in coffee after the termination of the lease amounted to about three acres. This evidence was most vague and the judge does not appear to have accepted it, as in the main he based his determination of the acreage planted on the evidence of the defendant. That evidence related more to the number of trees planted than to the acreage planted; but by using an agreed figure of trees per acre at the particular spacing adopted it is possible to translate the number of trees into acres. Doing this, the evidence of the defendant was that he planted thirteen acres in 1960, eight acres in 1962,

and nine acres in 1963, making a total of thirty acres against an obligation to plant $36 \frac{3}{4}$ acres, leaving a failure to plant $6 \frac{3}{4}$ acres. These figures, however, do not correspond with other parts of his evidence where he stated that by 1962 he had planted eighteen acres of new coffee and that by the end of 1963 there was a total of twenty-four acres under coffee, including coffee planted before the lease. The coffee planted before the lease has been variously stated on behalf of the plaintiffs to be eleven acres, seven acres and a little more than five acres.

The judge, in arriving at his conclusion that the defendant had planted only thirteen acres, did not credit the defendant with the eight acres planted in 1962, because they were planted in the thirteen acres already planted in 1960, and, apparently, because the defendant could not escape liability by reason of an act of God, and he appears to have overlooked the nine acres planted in 1963. The defendant in his appeal claims that the judge was wrong in refusing to give credit for the 1962 planting and in overlooking the 1963 planting. I agree that the judge seems to have overlooked the 1963 planting and that there will have to be some adjustment of the acreage which the judge found the defendant had failed to plant in accordance with his obligations. As regards the planting of eight acres in 1962 in the thirteen acres planted in 1960, the defendant said this was caused by the fact that at the end of 1960 there was a deluge – 3.47 inches of rain in forty minutes – which washed away ninety per cent. of the trees planted in the thirteen acres. When he planted eight acres in 1962 he did so in the thirteen acres, most of the plants in which had been washed away, and he claims to be entitled to credit in respect of both the thirteen acres and the eight acres. In effect this is a plea that he had performed his obligation to plant and that subsequent to performance his work had been destroyed by an act of God and that the loss should not fall on his shoulders. This plea is not strictly in accord with the defence which refers merely to “exceptional rains beyond the control of the defendant”. The case, however, has always been conducted on the basis that the defendant was seeking release from any further performance of his obligation by reason of an act of God and I think it right that this court should decide the matter on that basis.

The plea of an act of God is normally set up to absolve a person from the performance of an obligation. In this case it is set up to relieve the defendant from liability for damage suffered following the performance of part of his obligation. I see no reason why the plea should not be available to the defendant for that purpose as I am unable, in this respect, to draw a distinction between a failure to perform an obligation and a failure to produce the results of the performance of an obligation. If an act of God absolves in the one case then it should absolve in the other. Nor to my mind does it make any difference whether the obligation is imposed by law, in which case according to the old authorities in England performance is excused by an act of God, or is imposed by contract, in which case according to those authorities performance was not excused by an act of God, unless it is manifest from the clear words of the contract that the obligation is absolute. But before the plea can succeed it must be established that it was an act of God which prevented performance or which destroyed the results of performance. Nothing can be said to be an act of God unless it is an occurrence due exclusively to natural causes of so extraordinary a nature that it could not reasonably have been foreseen and the results of which occurrence could not have been avoided by any action which should reasonably have been taken by the person who seeks to avoid liability by reason of the occurrence. It is for the person setting up the plea of act of God to prove the various facts which constitute an act of God. In this case what has been proved is a heavy rainfall which washed away young coffee seedlings. The defendant described it as a “deluge” resultant from a fall of nearly $3 \frac{1}{2}$ inches in forty minutes. There is absolutely no other evidence from anyone as to this rainfall, as

to its extraordinary nature, or as to what precautions, if any, should reasonably be taken to guard newly planted coffee seedlings from erosion caused by heavy rain. The judge merely described the coffee as being washed away by “heavy rains”. He made no finding as to its extraordinary nature or as to its intensity being such that no reasonable precaution taken by the defendant would have been of any avail. The judge, parenthetically and without giving any reason, seems to accept that the damage was caused by an act of God. The plaintiffs challenge this finding in their cross-appeal, submitting that there is no evidence of any standard in the area in question which could determine what would be a rainfall of an extraordinary nature, nor any evidence that any reasonable precaution against the results of heavy rain would have been unavailing. The defendant asks this court, which is a court of an agricultural country, to take judicial notice of the normal intensity of rainfall and of the erosive effect of heavy rain. I am prepared to take judicial notice in a broad way of both these facts; but I cannot do so to the extent of coming to the conclusion, unaided by any evidence, that the rainfall in question in the area in question was of so extraordinary a nature that it could not reasonably have been foreseen and that no precautions which the defendant could reasonably have taken would have prevented or reduced the effect of the rain. Thus I do not consider that the defendant has proved that he is excused from his obligation to yield up on the expiry of the lease thirteen acres of planted coffee by reason of an act of God. As regards any loss of coffee seedlings due to normal circumstances, the obligation of the defendant under cll. 2 (6) and 2 (15) would not enable him to absolve himself from liability merely by giving evidence that he had planted a certain acreage.

This still leaves for determination how many acres were planted and maintained in coffee on the expiry of the lease. It is for the plaintiffs to prove the extent of the default. They have not done so. Like the judge, I prefer to accept the defendant’s evidence: but even this is confusing. Acreage determined by the number of trees will not suffice. While the number of coffee seedlings planted is known, due to the washaway in 1960 and the evidence of normal misses, the number in existence on the expiry of the lease is completely unknown. I consider that the best evidence of the acreage under coffee on the expiry of the lease was a definite statement from the defendant that on January 1, 1964, he had twenty-four acres, including the original coffee, in a cleaned and pruned state – that is, a state which would accord with his obligations under the lease. The most cogent evidence of the original area under coffee is that given by Col. Bushell, one of the plaintiffs, who said he originally thought the acreage to be more but it turned out to be a little over five acres. This leaves nineteen acres planted and maintained by the defendant in accordance with his obligations, with a resultant default of $17 \frac{3}{4}$ acres. As the judge held that the default amounted to $23 \frac{3}{4}$ acres, to this extent this appeal is successful and on this aspect the cross-appeal fails. The appeal is also successful insofar as it relates to the hypothetical effect of an act of God, but it fails and the cross-appeal succeeds on the question as to whether there was an act of God.

The next issue arises from the cross-appeal and it relates to the amount of damage suffered by the plaintiffs in respect of each acre in which the defendant is in default of his obligations under the lease. The judge accepted that the value of land in the area in question planted with coffee was £120 an acre, while the value of such land not so planted was £10 an acre. These values were the values at the date the lease expired and the defendant’s default occurred. Accordingly, it would seem that the proper measure of damages would be £110 for every acre by which the defendant was in default. The judge, however, reduced that figure to about £63 an acre because he was not sure that the permanent damage suffered by the plaintiffs was £110 an acre, as the Government

may in the future have permitted coffee to be planted. With respect to the judge this was a completely wrong approach. Damages are to be assessed as at the time of the breach. At that time the value of the land was £110 an acre less than it would have been if there had been no default; and that is the amount the plaintiffs are entitled to recover. This fact is easily shown by what would have happened if the plaintiffs had tried to sell the land: they would have got £10 an acre instead of £120 an acre. In other words, as a result of the defendant's default there was returned to the plaintiffs land which was £110 an acre less valuable than it should have been; and that position is not affected by any hypothetical circumstance which may or may not occur in the future. In my view the proper damages to be awarded were £110 in respect of each acre in default. The default of 17 3/4 acres multiplied by £110 gives in round figures £1,950; and I consider this to be the proper amount of the damage suffered by the plaintiffs in respect of the claim the subject of this appeal. Accordingly the cross-appeal succeeds in this respect.

I have found great difficulty in arriving at the proper order in relation to costs. The appeal has been partly successful and partly unsuccessful; but no benefit resulted to the appellant by reason of the success of the cross-appeal. In the result I consider that the order of this court should be that the judgment and decree of the High Court be varied by allowing damages for the coffee in the sum of Shs. 39,000/- and by substituting for the figure of Shs. 32,592/- a figure of Shs. 41,592/- with a consequential variation in the figure of the interest thereon. I would allow the appellant one quarter of his costs on the appeal and I would allow the respondent the costs of the cross-appeal. As the other members of the court agree it is so ordered.

Duffus JA: I agree with the judgment of the learned President.

Law JA: I have read in draft the judgment prepared by the learned President. I agree with it, and with the order proposed. I would only add that I am surprised that in a suit which included a claim for damages for breach of a covenant to plant a specified acreage of coffee, the evidence should have been so vague and imprecise. If there is any matter which is capable of accurate assessment, it is surely the acreage of a standing crop at any particular moment, in this case at the commencement of the lease and at its termination. The burden of proof in this respect being on the plaintiffs, they cannot complain if the trial judge preferred to base his calculations on the figures put forward by the defendant.

Judgment and decree of High Court varied accordingly.

For the appellant:

J. A. Mackie-Robertson, Q.C. and B. R. Paterson-Todd, Nakuru

For the respondents:

Daly & Figgis, Nairobi

P. J. S. Hewett

Household Centre Ltd v Achelis (Kenya) Ltd
[1967] 1 EA 823 (CAN)

Division: Court of Appeal at Nairobi

Date of judgment: 14 November 1967

Case Number: 30/1967 (184)
Before: Sir Charles Newbold P, Sir Clement de Lestang VP and Spry JA
Sourced by: LawAfrica

[1] Company Law – Receiver and manager – Acts as agent for the transferor company on a sale to another company.

[2] Debenture – Capacity in which receiver and manager acts when selling assets of a debtor company – Whether sale within Transfer of Businesses Act, s. 3 (K.).

[3] Transfer of Business – Receiver and manager – Whether, in the absence of any notice, transfer of a business by a receiver and manager results in the transferee being liable for the debts of the transferor company – Transfer of Businesses Act, ss. 3, 4 and 7 (K.).

Editor's Summary

In the High Court (reported, [1967] E.A. 382) it was held that the transfer of a business of a company by a receiver and manager appointed by a debenture holder, in the absence of any notice being given under ss. 3 and 4 of the Transfer of Businesses Act, rendered the transferee company (the appellant) liable for the debts of the transferor company (including a debt owed to the respondent). On appeal it was submitted, inter alia, that; (i) under the Act the transferor had to incur the debt but the receiver and manager was the true transferor and had not incurred any of the debts of the transferor company; (ii) the transfer had not taken the assets of the transferor company; out of the reach of the creditors of that company because the registration of the debenture so far as the immovable properties were concerned and the appointment of the receiver and manager so far as the movable properties were concerned had already done this before the transfer took place; (iii) the transfer of the business by the receiver and manager was not the act of the transferor company; (iv) literal interpretation of the Act as interpreted by the High Court would lead to anomalies, the object of the Act being to prevent fraudulent, i.e., secret transfers which was not applicable to registered debentures of which creditors would have notice.

Held –

- (i) although the transferor and the debtor had to be identical the receiver and manager validly acted for the transferor and the debtor in transferring the business;
- (ii) the transfer had taken the assets out of the reach of the creditors of the transferor company and until the transfer the unsecured creditors had an interest in the assets of that company despite the existence of the debenture, and that the value of the assets may have been less than the amount secured by the debenture was immaterial;
- (iii) the receiver and manager in effecting the sale and transfer did so in the name and on behalf of the company and the receiver's act was the act of the transferor company;
- (iv) there was no ambiguity in the Act, and if anomalies were to arise, this was no ground for refusing to interpret the Act in accordance with its clear provisions, namely that the business had been transferred by the transferor company to the transferee company, and since no notice had been given either before or after the date of the transfer as required by the Transfer of Businesses Act the transferor company was not relieved of liability for the debts of the transferee company.

Appeal dismissed with costs.

No cases referred to in judgment.

The following judgments were delivered:

Judgment

Spry JA: This appeal turns on a single question of law: whether the purchaser of a business from the receiver and manager appointed by a debenture holder was liable for a debt contracted by the former owner of the business (to which I shall refer as the debtor company) by virtue of the provisions of the Transfer of Businesses Act (Cap. 500), no notice having been given under ss. 3 and 4 of that Act. It was not disputed that there had been a transfer of the business to the purchaser, that is the appellant company, or that the debtor company had contracted the debt, which remained unpaid. It was also common ground that no notice had been given.

The learned trial judge held that the appellant company was liable. He began by saying that in his opinion the mere facts that there had been a transfer and that no notice had been given were enough to dispose of the matter and that it made no difference whether the transfer was by the owner or his agent or was made in exercise of a power of sale. He rejected a submission that the Act was sufficiently ambiguous to justify looking to its objects and held that its meaning was plain. He found that what had occurred was that “the assets of the debtor were removed out of the reach of commercial creditors by the transfer of the debtor’s business to the transferee” and that this was “exactly the sort of transaction at which the Act is aimed”. He also considered whether the receiver and manager was acting as agent of the debtor company when he sold the business, a question which had been argued at length, and held that he was acting as such agent. He accordingly gave judgment for the creditor, that is to say the respondent company.

At the hearing of the appeal, counsel for the appellant began by arguing that the learned judge was wrong when he said that all that mattered was that there was a transfer without notice and that it was immaterial who was the transferor. He submitted that it must be shown that it was the transferor who had incurred the debt. Secondly, he argued that the learned judge had erred in holding that the transfer had operated to remove the assets of the debtor company from the reach of commercial creditors. He submitted that the registration of the debenture, so far as immovable properties were concerned, and the appointment of the receiver, so far as movable properties were concerned, had operated to take the assets out of the reach of creditors before the transfer was effected. Thirdly, counsel submitted that the learned judge had erred in treating the transfer by the receiver and manager as the act of the debtor company. He conceded that under the terms of the debenture, a receiver and manager appointed by the debenture-holder was to be the agent of the debtor company but he argued that the agency so created was to be regarded as something different from an ordinary agency and existed merely to relieve the debenture-holder from potential liability for the acts of the receiver and manager. Finally, counsel submitted that there were ambiguities in the Act and that its literal interpretation would lead to anomalies, so that the court could and should look to the objects of the Act and found its interpretation on them. As an example of an ambiguity, counsel claimed that it was uncertain whether the word “transferee” as used in s. 3 included an intended transferee, as it does under the definition in s. 2. As an example of an anomaly, counsel submitted that if this had been a sale by order of the court, the Act

would not have applied, and he argued that it was anomalous that the question whether

the purchaser should be liable for the debts of the former owner should receive opposite answers according to whether the sale had been by the court or by a receiver and manager. Furthermore, he submitted that if the debtor company had gone into liquidation, the receiver appointed by the debenture-holder would have ceased to be the agent of the debtor company: thus again a chance factor would affect the liability for the debts. If it were permissible to look to the objects of the legislation, counsel for the appellant submitted that these were to be found in the long title to the Act, that it was an act to prevent fraudulent transfers, that is, secret transfers aimed to taking assets out of the reach of creditors. Here, the debenture was registered, so that the creditors had notice of it, and there was no question of the transfer operating to defraud anyone.

I hope that in this brief summary I have done justice to counsel for the appellant's main submissions. I will now deal with them in the order in which he presented them. I think there is substance in the first, to this extent, that since the only liability created by s. 3 of the Act is for "liabilities incurred in the business by the transferor", it follows that, whether or not the Act notionally applies, there can in fact be no liability unless the debtor and the transferor are, in law, identical.

I cannot, however, accept counsel's second submission. It seems to me that up to the moment when the business was transferred, the unsecured creditors had an interest in the assets of the debtor company, however slight it may have been; from that moment on, any interest they had could only be in the proceeds of sale. It is immaterial that in the present case the value of the assets was less than the amount secured by the debenture.

Again, I cannot accept that the receiver and manager was not the agent of the debtor company, so that his acts were the acts of the company. The very clause of the debenture which creates the agency empowers the receiver and manager to sell the property charged "and to carry any such sale into effect by conveying in the name and on behalf of the company or otherwise". Curiously, the instruments by which the immovable property of the debtor company were transferred were not produced in evidence, so that we do not know how the transfers were in fact executed, but the fact remains that the receiver and manager had power to convey in the name and on behalf of the debtor company and so far as I am aware he had no power to convey in any other manner. The fact, stressed by counsel for the appellant that the debtor company had no control over the receiver and manager is in my opinion irrelevant, as are the reasons why it is usual to make receivers and managers the agents of companies creating debentures. I think the learned judge was clearly right when he held that the acts of the receiver and manager, when he transferred the business, were those of the debtor company.

As regards counsel for the appellants' final argument, I am not, with respect, convinced that there is any ambiguity in the Act. It may create anomalies but I am not at present convinced that it does. The examples given by counsel depend for their validity on propositions of law on which, not having heard full argument, I prefer to express no opinion. In any event, the fact that the provisions of a statute create anomalies is no reason for rejecting those provisions, if their meaning is clear.

It may perhaps be appropriate to add a few words regarding the Act generally. It was, as counsel said, designed to prevent fraudulent transfers but the method employed was to regulate transfers generally. Briefly, the method is that persons to whom businesses are transferred two months after due notice may take free from liability for the debts of the business. The two months allows time for the creditors of the business to take action to recover their debts or possibly to seek an injunction. If a business is transferred before notice is given, the transferee

can still limit his liability by causing notice to be published, when he will only be liable to those creditors who take action before the notice becomes complete, and the position is similar where the transfer is effected during the period of a notice. These provisions may result in a person, who has acquired a business in good faith on the basis of the transferor paying the outstanding debts, finding himself liable for them, if, through ignorance or oversight, he has failed to ensure that notice was given. It is true that in a case such as the present, the creditors would have got nothing if notice had been given but the fact that hardship results in a particular case is no reason for ignoring the clear provisions of a statute.

I would add that the fact that s. 7 of the Act excludes from the operation of the Act transfers consequent upon the reconstruction or winding up of a company is itself an indication that no other class of transfer is excluded.

I would dismiss the appeal with costs.

Sir Charles Newbold P: Section 3 (1) of the Transfer of Businesses Act (Cap. 500) (hereinafter referred to as the Act) provides that:

“Whenever any business . . . is transferred . . . the transferee shall . . . become liable for all the liabilities incurred in the business by the transferor unless due notice in accordance with this Act has been given and has become complete at the date of the transfer.”

Section 3 (2) provides that:

“The liability of the transferee . . . shall cease immediately notice given in accordance with this section has become complete . . .”

While those two subsections seem to require that the notice should have become complete “at the date of the transfer” if the transferee is to be relieved of liability, nevertheless the other provisions of the Act, in particular s. 4 (1), make it clear that the notice may be given “either before or after the date of the transfer”. Section 7 provides that nothing in the Act:

“shall apply to the transfer of any business consequent upon the reconstruction or winding up of a company in accordance with the Companies Act.”

In this appeal it is urged on behalf of the appellant that where the business of a company is transferred by the receiver and manager of the company appointed as such by a debenture holder under a clause in the debenture which makes the receiver and manager the agent of the company with power to do what in fact he did the provisions of the Act do not apply. The trial judge did not accept this submission; nor do I. The clear words of s. 3 (1) combined with the manifest implication of s. 7 leave no room for doubt that the Act applies in the case of the transfer of a business by such a receiver and manager, whatever may be the other uncertainties in this not very clearly drafted Act. It was urged that where a business is transferred by such a receiver and manager it is not transferred by the owner of the business, in this case a company, but by either the debenture holder or the receiver and manager himself. It was also urged that where such a receiver and manager has been appointed the liabilities of the business may not have been incurred by the transferor. I accept neither of these propositions. When such a receiver and manager enters into any transaction within his lawful powers in relation to a business, whether it be the sale of the business or the incurring of a liability, then that transaction is, for all purposes in relation to the other party to it, the act of the owner of the business. It is immaterial for this purpose whether the ultimate responsibility for the transaction rests with the owner of the business, the appointor of the receiver

and manager or the receiver and manager himself. In this case the transfer of the business of the company by the receiver and manager is the transfer by the company and any liabilities properly incurred by the receiver and manager are liabilities of the company and thus of the transferor.

For these reasons I would dismiss the appeal. As the other members of the court are of the same view the appeal is dismissed with costs.

Sir Clement De Lestang VP: I have had the advantage of reading in draft the judgments of Sir Charles Newbold, P., and Spry, J.A., and agree entirely with their conclusions and their reasons therefor. I cannot usefully add anything. I would dismiss the appeal.

Appeal dismissed.

For the appellant:

Robson Harris & Co., Nairobi

C. W. Salter, Q.C. with B. Robson

For the respondent:

Shah and Shah, Nairobi

R. K. Shah

Oyat v Uganda [1967] 1 EA 827 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	7 November 1967
Case Number:	674/1967 (185)
Before:	Sir Udo Udoma CJ
Sourced by:	LawAfrica

[1] *Criminal Law – Theft – Claim of right – Ox impounded for damage to appellant’s crops – Ox sold by appellant on owner’s failing to pay compensation – Section 252, Penal Code (Cap. 22) (U.).*

[2] *Animals – Damage caused by – Accused impounding ox for damage to crops – Whether guilty of theft on selling ox.*

[3] *Distress – Animals – Damage caused to crops – Claim of right by appellant on charge of theft – Right of distress damage feasant.*

Editor’s Summary

On May 24, 1967, five oxen belonging to one Petero strayed on to the appellant’s land and destroyed his crops. The appellant seized the five oxen and impounded them in his private pound. The clan chief was

then asked by the appellant to consider the matter and after taking evidence and inspecting the damage, the chief ruled that Petero should pay Shs. 20/- compensation to the appellant. The appellant then released four of the oxen but retained one until Petero should pay him the compensation awarded. Petero stated that he was unable to pay the amount awarded and on May 29, 1967, the appellant sold the ox for Shs. 140/-. On that same day, the appellant was arrested and charged with theft of the ox. He put forward a claim of right as his defence. The learned judge accepted that the appellant intended to tender the balance of the proceeds of the sale of the ox to Petero but was prevented, by his arrest, from so doing.

Held –

- (i) the appellant had a lien over the ox in the exercise of his right to distress damage feasant and was entitled to detain it until the compensation awarded him had been paid by the owner of the ox;

- (ii) since Petero had told the appellant of his inability to pay the compensation, the appellant was entitled to sell the ox to realise the amount awarded to him;
- (iii) the balance realised from the sale should have been paid to Petero but the appellant had given a satisfactory explanation in this regard;
- (iv) even if no right to sell the ox had accrued at common law, the appellant would have committed no criminal offence and Petero's remedy would have been in civil proceedings.

Conviction and sentence quashed.

Cases referred to in judgment:

- (1) *Pilkington's Case* (1601), 5 Co. Rep. 76a; 77 E.R. 169.
- (2) *Browne v. Powell* (1827), 4 Bing. 229; 130 E.R. 757.
- (3) *Gulliver v. Cosens* (1845), 1 C.B. 788; 135 E.R. 753.
- (4) *Lindon v. Hooper* (1776), Cowper's Report 414; 98 E.R. 1160.
- (5) *Shipwick v. Blanchard* (1795), Term. Rep. 298; 101 E.R. 563.
- (6) *The Six Carpenters' Case* (1610), 8 Co. Rep. 147; 77 E.R. 695.
- (7) *Bagshawe v. Goward* (1607), Cro. Jac. 147; 79 E.R. 129.
- (8) *Smith v. Wright* (1861), 6 H. & H. 821; 158 E.R. 338.
- (9) *R. v. Hall* (1828), 3 C. & P. 409; 172 E.R. 477.

Judgment

Sir Udo Udoma CJ: The appellant, Ojera Oyat, was convicted by a Magistrate Grade I, Magistrate's Court, Acholi, of stealing cattle contrary to s. 252 and punishable under s. 255 of the Penal Code. He was sentenced to two years' imprisonment. This appeal is against his conviction and sentence.

At the hearing of the appeal, the appellant did not appear. He is serving his term in prison. His petition of appeal, however, was before the court. Counsel for the respondent intimated to the court, after his attention had been drawn to the law on the point, that he was not prepared to support the conviction of the appellant. I think it was right of him to have taken this course in view of the evidence which was before the court and the legal consequences of such evidence.

In his petition of appeal, the appellant complains against the decision of the learned trial magistrate convicting him of the offence of stealing an ox. His grounds are as set forth hereunder, namely:

- (1) That the decision of the magistrate was wrong in law because the right which he exercised in selling the ox over which he had a lien did not amount to stealing in law.
- (2) That the decision of the learned trial magistrate was unreasonable, unwarranted and could not be supported on the evidence.

The facts of this case are straightforward. There is not much in dispute. On May 24, 1967, five oxen belonging to Petero Uma were left in the care of his son Olweny. The oxen later strayed into the farm

garden of the appellant and therein destroyed the appellant's maize and ground nut crops. The appellant was angry. He seized the five oxen by way of distress damage feasant and impounded them in his private pound.

Shortly thereafter the appellant, of his own volition, reported the matter to the clan chief, Chief Odulifu (alias Rudolph Kitara). He complained that he had impounded the five oxen belonging to Petero because the oxen had destroyed his maize and ground nut crops in his farm garden. The chief inspected the land

and confirmed that the crops were in fact destroyed. He personally counted twenty-one maize plants destroyed by the oxen.

The chief then discussed the matter with five other persons including Augustino Ogik and Agimu Okoe. The fact of the five oxen having been impounded was also brought to the notice of Petero by the chief. In the course of the discussion, the appellant demanded the sum of Shs. 50/- for his crops which had been destroyed, and maintained that unless he was paid that amount he was not prepared to release the oxen. Finally it was decided by the chief with the assistance of Augustino Ogik and Agimu Okoe that Petero should pay to the appellant the sum of Shs. 20/- by way of compensation for his crops which had been destroyed, and thereafter the appellant was to return the five oxen to Petero, the owner. The sum of Shs. 20/- was to be paid within one week, failing which the chief undertook to report Petero to the mukungu chief. That decision was subsequently confirmed and approved by the mukungu chief. It was accepted by both the appellant and Petero.

As a result of and in obedience to the decision of the chief, the appellant immediately returned four of the oxen to Petero, but retained one of them on condition that he would only release it to Petero if he was paid the Shs. 20/- compensation awarded him.

Petero was, however, unable to pay the compensation of Shs. 20/- to the appellant. He complained that he had no money. Thereupon, in exercise of his lien, the appellant sold the oxen to Salimu Delei for the sum of Shs. 140/-. That was on May 29, 1967.

As soon as Petero heard that the ox had been sold by the appellant, he immediately reported the sale to the mukungu chief and later that day to the police, whereupon the appellant was arrested and the ox was rescued and handed over to Petero. In doing so, the police failed to see that the appellant was paid the compensation awarded him. The ox was handed over to Petero on May 30, 1967 – that was the day after the sale. In addition the police charged the appellant of having stolen the ox. The appellant was tried and found guilty by the magistrate. Hence this appeal.

In his judgment, the trial magistrate, after setting out the facts, held that the appellant had no claim of right over the ox which he had impounded and therefore was guilty of stealing the ox.

In summing up the evidence, the learned trial magistrate said:

“Accused in his sworn statement said that Petero’s ox was detained by him towards compensation of Shs. 20/- as ordered by the mukungu chief. The compensation was to be paid within a week from May 24, 1967, failing which the ox was to be his own. Petero failed to pay and he sold the ox on May 29, 1967 to Salimu Delei for Shs. 140/-. He was arrested before he could (sic) return the proceeds to the mukungu chief. The accused admitted that the ox as recovered from Salimu Delei belonged to Petero which he sold to Salimu at Shs. 140/-. He put forward a defence of right of claim (sic) obtained under the decision of the head of clan Rudolfo Kitara and the mukungu chief. The decision as given by Rudolfo Kitara was that Petero should pay compensation of Shs. 20/- to the accused for damage to his crops by oxen of the former. The mukungu chief confirmed it. Accused testified that Rudolfo Kitara ordered Petero to pay Shs. 20/- as compensation and retained (sic) one ox towards this compensation until it was paid within one week. Rudolfo Kitara testified that he decided that compensation of Shs. 20/- should be paid by Petero to the accused but did not allow the accused to keep the ox. Accused did not cross-examine him on this fact in absence of which I disbelieve the accused and the defence of a

right of claim (sic) fails. I am satisfied that the accused fraudulently and without a claim of right took Petero's ox. I consider that there is sufficient evidence to support conviction."

It is evident that the inference drawn from and the conclusion come to by the learned trial magistrate in consequence of the facts set out above are plainly wrong in law. On the evidence as summarised by the learned trial magistrate and the facts emerging therefrom, it is not at all clear the ground upon which the trial magistrate founded his decision that, by the appellant selling the ox which in exercise of his right as he claimed he had impounded because his crops had been destroyed by the oxen, the property of Petero, which right was recognised by both the chief and the mukungu chief, the appellant was guilty of stealing the ox under s. 252 and punishable under s. 255 of the Penal Code.

The right of seizure of domesticated animals destroying another's crops either in his garden or farm is an ancient one. A person is entitled both by custom and under the common law to exercise the right of detaining and impounding any animal which destroys his crops until the owner of such animal has compensated him in respect of the crops destroyed.

Therefore it cannot be doubted that the appellant, quite independently of the decision of the chief, had a lien over the ox and was entitled to detain it until the compensation awarded him had been paid by Petero.

It would appear that, since Petero had told the appellant that he had no money with which to compensate him for his crops destroyed, the appellant was entitled to sell the ox for the purpose of realising the amount awarded him. It is of course true that by selling it above the sum of Shs. 20/- awarded him, the balance in excess of the amount, according to custom, should have been paid over to Petero Uma. But the appellant appears to have given a reasonable explanation in this respect, in that he said that immediately he collected the price of the ox he was arrested by the police without being afforded the opportunity of paying the excess amount to the mukungu chief for payment over to Petero Uma.

By his decision the trial magistrate failed to direct his mind to the law regulating the exercise of the remedy known to the law as distress damage feasant, which is open to a farmer or landowner whose crops have been destroyed by straying animals. Distress damage feasant is similar to distress for rent. It is a remedy available to a farmer or landowner to seize and impound any animal trespassing into his farm or land, for the purpose of securing compensation for whatever damage had been done by such animals to his land or farm. Such compensation is payable by the owner of the animal seized and detained.

The essential condition for the exercise of the right of distress damage feasant is that it must be exercised at the time of the trespass on the land or farm. The right cannot be exercised after the animal involved has left the land or farm. In such a case the owner of the animal would be entitled to rescue it, and the animal cannot be followed once it goes off the land or farm. This principle has found expression in the quaint language to be found in Co. Litt. 161 (a), quoted in I Halsbury's Laws (3rd Edn.), pages 676 to 677, and is as follows:

"If a man go to distreyne for damage feasant, and see the beasts in his soyle, and the owner chase them out of purpose before the distress is taken, the owner of the soyle cannot distreyne for them, and if he doth, the owner of the cattle may rescue them, for the beasts must be damage feasant at the time of the distress; and so note diversitie."

Generally a party who is aggrieved by cattle damaging his land has a choice of remedy. He may either bring an action for trespass or distrain the cattle.

Of the two remedies distress is better because it is less expensive and speedy; and so long as the distress is detained and not accounted for, no action of trespass is maintainable, for the distress is an answer to the action of trespass. It is lawful for the owner of a farm or land trespassed upon by cattle to impound such animals on his said farm or land and to demand compensation for any damage done to the farm or land or the crops thereon.

In some towns and cities there are what are known as public pounds as distinct from private pounds; and the difference is of legal importance. Any animal placed in a public pound is usually said to be in custodia legis and implies certain legal consequences. One of the most important differences between a public pound and a private one is that in the case of a private pound, the animal involved may be redeemed by its owners paying to the distrainor compensation, whereas if the animal reaches a public pound, it is detained by the pound keeper till satisfaction is accepted and certain charges paid or till the owner bails it and replevies.

In *Pilkington's Case* (1), it was held that on a distress for damage feasant amends might be tendered till the cattle are impounded, but, after impounding in a public pound, the tender of compensation might be considered too late.

In *Browne v. Powell* (2), it was held that, where cattle distrained damage feasant were in a private pound and the distrainor admitted that they were about to be forwarded to a public pound, a tender of amends made, while they were in the private pound, was not too late.

In *Gulliver v. Cosens* (3), it was held that where cattle were distrained as damage feasant, the owner of the cattle could not, without tendering amends, pay, under protest, an excessive sum demanded for damage, and thereafter recover the amount as money had and received to his use – if a sufficient tender was made before the distress the remedy is replevin or trespass; if after the distress, and before the impounding, detinue.

That was an action for money had and received to the plaintiff's use. The defendant's plea to the claim was *nun quam indebitatus*. At the trial before Alderson, B., it appeared that a flock of sheep, belonging to the plaintiff, having strayed upon the defendant's land, they were distrained as damage feasant by the defendant, who refused to restore them except upon payment of £2 15s. 9d., at which amount he estimated the damage they had done. The plaintiff paid the amount under protest, and, to recover it, brought an action against the defendant.

For the defendant it was contended upon the authority of *Lindon v. Hooper* (4) and *Shipwick v. Blanchard* (5) that where an exorbitant demand was made for compensation, the only remedy was replevin.

The learned judge directed a non-suit, reserving to the plaintiff leave to move to enter a verdict for the sum claimed, if the court should be of opinion that the action was maintainable. The actual damage done upon the plaintiff's land by the cattle was assessed by the jury at five shillings.

Accordingly a rule nisi was obtained. Cause was shown by the defendant.

It was held that the rule obtained to enter verdict for the plaintiff ought to be discharged. In other words, that the action was not maintainable. Tindall, C.J., in his judgment discharging the rule, said:

"The question at issue seems to me to depend upon the consideration – upon which of the parties has the law cast the onus of estimating the amount of damage done to the owner of the land. The party whose sheep have trespassed is, in the first instance, the wrongdoer; it is therefore upon him that the risk of estimating the

amount of damage ought to rest, and

not upon the party who has suffered by the trespass. If the owner of the cattle elects to make a tender of sufficient amends before the distress, and the distrainor refuses it, the latter becomes a wrong-doer; but a tender after distress does not entitle the owner to replevy his cattle. The rule of law cannot be more clearly stated than is done by Lord Coke in *The Six Carpenters' Case* (6), wherein it is held by the court that, if the Lord or his bailiff comes to distrain, and, before the distress, the tenant tenders the arrears upon the land, there the distress taken for it is tortious; and there-with agree . . .

“Note, Reader, this difference, that tender upon the land before distress makes the distress tortious; tender after the distress, and before the impounding, makes the detainor and not the taking, wrongful; tender after the impounding makes neither the one nor the other wrongful; for then it comes too late, because then the cause is put to the trial of the law, to be there determined. But, after the law has determined it, and the avowant has returned the irreplevisable, yet, if the plaintiff makes him a sufficient tender, he may have an action of detinue for the detainor after, or he may, upon satisfaction made in court, have a writ for the delivery of the goods.”

As a general rule, distress at common law being merely a pledge for compensation for injury, animals seized damage feasant cannot be sold or used by the distrainor. Any wrongful user of the distress makes the distrainor a trespasser ab initio, as when a man used for farm work a horse which he had distrained for; as was said in *Bagshawe v. Goward* (7): “He hath it by law only for a gage”; and in *Smith v. Wright* (8) such a user would entitle the owner to interfere and recover his beasts. The distress must not only not be used, but nothing must be done to alter its state at the time it was taken, because the distrainor has no sort of property in it.

I think I have said enough to show that by selling the ox, the appellant had committed no criminal offence, and, least of all, an offence under s. 252 which is punishable under s. 255 of the Penal Code. Petero’s remedy did not lie in setting the criminal proceeding in motion. His remedy was grounded in civil proceedings for, in a criminal proceeding, a claim of right was available to the appellant however ill-founded, if at all, since the appellant had firmly believed that, because of the Shs. 20/- awarded to him, he had a claim of right over the ox – see *R. v. Hall* (9). The learned trial magistrate was wrong in law in convicting the appellant as charged. The conviction and sentence are quashed. The appellant is acquitted and discharged.

Order accordingly.

The appellant was unrepresented and did not appear.

For the respondent:

Director of Public Prosecutions, Uganda

V. M. Patel (State Attorney, Uganda)

Rodseth v Shaw
[1967] 1 EA 833 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	29 September 1967
Case Number:	444/1967 (187)

Before: Farrell J
Sourced by: LawAfrica

[1] *Landlord and tenant – Notice to quit signed by husband on behalf of wife – Whether notice valid – Indian Transfer of Property Act, s. 106.*

[2] *Landlord and tenant – Title of landlord denied by tenant – Evidence Act, s. 121.*

[3] *Landlord and tenant – Standard rent – Rent Restriction Act, ss. 3, 4 and 5 (1) (a) as amended by Rent Restriction (Amendment) Act 1966 (K.).*

[4] *Statute – Construction – Meaning of “standard rent” – Rent Restriction Act, ss. 3, 4 and 5 (1) (a) as amended by Rent Restriction (Amendment) Act 1966 (K.).*

[5] *Rent Restriction – Meaning of “standard rent” – Rent Restriction Act, ss. 3, 4 and 5 (1) (a) as amended by Rent Restriction (Amendment) Act 1966 (K.).*

Editor’s Summary

The plaintiff, as landlord of a furnished dwelling-house, claimed vacant possession of the premises in question by a notice to quit delivered to the defendant on January 31, 1967 and calling upon the defendant to vacate the premises on or before February 28, 1967. The plea put forward by the defendant raised four points, viz. (i) that the notice to quit was invalid as not expiring at the end of a period of tenancy; (ii) that the notice to quit was not signed by the plaintiff herself but by her husband; (iii) that the plaintiff had no title to the property due to a circumstance which arose ten years prior to the beginning of the tenancy; and (iv) that the premises were subject to the Rent Restriction Act. The argument put forward by the defendant on the last point was that the correct interpretation of the terms of s. 3 of the Rent Restriction Act as substituted by s. 3 of the Rent Restriction (Amendment) Act 1966 was that *prima facie*, the Act applies to every dwelling-house with three exceptions specifically stated in the Act, the last of which applied to the present case and read as follows:

“(c) a dwelling-house which, if it were a dwelling-house to which this Act applies, would have a standard rent exceeding Shs. 800/- per month, or in the case of a furnished dwelling-house Shs. 1100/- per month”;

and that the onus was therefore on the plaintiff to show that the standard rent fell within the exception (c) above, but that owing to the wording of the definition section of the amending Act, “standard rent” could only mean

“(a) in relation to an unfurnished dwelling-house – (i) if on January 1, 1965, it was let, the rent at which it was lawfully so let; (ii) if, on January 1, 1965, it was not so let, a rent to be assessed by the tribunal at a monthly rate of one and one quarter per cent. of the cost of construction and the market value of the land . . .”

It was agreed that the property was not let on January 1, 1965, and that no assessment had been made by the tribunal. The defendant therefore argued that the plaintiff was precluded from establishing the “standard rent” by any other method than those two set out in the definition section quoted.

Held –

(i) on the facts, the tenancy period expired at the end of each month and the notice to quit was valid in

that regard;

- (ii) s. 106 of the Indian Transfer of Property Act lays down that “every notice under this section must be in writing signed by or on behalf of the person

giving it” and the notice to quit was properly signed by the husband on behalf of the plaintiff within the terms of the section;

- (iii) by s. 121 of the Evidence Act, no tenant of immovable property shall, during the tenancy, deny that the landlord had, at the beginning of the tenancy, a title to the property; and therefore, the defendant’s objection to the plaintiff’s title failed;
- (iv) by interpretation of the words of the Rent Restriction (Amendment) Act 1966 the court must, in the present case, determine whether the standard rent would or would not exceed Shs. 800/- per month;
- (v) the defendant had not discharged the onus of showing that the premises were subject to the Rent Restriction Act and that he was a protected tenant.

Judgment for the plaintiff.

Case referred to in judgment:

- (1) *Lemon v. Lardeur*, [1946] 2 All E.R. 329.

Judgment

Farrell J, delivered the following ruling: In this suit the plaintiff as landlord claims possession of the suit premises by virtue of a notice to quit given to the defendant on or about January 31, 1967, calling upon the defendant to vacate the premises on or before February 28.

The defence denies the validity of the notice to quit, denies the plaintiff’s title to the premises and seeks to set up a better title in the defendant, and claims that the premises are subject to the Rent Restriction Act and that the defendant is a protected tenant. As two of these issues were matters of legal argument and one called for determination in evidence of a single fact, it was agreed with the consent of the parties that they should be disposed of as preliminary issues of law, subject to production of evidence limited to the single issue whether the tenancy ran from the 24th of each month to the 23rd of the next month, or from the 1st of the month to the end of the month. If I may deal with the evidence first, it was undisputed that after somewhat informal negotiations the defendant entered into occupation on February 24, 1966, and that the rent was agreed at £65 per month. There is conflict between the plaintiff and the defendant as to the period of the tenancy, but it is abundantly clear from the defendant’s own evidence that he regarded the period as terminating at the end of each month. Consistently with this view he gave his first cheque for Shs. 1520/-, being advance payment for the whole of March and in addition for the four days of February. He continued to pay Shs. 1,300/- in advance within the first few days of each calendar month, and the last cheque accepted which he gave in February, 1967, was for that amount which he assumed would cover him until the end of the month. In view of this evidence, the contention that the notice to quit was invalid as not expiring at the end of a period of the tenancy is untenable.

It further came out in the evidence that the notice to quit was not signed by the plaintiff herself, but by her husband, and its validity is attacked also on this ground. The defendant places strong reliance on the decision of the English Court of Appeal in *Lemon v. Lardeur* (1), in which the notice was signed by the appellant’s husband and it was held that as there was no evidence that the husband had any general

authority to deal with the appellant's property and if he had only a particular authority so to deal with this particular matter, the notice was invalid because it ought to have been given expressly on behalf of the appellant, who ought to have been either named or sufficiently identified.

This is a highly technical rule which in the circumstances of the present case has no merits whatsoever. Nevertheless, the defendant is entitled to rely on the

technicality if it is a sound one. But the law to be applied in this country is the Indian Transfer of Property Act, s. 106 of which lays down that “every notice under this section must be in writing signed by or on behalf of the person giving it.” The evidence established clearly that the plaintiff authorised her husband to sign the notice and this is prima facie compliance with the requirements of the law. It is true that Mulla in his Commentary at p. 623 mentions the rule that where an agent signs under special authority, the authority must appear on the face of the notice so that the tenant may know that he may safely act upon it. An English case 100 year old and one or two Indian cases are cited as authorities for this proposition, but in my view these authorities cannot derogate from the plain words of the section, particularly when the reason for the alleged rule is completely absent from the circumstances of this case. In the case above cited it was found that the tenant did not in fact know who the landlord was. In this case the defendant knew well enough and there is also evidence that he had discussed the arrangement with the plaintiff’s husband and accepted his assurance that no formal lease was necessary. From this it is arguable that the plaintiff’s husband had a general authority and not a special authority as is suggested. But whether that is so or not, in my view the notice to quit was properly signed by the husband on behalf of the plaintiff within the terms of the section, and I hold that this objection also fails and that the notice to quit was valid.

I propose to deal very shortly with the challenge to the plaintiff’s title as landlord. I had always regarded it as elementary law that a tenant cannot be permitted to impugn his landlord’s title. There may be exceptions and qualifications to the generality of the rule, but the rule itself is clearly set out in s. 121 of the Evidence Act, which so far as material reads as follows:

“No tenant of immovable property . . . shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had at the beginning of the tenancy a title to such immovable property . . .”

Counsel for the defendant nevertheless argues that at the time when the plaintiff gave the defendant notice to quit she had no title to the property. He concedes that nothing had happened to detract from her title between the commencement of the tenancy and the date of the notice, and he relies on something which he alleges to have happened some 10 years before the commencement of the tenancy. It would be difficult to imagine a more flagrant disregard of the principle embodied in the section, and I propose to say nothing further about it.

I turn now to the last submission, that the premises are subject to the Rent Restriction Act. As this is a plea set up by the defendant, counsel for the defendant concedes that the onus is in the first place on him to establish the proposition for which he contends. Prima facie it would appear obvious that the premises are of a rental considerably in excess of the limits above which the Act does not apply, and the defendant produces no evidence in support of his contention. But counsel puts his argument in this way. He first of all refers to the terms of s. 3 of the Act, as substituted by s. 3 of the Rent Restriction (Amendment) Act 1966 (to which I shall refer as “the amending Act”) which reads as follows:

“3. This Act applies to every dwelling-house, other than:

- (a) an excepted dwelling-house;
- (b) a dwelling-house let on a service tenancy;
- (c) a dwelling-house which, if it were a dwelling-house to which this Act applies, would have a standard rent exceeding Shs. 800/- per month, or in the case of a furnished dwelling-house, Shs. 1,100/- per month.”

Analysing this provision, counsel for the defendant submits on the basis of the opening words of the section that *prima facie* the Act “applies to every dwelling-house” in Kenya. There follow, however, three exceptions, the third of which alone is relevant to the present case. On a well-known principle of evidence, counsel submits that if a question arises whether an exception applies, the onus lies on the party so alleging to show that the case falls within the exception. Counsel next refers to the definition of “standard rent” to be found in s. 4 of the Act as amended by s. 4 of the amending Act. For convenience I shall cite only that part of the definition which covers unfurnished dwelling-houses, while reserving for later consideration (if necessary) the second limb of the definition relating to furnished dwelling-houses (it being common ground that the suit premises are to some degree “furnished”). The definition reads as follows:

“standard rent” means:

(a) in relation to an unfurnished dwelling-house:

- (i) if on January 1, 1965 it was let, the rent at which it was lawfully so let;
- (ii) if on January 1, 1965 it was not so let, a rent to be assessed by the tribunal at a monthly rate of one and a quarter per cent. of the cost of construction and the market value of the land, the landlord paying all out-goings; . . .”

It is agreed that the premises were not let on January 1, 1965, and that no assessment of standard rent has at any time been made by the tribunal. Section 5 (1) (a) of the Act empowers the tribunal (*inter alia*) to determine the standard rent, and that being so it is submitted that the court has no power to make its own assessment. It follows then, so the argument runs, that in the absence of any determination of the standard rent in the manner laid down by the Act, the plaintiff is precluded from any attempt to establish that the dwelling-house the subject of the present proceedings falls within the exception set out in para. (c) of s. 3.

This is a well-constructed and formidable argument. Nor is it sufficient answer to point out the inconvenience which would arise if it were held to be well-founded. The proposition involves that, however far in excess of the prescribed limits the actual rent of the premises may be, no landlord can ever succeed in a suit for ejectment unless he can first establish either that the premises were let on the material date or that the tribunal has adjudicated on the standard rent on the application either of the landlord or of the tenant. However absurd the result may be, if the law is clear the court must give effect to its plain meaning.

It is necessary then to consider whether the plain meaning of the Act is as the defendant contends, and to examine his argument in greater detail. First of all, it is clear that the burden of proof arising on the pleadings rests squarely on the defendant to show that the Rent Restriction Act applies to the premises. In order to discharge that onus the defendant has produced no evidence. He merely says “this is a dwelling-house”, and thereupon submits that, having regard to the language of s. 3 of the Act, it follows that the Act applies unless the plaintiff can show that it does not. In other words, he claims to throw the burden from his own shoulders to those of the plaintiff by a mere reference to the section. This is a proposition which is so contrary to common sense that the court could only accept it if constrained to do so by the most cogent reasoning. Now the underlying basis of the defendant’s argument is that s. 3 first lays down a general rule, followed by exceptions to which the principle of evidence already mentioned applies. The general rule on which he relies is to be found in the words “this Act applies to every dwelling-house”, which he claims to treat in

isolation from the remainder of the section. But it is very questionable whether the legislature must be presumed ever to have intended to lay down a general rule to that effect. Punctuation may be a dangerous guide to construction, but some significance may nevertheless be found in the fact that the words cited are separated by nothing more than a comma from the ensuing words “other than –”. If they had been followed by a colon, a different meaning might have to be given to the provision. It may indeed be suggested that so far as para. (c) is concerned, the effect is the same as if the provision had read:

“This Act applies to every dwelling-house of which the standard rent does not exceed Shs. 800/- per month . . .”

If that is a legitimate construction, as I think it is, it could no longer be argued that the onus would lie on the landlord to show that the Act did not apply: it would be for the tenant who sought to avail himself of the Act to show that the premises were subject to the Act. When two constructions are open, one of which leads to absurdity and the other does not, the court is entitled to prefer the latter, and on that basis I hold that the language of the section is not so plain as to transfer to the landlord the burden of proving in every case that the premises in question are outside the Act.

Whether that is right or wrong, and irrespective of the incidence of the burden of proof, I am unable to accept the defendant’s contention that this court is precluded from inquiring whether para. (c) applies without first waiting for a determination of the standard rent by the rent tribunal. The language of para. (c) is peculiar. The exception, if such it is, applies to “a dwelling-house which, if it were a dwelling-house to which this Act applies, would have a standard rent exceeding Shs. 800/- per month . . .” At first sight it may be difficult to understand why the words “if it were a dwelling-house to which this Act applies” were included. If the premises were let on January 1, 1965, the words would be unnecessary: the standard rent would be the rent at which they were let, and it would have been sufficient in para. (c) to refer to a dwelling-house with a standard rent exceeding Shs. 800/- a month. By parity of reasoning, if the rent had in fact been assessed by the tribunal, the same words could have been used. Some effect must be given to the words actually used and it is legitimate to inquire for what purpose the hypothetical language was chosen. The answer must, I think, be that the words were intended to apply to a case where there was neither a letting on January 1, 1965, nor had there been any assessment by the tribunal. In that case it has to be determined whether the dwelling-house is one which, if it were a dwelling-house to which the Act applies, would have a standard rent exceeding Shs. 800/- a month. Ex hypothesi that question has not been answered by the tribunal, and the determination can only be made by the court. In so determining, the court is not purporting to fix the standard rent. It merely has to decide whether on the balance of probabilities the standard rent would or would not exceed Shs. 800/- per month. In so deciding it is entitled to take into consideration, as one element, the actual rent at which the premises are let. It would also be entitled to take into account that the rent (if such were the case) had been paid without complaint for a substantial period without any attempt by the tenant to ask for a determination of the standard rent by the tribunal. But this last point cannot be pressed too far in the instant case, since the amending Act did not come into force until December 20, 1966.

For the reasons given I find that in the circumstances of this case the defendant has not discharged the onus of showing that the premises are subject to the Rent Restriction Act and that he is a protected tenant.

Order accordingly.

For the plaintiff:

Hamilton Harrison & Mathews, Nairobi
Sir William Lindsay

For the defendant:
Macdougall & Wollen, Nairobi
P. J. Ransle